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September 9, 2020

VIA EMAIL

Vanessa Countryman, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
apfilings@sec.gov

RE: In the Matter of the Application for Review of Potomac Capital Markets LLC
Administrative Proceeding No. 3-19917

Dear Ms. Countryman:

Enclosed please find an electronic copy of FINRA's Motion to Dismiss the Application for Review and to Stay the Briefing Schedule in the above-captioned matter.

Please contact me at (202) 728-8207 if you have any questions.

Very truly yours,

Ashley Martin

Ashley Martin

Enclosures

cc: Goodloe E. Byron, Jr. (via email)
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**BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC**

In the Matter of the Application of
Potomac Capital Markets LLC
For Review of Disciplinary Action Taken by
Financial Industry Regulatory Authority
File No. 3-19917

**FINRA'S MOTION TO DISMISS THE APPLICATION FOR REVIEW AND
TO STAY THE BRIEFING SCHEDULE**

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September 9, 2020

TABLE OF CONTENTS

| | <u>Page</u> |
|---|--------------------|
| I. INTRODUCTION | 1 |
| II. FACTUAL BACKGROUND..... | 2 |
| A. Potomac Files Its 2018 Audit Late, and Only After FINRA Starts an Expedited Proceeding to Suspend It | 2 |
| B. Potomac Fails to Pay Membership Fees | 4 |
| C. Potomac Fails to File an Audited Annual Report for 2019 and is Expelled from FINRA Membership | 5 |
| III. ARGUMENT | 6 |
| A. Potomac Failed to File Its 2019 Annual Audited Report..... | 7 |
| B. Potomac Failed to Exhaust Its Administrative Remedies..... | 8 |
| C. Potomac Has Not Shown that Dismissal is Inappropriate | 10 |
| IV. Conclusion | 15 |

TABLE OF AUTHORITIES

Page

FEDERAL DECISIONS

MFS Secs. Corp. v. SEC, 380 F.3d 611 (2d Cir. 2004).....8

FEDERAL RULES AND STATUTES

17 C.F.R. § 201.1612

COMMISSION DECISIONS AND ORDERS

Patrick H. Dowd, Exchange Act Release No. 83710, 2018 SEC LEXIS 1875
(July 25, 2018)8

Jonathan Roth Ellis, Exchange Act Release No. 80312, 2017 SEC LEXIS 970
(Mar. 24, 2017)10, 14

Brendan D. Feitelberg, Exchange Act Release No. 89365, 2020 SEC LEXIS 2227
(July 21, 2020)14

Calais Resources, Inc., Exchange Act Release No. 34-67312, 2012 SEC LEXIS 2023
(June 29, 2012).....11

First Philadelphia Corp., Exchange Act Release No. 13194, 1977 SEC LEXIS 2603
(Jan. 21, 1977).....12

Greco Investments, Inc., Exchange Act Release No. 64481, 2011 SEC LEXIS 1695
(May 12, 2011).....7, 14

Rogelio Guevara, Exchange Act Release No. 78134, 2016 SEC LEXIS 2233 (June 22, 2016).....8

Li-Lin Hsu, Exchange Act Release No. 78899, 2016 SEC LEXIS 3585
(Sept. 21, 2016).....14, 15

Robert Marcus Lane and Jeffrey Griffin Lane, Exchange Act Release 74269,
2015 SEC LEXIS 558 (Feb. 13, 2015)12

Caryl Trewyn Lenahan, Exchange Act Release No. 73146, 2014 SEC LEXIS 3503
(Sept. 19, 2014).....8

MFS Secs. Corp., Exchange Act Release No. 47626, 2003 SEC LEXIS 789 (Apr. 3, 2003)8

Ricky D. Mullins, Exchange Act Release No. 71926, 2014 SEC LEXIS 1268
(Apr. 10, 2014).....8, 9

COMMISSION DECISIONS AND ORDERS – continued

Palm State Equities, Inc., Exchange Act Release No. 35873, 52 SEC LEXIS 333
(June 20, 1995).....11

Gregory S. Profeta, Exchange Act Release No. 62055, 2010 SEC LEXIS 1563
(May 6, 2010).....9

TMR Bayhead Securities, Exchange Act Release No. 88006, 2020 SEC LEXIS 2833
(Jan. 17, 2020).....7, 10

FINRA RULES

FINRA Rule 2010.....7

FINRA Rule 8210.....8, 10

FINRA Rule 9134.....9

FINRA Rule 9263.....12

FINRA Rule 9552..... 1, *passim*

FINRA Rule 9553.....4

FINRA Rule 9559.....3, 4, 8, 13

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In the Matter of the Application of

Potomac Capital Markets LLC

For Review of Disciplinary Action Taken by

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File No. 3-19917

**FINRA'S MOTION TO DISMISS THE APPLICATION FOR REVIEW AND
TO STAY THE BRIEFING SCHEDULE**

I. INTRODUCTION

Potomac Capital Markets LLC (“Potomac” or the “Firm”) failed to file its audited annual report for 2019, in violation of the requirement contained in Securities Exchange Act Rule 17a-5(d). In response, FINRA initiated an expedited process to suspend, and potentially expel from membership, Potomac. FINRA provided notice to Potomac of its pending suspension and explained that Potomac could contest the suspension at a hearing; however, Potomac did not ask for a hearing or seek termination of the suspension by filing its audited annual report.

Accordingly, Potomac’s application for review of that expulsion should be dismissed by the Commission for failure to exhaust the administrative remedies available to it in FINRA’s forum.

FINRA provided several opportunities for Potomac to participate in a hearing or end its suspension. The Firm, however, pursued none of these opportunities. After Potomac failed to file its 2019 audited annual report, FINRA initiated an expedited proceeding against the Firm pursuant to FINRA Rule 9552. FINRA informed the Firm that it would be suspended if it did not file the audited annual report or request a hearing. When Potomac took neither action, the

suspension took effect. FINRA explained that Potomac could request termination of the suspension on the ground that it complied fully with its reporting obligation. FINRA also warned Potomac that the suspension would convert to an expulsion if Potomac failed to request termination within three months of issuance of the original notice of suspension. After Potomac neither filed a 2019 audited annual report nor requested termination of the suspension, FINRA expelled the Firm.

Potomac now seeks Commission review of its expulsion and proffers various excuses for its failure to file the 2019 audited annual report. Potomac's application for review should be dismissed because it failed to follow FINRA's procedures, and because its assertions on appeal do not excuse its failure to file an audited annual report and are irrelevant to its failure to exhaust the remedies available to it in FINRA's forum.¹

II. FACTUAL BACKGROUND

A. Potomac Files Its 2018 Audit Late, and Only After FINRA Starts an Expedited Proceeding to Suspend It

Potomac was a registered FINRA member until its July 6, 2020 expulsion, which is the subject of the present application for review. (R. at 52, 64.)² Prior to its expulsion, Potomac was the subject of two other FINRA expedited proceedings.

¹ Pursuant to Commission Rule of Practice 161, FINRA requests that the Commission stay issuance of a briefing schedule in this matter while this motion is pending. *See* 17 C.F.R. § 201.161. The Commission should first evaluate the dispositive argument that Potomac's appeal should be dismissed on procedural grounds before it reaches the underlying substance of this appeal.

² "R. at ___." refers to the page numbers in the certified record filed by FINRA on August 27, 2020.

On March 19, 2019, FINRA sent Potomac a notice pursuant to FINRA Rule 9552(a) advising the Firm that it had failed to file its 2018 audited annual report by the applicable deadline (March 1, 2019), and that its failure to file the report by April 12, 2019 would result in its suspension. (R. at 1-2.)³ The notice further advised Potomac that it could request a hearing and that, if the Firm were suspended, it would have three months from the date of the notice to request termination of the suspension on grounds of full compliance. (R. at 2.); FINRA Rules 9552(e)-(f).⁴

Potomac completed its 2018 audited annual report (the “2018 Audit”) on April 24, 2019, more than seven weeks after its March 1, 2019 filing deadline, and 12 days after it was suspended. (R. at 5-21.) The 2018 Audit noted the Firm’s “history of a lack of significant revenues, operating losses for at least the last four years, and net capital violations.” (R. at 15.) FINRA lifted Potomac’s suspension on May 1, 2019, after the Firm submitted the 2018 Audit. (R. at 71.)

³ FINRA Rule 9552(a) states that:

[i]f a member, person associated with a member or person subject to FINRA’s jurisdiction fails to provide any information, report, material, data, or testimony requested or required to be filed pursuant to the FINRA By-Laws or FINRA rules, or fails to keep its membership application or supporting documents current, FINRA staff may provide written notice to such member or person specifying the nature of the failure and stating that the failure to take corrective action within 21 days after service of the notice will result in suspension of membership or of association of the person with any member.

⁴ Under FINRA Rule 9552(e), a member who receives a suspension notice may, before the effective date of the suspension, file a written request for a hearing with FINRA’s Office of Hearing Officers under FINRA Rule 9559. Such a request will stay the suspension. FINRA Rule 9552(d). Under FINRA Rule 9552(f), a suspended member “may file a written request for termination of the suspension on the ground of full compliance with the [suspension] notice.”

B. Potomac Fails to Pay Membership Fees

Although not immediately relevant to this application for review, FINRA cancelled Potomac's membership for failure to pay fees at a time that overlapped with Potomac's suspension. On March 26, 2020, FINRA notified Potomac of its intent to cancel the Firm's membership pursuant to FINRA Rule 9553 for its failure to pay Central Registration Depository ("CRD"[®]) renewal fees (the "Cancellation Notice").⁵ (R. at 23-26.) The notice advised Potomac that the cancellation would become effective on April 16, 2020 unless the Firm paid the balance, and further advised Potomac of its right to request a hearing pursuant to FINRA Rule 9559. (R. at 24-25.)

On May 11, 2020, FINRA notified Potomac in writing that its membership was cancelled due to its failure to pay the "severely delinquent" fees identified in the Cancellation Notice. (R. at 27.) In its letter, FINRA also noted that Potomac owed a total of \$3,437.50 in other CRD fees and member regulation fees. (R. at 27.) On June 8, 2020, FINRA sent Potomac a letter confirming that, after a discussion with the Firm and the payment of the outstanding fees, FINRA had reinstated Potomac's membership. (R. at 33, 45.) FINRA noted, however, that the Firm remained suspended due to a separate matter, which is described below. (R. at 33, 45.)

⁵ FINRA Rule 9553(a) states that:

If a member, person associated with a member or person subject to FINRA's jurisdiction fails to pay any fees, dues, assessment or other charge required to be paid under the FINRA By-Laws or rules, or to submit a required report or information related to such payment, FINRA staff may issue a written notice to such member or person stating that the failure to comply within 21 days of service of the notice will result in a suspension or cancellation of membership or a suspension or bar from associating with any member.

C. Potomac Fails to File an Audited Annual Report for 2019 and is Expelled from FINRA Membership

Potomac’s 2019 audited annual report was due on March 2, 2020. (R. at 34.) On April 2, 2020, FINRA sent Potomac a notice pursuant to FINRA Rule 9552(a) (the “Pre-Suspension Notice”) advising it that Potomac would be suspended, effective April 27, 2020, for its failure to file its 2019 audited annual report. (R. at 34-36.) The Pre-Suspension Notice stated that Potomac could avoid imposition of the suspension if it filed the audit report before the suspension date. (R. at 35.) The notice further explained that Potomac could request a hearing before the suspension date to contest the imposition of the suspension, and that such a request would stay the effectiveness of the suspension. (R. at 35.); FINRA Rules 9552(d)-(e). The Pre-Suspension Notice also advised Potomac that—if it was suspended—it could seek termination of the suspension based on full compliance with the notice (i.e., by filing the 2019 audited annual report), but that failure to request termination of the suspension within three months of the issuance of the Pre-Suspension Notice would result in an expulsion of the Firm. (R. at 35.); *see also* FINRA Rule 9552(h).⁶

Potomac did not file the 2019 audit report or request a hearing. (R. at 33, 49.) Accordingly, the Firm was suspended effective April 27, 2020. (R. at 33, 49.); FINRA Rules 9552(d)-(e). In its June 8, 2020 letter to Potomac concerning the Firm’s delinquent fees, FINRA reminded the Firm that its suspension for failure to file the 2019 audit report took effect on April 27, 2020. (R. at 33.) FINRA also reminded Potomac that its failure to timely request termination of that suspension (i.e., by July 2, 2020) would result in an expulsion. (R. at 33.).

⁶ FINRA Rule 9552(h) states, “[a] member or person who is suspended under this Rule and fails to request termination of the suspension within three months of issuance of the original notice of suspension will automatically be expelled or barred.”

Potomac neither filed an audit for 2019, nor requested termination of its April 27, 2020 suspension. (R. at 49.); FINRA Rule 9552(f). Instead, in a letter dated July 2, 2020 (the last possible day it could have requested termination), Potomac advised FINRA that it would not file its 2019 annual audit until sometime after July 8, 2020. (R. at 33-35, 47.) In its letter, Potomac stated that, on June 30, 2020, it learned that a staff member at its auditing firm was on vacation and would not return until July 8, 2020. (R. at 47.) According to Potomac, its auditing firm advised that the audit report would not be completed until sometime after the staff member returned from vacation. (R. at 47.) Potomac requested an extension of time to submit the audit report, without specifying an end date for such an extension. (R. at 47.) The Firm stated, without elaboration, that it would “never again [] ask for pandemic relief.” (R. at 47.)

In a July 6, 2020 letter (the “Expulsion Notice”), FINRA notified Potomac that it was expelled from FINRA membership. (R. at 49.) The Expulsion Notice informed Potomac that an application for review could be filed with the Commission. (R. at 49.) This appeal followed. (R. at 51-53.)

III. ARGUMENT

The Commission should dismiss the Application for Review because Potomac failed to exhaust the administrative remedies available to it in FINRA’s forum. Potomac did not file its 2019 annual audit report, did not request a hearing, and did not request termination of its suspension based on full compliance. Potomac does not dispute that it received notice of its suspension, and concedes that it failed to comply with its audit reporting obligations. An appeal to the Commission is not an avenue for a delinquent firm to be granted an extension of time to

file its audited annual report. The Commission, accordingly, should reject Potomac's attempt to bypass FINRA's administrative procedures, and dismiss the Application for Review.

A. Potomac Failed to File Its 2019 Annual Audited Report

FINRA members must timely file annual reports audited by an independent public accountant, as required by Securities Exchange Act ("Exchange Act") Rule 17a-5(d) and FINRA Rule 2010. *See TMR Bayhead Securities*, Exchange Act Release No. 88006, 2020 SEC LEXIS 2833, at *8, 12-13 & n.13 (Jan. 17, 2020). This requirement is "important to monitor the financial status of broker-dealers and to protect investors" and, as a result, the failure to comply with this requirement is serious. *Gremo Invs.*, Exchange Act Release No. 64481, 2011 SEC LEXIS 1695, at *14-15 (May 12, 2011). Indeed, "the Commission has emphasized that the reporting rules are not technical but involve fundamental safeguards imposed for the protection of the investing public on those who wish to engage in the securities business." *Id.* at *15 (internal quotation omitted).

Potomac's failure to file its 2019 Annual Audit Report impedes FINRA's ability to monitor the Firm's financial status and, therefore, raises significant concerns. This is particularly true because the notes to Potomac's financial statement for the preceding year disclosed liquidity and going concern issues.⁷ (R. at 15, n.1 Liquidity and Going Concern Issues.) Potomac concedes that it failed to comply with this important obligation. (R. at 51-53.)

⁷ In the notes to the financial statement, Potomac acknowledged a history of net capital violations, and stated that its cash on hand as of December 31, 2018 was "not sufficient to satisfy [its] liabilities and cover [its] operating costs for the next twelve months." (R. at 15, n.1 Liquidity and Going Concern Issues.)

B. Potomac Failed to Exhaust Its Administrative Remedies

The Commission is precluded from considering Potomac's application for review because the Firm failed to follow FINRA procedures and, consequently, failed to exhaust its administrative remedies. As the Commission has emphasized, "[i]t is clearly proper to require that a statutory right to review be exercised in an orderly fashion, and to specify procedural steps which must be observed as a condition to securing review." *Ricky D. Mullins*, Exchange Act Release No. 71926, 2014 SEC LEXIS 1268, at *9 (Apr. 10, 2014) (quoting *MFS Secs. Corp.*, Exchange Act Release No. 47626, 2003 SEC LEXIS 789, at *22 & n.29 (Apr. 3, 2003)). The Commission has repeatedly held that requiring respondents to exhaust their administrative remedies before FINRA is necessary to FINRA's important regulatory functions, promotes development of the record, allows FINRA the opportunity to correct any error in its earlier decisions, and promotes the efficient resolution of disputes between FINRA and its members. *See, e.g., Caryl Trewyn Lenahan*, Exchange Act Release No. 73146, 2014 SEC LEXIS 3503, at *6-7 (Sept. 19, 2014) (quoting *MFS Secs. Corp. v. SEC*, 380 F.3d 611, 621-22 (2d Cir. 2004)); *Mullins*, 2014 SEC LEXIS 1268, at *10.

The precedent with respect to FINRA Rule 9552 expedited proceedings is well-settled, and the Commission has consistently dismissed respondents' applications for review where, as here, the respondent failed to exhaust its administrative remedies under FINRA Rules 9552 and 9559. *See, e.g., Patrick H. Dowd*, Exchange Act Release No. 83710, 2018 SEC LEXIS 1875, at *11-12 (July 25, 2018) (dismissing applicant's appeal for failure to exhaust administrative remedies where FINRA barred applicant under Rule 9552 for failing to respond to Rule 8210 requests); *Rogelio Guevara*, Exchange Act Release No. 78134, 2016 SEC LEXIS 2233, at *9-11 (June 22, 2016) (same); *Lenahan*, 2014 SEC 3503, *6 & n.5 (same).

Potomac does not dispute that it received the April 2, 2020 Pre-Suspension Notice, nor does it dispute that it did not request a hearing prior to the suspension date.⁸ (R. at 35, 51-53.) And, while the Pre-Suspension Notice advised Potomac of the deadline to request termination of the suspension—and FINRA’s June 8, 2020 letter reminded Potomac of the same—the Firm did not request termination of the suspension. (R. at 33, 35, 49.); FINRA Rules 9552(f), (h). Because Potomac did not file its 2019 annual audit, did not request a hearing, and did not request termination of its suspension based on full compliance, it failed to exhaust its administrative remedies and, consequently, is precluded from challenging FINRA’s action before the Commission. *See, e.g., Mullins*, 2014 SEC LEXIS 1268, at *13 (relying on “well-established precedent” when dismissing an application for review in a FINRA Rule 9552 proceeding where applicant failed to request a hearing or take corrective action in FINRA’s forum); *Gregory S. Profeta*, Exchange Act Release No. 62055, 2010 SEC LEXIS 1563, at *6 (May 6, 2010) (finding in a Rule 9552 proceeding that “FINRA’s actions were in accordance with its rules and the purposes of the Exchange Act [when] rules set forth the procedures for suspending and ultimately barring individuals who fail to supply requested information or take corrective action”).

⁸ The address listed on the April 2, 2020 Pre-Suspension Notice is in Frederick, Maryland, and Potomac’s CRD address is in Middletown, Maryland. (R. at 34, 64.) It appears that the Pre-Suspension Notice was sent to the address in Frederick due to Potomac’s temporary relocation in March 2020. (*See* R. at 52.); *see* FINRA Rule 9134(b)(2) (providing that papers may be served on an entity’s last known address if the CRD address is out of date); FINRA Rule 9552(b) (providing that FINRA Rule 9134 governs service of notices of suspension in a FINRA Rule 9552 expedited proceedings). In any event, Potomac does not dispute that it received the Pre-Suspension Notice. (R. at 51-53.)

Potomac's failure to request a hearing or seek termination of its suspension warrants dismissal on exhaustion grounds. *See Mullins*, 2014 SEC LEXIS 1268, at *5-10, 13. Based on Potomac's failures to avail itself of the administrative remedies available to it, the Commission should dismiss the Application for Review.

C. Potomac Has Not Shown that Dismissal is Inappropriate

In its application for review, Potomac does not address its failure to avail itself of FINRA's procedures to avoid a suspension or expulsion. (R. at 51-53.) Rather, it lists a number of purported reasons why it did not file its 2019 audit report. (R. at 51-53.) The Commission should not address these assertions because they go to the merits of the violation, and the merits are not the basis of this Motion to Dismiss. (R. at 51-53.); *see Jonathan Roth Ellis*, Exchange Act Release No. 80312, 2017 SEC LEXIS 970, at *16 (Mar. 24, 2017) (explaining that applicant's "arguments go to the merits of his violation of FINRA Rule 8210 . . . and we do not consider them because he did not timely present them in the first instance to FINRA through its administrative process").

Even if the Commission were to consider the assertions in Potomac's application for review, it should find them unpersuasive. Exchange Act Section 17(e)(1)(A) and Rule 17a-5(d) place the obligation squarely on a broker-dealer to file timely an audited annual report. *See TMR Bayhead Securities*, 2020 SEC LEXIS 2833, at *4. Consequently, Potomac's assertions are largely irrelevant to its failure to file the report or exhaust FINRA's administrative procedures. For example, there is no apparent reason why a January 2020 change in Potomac's point-of-contact at FINRA would be relevant to its ability to file an audit report by the March 2, 2020, deadline—and Potomac does not explain its relevance. (R. at 52 ¶ 1.)

Potomac also asserts that it was waiting on a FINRA exam report, and its auditor was “unable to continue the audit.”⁹ (R. at 52-53 ¶¶ 7-10, 12-15.) This claim is unpersuasive because it is not confirmed by the auditor, and it does not explain why the audit was not completed for months after it was due on March 2, 2020. Potomac was aware of both the examination and the going concern issues identified in its 2018 Audit, and it could have planned accordingly to file its 2019 annual audited report by the deadline. (R. at 15, 41.) Potomac did not do so—in fact, it appears that Potomac took few, if any, steps to complete the 2019 annual audited report until after the deadline had passed. (R. at 31, 47.); *cf. Calais Resources, Inc.*, Exchange Act Release No. 34-67312, 2012 SEC LEXIS 2023, at *26-28 (June 29, 2012) (expressing concern with a firm’s belated efforts to provide audit reports, where the firm could have, but did not, take steps to address deficiencies prior to the Commission entering an initial decision revoking the registration of its securities); *Palm State Equities, Inc.*, Exchange Act Release No. 35873, 52 SEC LEXIS 333, 335-36 (June 20, 1995) (explaining that the firm’s failure to maintain current books and records was not excused by the fact that the resulting adjustments ultimately proved to be immaterial). Even if the exam report were relevant,

⁹ Public Company Accounting Oversight Board (“PCAOB”) Auditing Standards require an auditor to “obtain an understanding of the company and its environment,” including relevant regulatory factors. PCAOB, AUDITING STANDARDS, Auditing Standard 2110.07 (2017), available at: <https://pcaobus.org/Standards/Auditing/Pages/default.aspx> (last visited Sept. 9, 2020). In its applicable staff guidance, PCAOB states that “[r]eading regulatory filings, related correspondence, and a broker’s or dealer’s [Designated Examining Authority] examination reports can help inform the auditor’s understanding of the regulatory environment.” PCAOB, *Staff Guidance for Auditors of SEC-Registered Brokers and Dealers*, at 14-15 (June 26, 2014), available at: https://pcaobus.org/Standards/Documents/06262014_Staff_Guidance.pdf (last visited Sept. 9, 2020). The guidance, however, does not require that an auditor wait for an examination to conclude, or for the examiner to send a close out letter to the broker-dealer, before it issues an audit report. *See id.*

Potomac could have requested a hearing to present this argument to FINRA. *See* FINRA Rule 9552(e).

The Commission should reject Potomac’s attempts to shift blame to FINRA or its auditor for its failures to act.¹⁰ (R. at 52-53 ¶¶ 7-10, 12-15.); *see Robert Marcus Lane and Jeffrey Griffin Lane*, Exchange Act Release 74269, 2015 SEC LEXIS 558, at *56 (Feb. 13, 2015) (explaining that the Commission has rejected attempts to shift a member or associated person’s compliance burden to FINRA); *First Philadelphia Corp.*, Exchange Act Release No. 13194, 1977 SEC LEXIS 2603, at *7 (Jan. 21, 1977) (“As we have often pointed out, broker-dealers cannot shift their responsibility of compliance with applicable requirements to the [former] NASD or to us.”). Potomac had the responsibility to file its audited annual report on time.

Potomac also refers to the COVID-19 pandemic in its application for review. (R. at 52 ¶ 3.) Yet, the State of Maryland’s closure of non-essential businesses on March 23, 2020 would have had little or no relevance to Potomac’s failure to meet a deadline three weeks earlier,

¹⁰ In its application for review, Potomac states that, sometime after July 15, 2020, it contacted FINRA’s Office of the Ombudsman concerning the exam report. (R. at 53 ¶ 14.). That office does not, however, “participate in formal investigations,” “play a role in a formal resolution process,” or “overturn any decisions of existing dispute resolution [] bodies,” nor does it “replace already existing FINRA processes or programs.” Rather, the Office of the Ombudsman will help a party identify existing options and use them effectively. FINRA, Office of the Ombudsman, *Frequently Asked Questions*, <https://www.finra.org/about/office-ombudsman/ombudsman-frequently-asked-questions> (last visited Sep. 2, 2020). Accordingly, Potomac’s decision to contact the Office of the Ombudsman after its July 8, 2020 expulsion was no substitute for its failure to avail itself of FINRA’s existing processes for addressing its suspension. *See id.*; FINRA Rules 9552(e)-(f).

particularly since Potomac was classified as an essential business.¹¹ (R. at 34.) Even if the pandemic contributed to Potomac’s delay in filing an audited annual report, the Firm could have—but did not—avail itself of FINRA’s procedures for requesting relief for that reason. FINRA permits a member firm to request an extension of the deadline for filing its annual audited report, and Potomac does not explain why it did not utilize this procedure.¹² (R. 51-53.) And, as explained above, Potomac could have requested a hearing, where it would have been able to present any evidence that the pandemic contributed to its delay. *See* FINRA Rules 9263(a), 9552(e), 9559(i). Potomac did not do so, instead waiting until July 2, 2020 (three months after the deadline, and on the last possible day to request termination on grounds of full compliance) to mention the pandemic in connection with its failure to file an annual audited report. (R. at 34, 47.); FINRA Rule 9552(h). Moreover, Potomac’s July 2, 2020 letter did not explain how the pandemic might have contributed to its delay—a claim that, in any event, was undermined by its simultaneous assertion that the audit would be late because the auditor was on vacation. (R. at 47.)

¹¹ Press Release, The Office of Governor Larry Hogan, Governor Hogan Announces Closure of All Non-Essential Businesses, \$175 Million Relief Package for Workers and Small Businesses Affected by COVID19 (March 23, 2020) (available at: <https://governor.maryland.gov/2020/03/23/governor-hogan-announces-closure-of-all-non-essential-businesses-175-million-relief-package-for-workers-and-small-businesses-affected-by-covid-19/>) (last visited August 31, 2020); Interpretive Guidance by the Office of Legal Counsel for The Office of Governor Larry Hogan, No. COVID19-04, at 2 (March 23, 2020) (providing that “[s]ecurities and investment companies” are not required to close) (available at: <https://governor.maryland.gov/wp-content/uploads/2020/03/OLC-Interpretive-Guidance-COVID19-04.pdf>) (last visited September 2, 2020).

¹² FINRA, *Annual Audit Extension of Time Request Policy*, <https://www.finra.org/filing-reporting/annual-audit/extension-time-request-policy>. (last visited Sep. 2, 2020) (attached) (When a firm determines that an extension is necessary, it must submit a written request to its assigned FINRA Coordinator as early as possible—“**but no later than three business days prior to the audit due date.**”) (emphasis added).

In its application for review, Potomac also notes that it changed accounting firms. (R. at 52 ¶ 2). Even if a change in accounting firms could justify its failure to file an audit, Potomac does not explain why it did not request a hearing to raise this issue. (R. at 51-53.); FINRA Rule 9552(e). Potomac cannot argue now before the Commission that the change in firms excused its failure to file the audit report. *Ellis*, 2017 SEC LEXIS 970, at *16.

Finally, Potomac's July 2, 2020 extension request was far from sufficient to exhaust its administrative remedies. (R. at 47.) Potomac's July 2, 2020 letter respectfully "request[s] an extension for submitting the completed audit;" it does not ask to terminate the suspension based on full compliance. As the Commission has explained, "[a]n extension request does not demonstrate compliance[], request a hearing, or seek termination of a suspension on the grounds of full compliance." *Li-Lin Hsu*, Exchange Act Release No. 78899, 2016 SEC LEXIS 3585, at *7-8 (Sept. 21, 2016). Although the Commission has noted that an exception might apply if FINRA were to abuse its discretion in denying an extension request, *Id.* at *9, the circumstances of this case do not support the application of such an exception. Notably, Potomac submitted the request on the last possible day it could have requested termination of its suspension, even though it received notice of the impending suspension three months earlier. (R. at 34, 47.)

Furthermore, Potomac did not show that it worked diligently to correct the violation. (R. at 47.) Rather, Potomac's evidence of its efforts to complete the audit report consisted only of: (1) a June 24, 2020 email requesting an exam report that was irrelevant to the audit, *see Gremo Invs.*, 2011 SEC LEXIS 1695, at *12-13; and (2) a representation that it spoke to its auditing firm on July 2, 2020—the last possible day to request termination of its suspension. (R. at 33-34, 41, 47.) These last-minute gestures to address Potomac's violation are a far cry

from the kind of circumstances that might demonstrate good cause for a respondent's failure to comply with its obligations or exhaust administrative remedies. *See Brendan D. Feitelberg*, Exchange Act Release 89365, 2020 SEC LEXIS 2746, at *12-13 (July 21, 2020) (rejecting FINRA's exhaustion argument). Accordingly, Potomac's eleventh-hour extension request should not preclude dismissal on exhaustion grounds. *See Hsu*, 2016 SEC LEXIS 3585, at *9-14 (explaining that an extension request filed on the day the respondent would be barred automatically did not demonstrate good cause to excuse her failure to exhaust administrative remedies).

In sum, Potomac's application for review offers excuses for its failure to file an annual audited report that it could have—but did not—exhaust before FINRA under its available procedures. Potomac may not present those arguments to the Commission in the first instance and, in any event, they are unpersuasive.

IV. CONCLUSION

Potomac failed to file its 2019 audited annual report, failed to take corrective action or request a hearing, and failed to request termination of its suspension based on full compliance. Consequently, the Firm was expelled in accordance with FINRA's rules. Potomac does not dispute that it failed to file its 2019 audit, and the record establishes that it failed to exhaust its administrative remedies. The Commission should not reach Potomac's assertions in its application for review, as the merits of the reporting violation are not before the Commission. In

any event, Potomac's assertions are irrelevant to its failure to file the audited annual report or exhaust its remedies. Accordingly, the Commission should dismiss the Application for Review.

Respectfully submitted,

/s/ Ashley Martin

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September 9, 2020

CERTIFICATE OF SERVICE

I, Ashley Martin, certify that on this 9th day of September, 2020, I caused a copy of FINRA's Motion to Dismiss the Application for Review and to Stay the Briefing Schedule, in the matter of *Application for Review of Potomac Capital Markets LLC*, Administrative Proceeding No. 3-19917, to be served by email on:

Vanessa Countryman, Secretary
Securities and Exchange Commission
apfilings@sec.gov

and by email on:

Goodloe E. Byron
Potomac Markets LLC
gebyron@potomacinvestments.com

Service was made pursuant to the Commission's order in *Matter of Pending Administrative Proceedings*, Exchange Release No. 88415, 2020 SEC LEXIS 760 (March 18, 2020).

Respectfully Submitted,

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