

**POTOMAC CAPITAL MARKETS  
LIMITED LIABILITY COMPANY**

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129 West Patrick Street, Unit 4, Frederick, MD 21701  
240-409-3867

January 15, 2021

**VIA EMAIL**

Vanessa Countryman, Secretary  
Securities and Exchange Commission  
100 F Street, NE  
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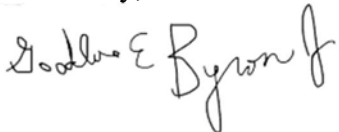
RE: In the matter of the Application for Review of Potomac Capital Markets LLC  
Administrative Proceeding No. 3-19917

Dear Ms. Countryman:

Enclosed please find an electronic copy of Potomac Capital Markets LLC's Opposition to FINRA's Motion To Dismiss in the above-captioned matter.

Please contact me at (240) 409-3867 if you have any questions.

Sincerely,



Goodloe E. Byron, Jr.  
President

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

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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

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**POTOMAC CAPITAL MARKETS, LLC'S OPPOSITION TO  
FINRA'S MOTION TO DISMISS THE APPLICATION FOR REVIEW AND  
TO STAY THE BRIEFING SCHEDULE**

Goodloe E. Byron, Jr., President  
Potomac Capital Markets, LLC  
CRD# 39800  
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(240) 409-3867

January 15, 2021

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## **I. INTRODUCTION**

Potomac Capital Markets, LLC has been a broker-dealer for 25 years. Due to a combination of factors that included change in auditor, global pandemic constraints, delays caused by FINRA's failure to provide a timely examination report, and unfortunately timed vacations by auditor staff, Potomac filed its 2019 audited annual report late. FINRA initiated an expedited process to suspend Potomac and potentially expel it from membership. Potomac communicated with FINRA throughout the process, and asked for extension of time when it became apparent the audit would require time beyond the effective date of expulsion. FINRA did not respond to the request, or provide reasons for denying it, but rather moved straight to expulsion, without explaining why expulsion could not be cured by filing the audited annual report. Potomac has since completed the examination and audit, despite delays that were caused by FINRA in full in the former case and in part in the latter. Under the circumstances, Potomac could not request a hearing or seek termination of the suspension. Its only administrative option was a request for extension of time, which it made.

FINRA's motion should be denied. Potomac exhausted the administrative remedies available to it. Exhaustion is not required where, as here, FINRA abuses its discretion in denying a request for extension of time. FINRA also abused its discretion when, having ignored the extension request, it failed to give Potomac a hearing. The sanction of expulsion should be overturned as excessive and oppressive, and on grounds that FINRA failed to explain why expulsion should not be reversed once Potomac filed its audited annual report. Dismissal is inappropriate where Potomac engaged fully with the administrative process, filed its audited financial statements despite 7 months of delay from FINRA in providing an examination report, and engaged in no other violation, while FINRA abused its discretion, imposed an excessive sanction, and failed to explain itself. All these grounds for dismissal would stand in ordinary times, but are more forceful under global pandemic conditions, as the Commission itself has recognized in its procedural orders and in its handling of this case.

## **II. FACTUAL BACKGROUND**

### **A. Potomac's 2018 Audited Annual Report**

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). 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). FINRA Rule 9552(e) only permits a request for hearing to be made *before* the suspension goes into effect. FINRA Rule 9552(f) only permits a request for termination of suspension if the member can claim full compliance.

Potomac completed its 2018 audited annual report (the “2018 Audit”) on April 24, 2019. (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).

#### **B. Potomac’s Membership Fees**

FINRA cancelled Potomac’s membership for failure to pay fees at a time that overlapped with Potomac’s 2020 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”). (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.

On May 11, 2020, FINRA notified Potomac in writing that its membership was cancelled due to its failure to pay the fees identified in the Cancellation Notice. (R. at 27.). In its letter, FINRA also stated 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).

On June 1, 2020, Goodloe Byron sent the following email to accounts receivable at FINRA:

Potomac Capital Markets is writing to request termination of the cancellation of membership notice received in your letter of May 11, 2020.

Potomac Capital Markets was notified that the firm's membership would be cancelled in accordance with FINRA RULE 9553 for failure to pay the outstanding fees of \$3,437.50 of which \$1,637.50 were CRD RELATED FEES and \$1,800 for MRGEN Fees.

PCM believes there is no violation of Rule 9553 for the \$1,800 MRGEN balances as these fees were for the annual assessment and FINRA provided COVID relief of these fees to small member firms making due in September 2020.

As for the CRD fees, the majority of the fees were billed April 28th so were not overdue by 21 days but outstanding for 13 days.

Potomac Capital Markets fully complied with satisfying the entire CRD fee the following day of receipt of May 11th notification.

Potomac Capital additionally paid all of subsequent May billings.

Potomac Capital requests termination of the suspension on the grounds it fully complied by making payment of the amount overdue and has shown good cause in resolving the payment of fees.

### **C. Potomac's 2019 Audited Annual Report**

As of January 2020, Potomac's FINRA Coordinator was replaced with a new contact, now known as a Risk Monitoring Analyst, (RMA). This change in personnel meant the RMA had limited familiarity with Potomac, and may be part of why FINRA was 7 months late in providing an Exam Report to Potomac. The examination had concluded in September 2019, and the report was due in November 2019.

In preparation for filing the December 2019 Annual Audit Report, Potomac underwent a change in accounting firms in February of 2020. Potomac was able to engage with the accounting firm in March 2020, just prior to a State-ordered shut down due to the current pandemic. Following the initial State ordered shutdown, Potomac was forced to relocate its offices to a new facility in March 2020. The Firm's Annual Filing of its completed audit was due to be filed on or before March 2, 2020. Accordingly, and based on the foregoing, the Firm spoke with its assigned RMA

to request an extension for filing. Simultaneously, the Firm worked with its Auditor to complete the above-referenced filing.

On April 2, 2020, FINRA sent Potomac a notice under FINRA Rule 9552(a) (the “Pre-Suspension Notice”) advising it that Potomac would be suspended, effective April 27, 2020, for 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).

During the course of completing the above-referenced filing, Potomac’s auditor discovered that FINRA had failed to issue the Firm’s Exam Report, Examination Number: 20190639753, to the firm via the CRD Firm Gateway. That report had been due in November 2019. As such, the Auditor was unable to continue the audit. FINRA issued the Exam Report, dated June 22, 2020, providing a 30-day response period – in other words Potomac’s response deadline was 20 days after the due date for its Annual Audit Report.

FINRA’s examination alleged: that Potomac’s books and records were inaccurate with respect to accrual of expenses and computation of Net Capital; that Potomac had failed to comply with various securities laws; that Potomac had failed to file required monthly and quarterly reports; that Potomac had failed to comply with FINRA fidelity bond requirements; and that Potomac had failed to file notice that net capital was below minimum required amounts. (R. at 37). All of these allegations would ultimately result in cautionary action or no further action.

Potomac on multiple occasions requested that its suspension be terminated. This was memorialized in an email exchange between Cathy Cucharale, who was assisting Potomac with

compliance matters, and RMA Shahzad Sultan. A June 9 email from Cucharale to Sultan states:

Can you please advise if we should file the official request for termination of suspension letter at this time or should we wait until we file the audit? I know that Geb has submitted an email request already to the accounts receivable department. Please let me know how best to proceed.

Sultan's June 10 reply stated "The firm can only file for the lifting of the suspension only after the firm corrects the reason for suspension. I believe that would be the submission of the audit and payment of the fee associated with the late audit." As Cucharale indicated in her reply later that evening, Potomac had already paid the fees, and would submit the letter seeking termination of the suspension when the audit was submitted.

Following the issuance of the Exam Report, the Auditor resumed the Audit. On July 2, 2020, the Auditor indicated to Potomac that the Audit would not be completed within the allotted 90 day period prior to automatic expulsion on July 2, 2020, in part because a key staff person had gone on vacation. As a result of this information, the Firm contacted FINRA via letter on July 2, 2020, explaining the circumstances and asking for an extension of time. On July 6, 2020 the Firm received a letter from FINRA notifying the Firm of their expulsion from FINRA membership.

Without responding in any way to Potomac's request for an extension of time, much less offering any reason for denying it, FINRA issued a letter on July 6, 2020, expelling Potomac from membership. (R at 49). The letter did not indicate that any administrative remedy remained available to Potomac at the FINRA level; the only mechanism it described for challenging the decision was an appeal to the Commission. *Id.* Potomac had additional communications with FINRA's Office of the Ombudsman and FINRA's counsel regarding options for reversing Potomac's expulsion, and was told in each instance that no administrative options remained, apart from appeal to the Commission.

On July 15, 2020, the Firm responded to FINRA's Exam Report, and cced the Auditor. Upon receipt of the Firm's response to FINRA, it was indicated by the auditor that the audit would not resume until a response was received from FINRA regarding the Exam Report Response submitted by the Firm on July 15, 2020. Based on this determination, the Firm contacted the



Ombudsman Department of FINRA requesting an update with regard to a response from FINRA. FINRA's response did not arrive until August 7, 2020. That response indicated cautionary action on the first three items in the examination report, and no further action on the fourth. On August 27, 2020, the auditor contacted AnnMarie McGonnigal at FINRA to confirm the authenticity of FINRA's sur-reply, because he was surprised at how far it had retreated from the initial examination report. This further reinforces the importance of the examination to the audit process.

Having finally received FINRA's examination correspondence, months late, the auditor completed the audited annual report on November 13, 2020, and Potomac submitted it to FINRA on November 17, 2020. Potomac has remained engaged with its auditor, who has been reviewing 2020 information. in service of limiting the time needed to catch up on filings upon reinstatement.

### **III. LEGAL ARGUMENT**

The Commission has indicated that, in this time of global pandemic, the Commission and any self-regulating organizations conducting proceedings under its jurisdiction should exhibit greater procedural flexibility and leniency than in ordinary times. The Commission's policy makes sense – the COVID-19 pandemic has infected 23.2 million Americans and 92.3 million worldwide, and caused 386,000 deaths in the U.S. and 1.98 million deaths worldwide. On March 18, 2020, the Commission issued an order providing that reasonable requests for extension of time will not be disfavored, notwithstanding Rule of Practice 161. Pending Administrative Proceedings, Exchange Act Release No. 88415, 2020 WL 1322001, at \*1 (Mar. 18, 2020) (relaxing the strictures of Rule of Practice 154(b), 17 C.F.R. §201.154(b)).

The Commission has evidenced this flexibility and leniency in this case. On November 19, 2020, over a month after any response to FINRA's Motion was due, Potomac sent a letter to the Secretary that stated it had not received "a schedule on how to move forward with [its] application." The letter did not mention FINRA's Motion. The Commission nonetheless treated Potomac's letter as a motion for extension of time to file an opposition, and granted that motion.

This matter is before the Commission because Potomac made a request to FINRA for extension of time, before the deadline for response, and explained the reasons why more time was

needed, but FINRA simply proceeded with expulsion. FINRA not only failed to grant the request – it did not even respond, much less offer reasons for denying or ignoring the request. The contrast with the Commission’s handling of procedural matters is stark. The Commission generously interpreted Potomac’s letter to ask for relief that it did not request, then granted the relief, even though the deadline had long since passed.

**A. Potomac Filed its 2019 Audited Annual Report**

Potomac understands the importance of filing audited annual reports, and has filed them annually since becoming a FINRA member, though the 2018 and 2019 reports were filed late.

At the same time, the authorities FINRA cites regarding the substantive importance of filing audited annual reports illustrate that the sanction of expulsion is excessive and oppressive (*see* 15 U.S.C. §78s(e)(2)), and FINRA’s refusal to grant an extension constituted an abuse of discretion. In *In re TMR Bayhead Securities*, the appealing FINRA member was suspended and fined, *not expelled*, for failing to file *three years* of audited financial statements, rather than filing *one* statement late. Exchange Act Release No. 88006, 2020 SEC LEXIS 2833, at \*1 (Jan. 17, 2020), The Commission upheld the suspension, but reversed the imposition of a \$3,000 fine. *Id.* at \*6–\*7, \*9. The appellant would be able to lift its suspension once it filed the audited financial statements. *Id.* at \*9 (citing *In re Sharemaster*, Exchange Act Release No. 83138, 2018 WL 2017542, at \*8 (Apr. 30, 2018), where FINRA removed a suspension after the appellant filed audited financial statements). Likewise, the appellant in *In re Gremo Investments, Inc.* was suspended for filing a financial statement audited by an accounting firm that was not registered with the Public Company Accounting Oversight Board, but would be able to terminate the suspension upon filing a properly audited statement. Exchange Act Release No. 64481, 2011 SEC LEXIS 1695, at \*7 (May 12, 2011).

Thus, in non-pandemic times, FINRA and the Commission deemed suspension until audited financial reports are filed to be the appropriate sanction, even when failure to file has occurred over three years. Here, Potomac was months late, not years, under circumstances where FINRA itself was months late in providing an examination report that Potomac’s auditor deemed

essential to completion of the audit.

**B. There is no Exhaustion of Administrative Remedies Bar to Potomac's Appeal**

**1. Potomac Exhausted Administrative Remedies**

Invariably, the cases FINRA cites to support its assertion that Potomac's expulsion should stand due to failure to exhaust administrative remedies involve investigations into wrongdoing, where appellants failed to provide information that was entirely within their control to provide, and their nonresponsiveness was extreme in comparison to this case. Most of these cases involved affirmative misconduct by the appellant. *See Patrick H. Dowd*, Exchange Act Release No. 83710, 2018 SEC LEXIS 1875, at \*1–5 (July 25, 2018) (investigation of representative who had been fired for annuity applications with inaccurate information and falsified signatures, where representative made no response whatsoever to information requests or suspension notice); *Jonathan Roth Ellis*, Exchange Act Release No. 80312, 2017 SEC LEXIS 970, at \*2–5 (Mar. 24, 2017) (investigation of termination of applicant by securities firm, applicant, who made no response whatsoever to information requests or suspension notice); *Rogelio Guevara*, Exchange Act Release No. 78134, 2016 SEC LEXIS 2233 (June 22, 2016) (investigation of registered representative who had resigned under internal review for making premium payments for clients from a personal account, where representative provided no response whatsoever to information requests or suspension notice); *Caryl Trewyn Lenahan*, Exchange Act Release No. 73146, 2014 SEC LEXIS 3503, at \*1–4 (Sept. 19, 2014) (investigation of customer complaint, petitioner made no response whatsoever to information requests or suspension notices); *Ricky D. Mullins*, Exchange Act Release No. 71926, 2014 SEC LEXIS 1268, at \*2–6 (Apr. 10, 2014) (in FINRA investigation of customer complaint, petitioner failed to appear for testimony, repeatedly refused to respond to information requests, took no action to oppose suspension); *Gregory S. Profeta*, Exchange Act Release No. 62055, 2010 SEC LEXIS 1563 (May 6, 2010) (FINRA investigation of potential criminal background of applicant, who made no response whatsoever to information requests or suspension notice).

In short, the cases FINRA cites involve individuals who did not engage with the

administrative process in any way whatsoever, and who failed or refused to provide information that was within their control, even though the administrative process involved investigations of potential violations of securities laws. By contrast, Potomac was not under investigation. After FINRA issued its first notice that the audited annual report was overdue, Potomac communicated with FINRA on multiple occasions about completing it. Potomac directly requested an extension of time, and FINRA never responded to this request, much less explained why it wasn't granted. While Potomac is ultimately responsible for submitting an audit in a timely manner, the timing of the audit's arrival was not in Potomac's control. This is all the more true, because FINRA itself was 7 months delinquent in providing an examination report that the auditor deemed crucial.

Once Potomac realized its auditor was not going to meet the deadline, it had no realistic options, other than asking for an extension of time. Potomac could hardly have terminated its auditor at that point. Such terminations are discouraged in the financial industry for obvious reasons, but even if they weren't, an audit that was commenced from scratch at that point would have taken significant additional time to complete.

Exhaustion does not require a litigant to use every conceivable procedural opportunity under an administrative scheme; it requires the litigant to engage with the administrative process and to use remedies that are available under the circumstances. After April 27, 2020, FINRA Rules did not permit Potomac to seek a hearing regarding its suspension. Potomac would not find out about FINRA's gross delinquency on the examination report or its auditor's challenges in completing the audit until long after that deadline. Under FINRA Rule 9552(e), Potomac was required to request a hearing before the suspension date, and to list all defenses, but the major defenses were not knowable until after that deadline. Similarly, under FINRA Rule 9552(f), Potomac could only request termination of suspension on grounds of full compliance with the notice. Potomac had no avenue to claim full compliance – it could not compel its auditor to produce the audit by the deadline in question. In its expulsion notice, FINRA itself confirmed that no administrative remedies remained to Potomac, other than appeal to the Commission.

In short, Potomac fully engaged with the administrative process, and utilized every

administrative remedy that was realistically available to it. This case is thus dramatically different from *MFS Sec. Corp. v. Commission*, where a stock exchange member was in the midst of an administrative proceeding and simply abandoned it to file suit. 380 F.3d 611 (2d Cir. 2004).

To the extent the Commission decides Potomac failed to exhaust administrative remedies, the Commission should apply the futility exception to the exhaustion requirement. *See McCarthy v. Madigan*, 503 U.S. 140, 148-149 (1992) (recognizing futility exception to exhaustion requirement); *Randolph-Sheppard Vendors of Am. v. Weinberger*, 795 F.2d 90, 105-106 (D.C. Cir. 1986) (noting that the futility exception is appropriate in cases where the agency “has indicated that it does not have jurisdiction” or “has evidenced a strong stand on the issue in question and an unwillingness to reconsider the issue”). FINRA Rules did not give FINRA jurisdiction to grant a hearing after April 27, 2020, or to terminate the suspension without Potomac’s provision of the audit before a deadline. Invoking either remedy thus would have been futile for Potomac.

The chief case FINRA cites on non-exhaustion is *In re Li-Lin Hsu*, but the case is inapposite. *See* Exchange Act Release No. 78899, 2016 SEC LEXIS 3585 (Sept. 21, 2016). In that case, a broker-dealer was *under investigation* after being suspended and terminated from Ameriprise Financial Services, Inc. (“Ameriprise”). *Id.* at \*1. She was temporarily suspended for failing to respond to two document requests, with the suspension lifted when she belatedly produced them, then suspended again for further failure to comply with document requests, with notification that she would be barred from association with any FINRA member if she did not comply or seek termination of the suspension by June 1, 2016. *See id.* at \*2. On that date, she requested an extension, asserting she had been out of the country being treated for injuries from an August 3, 2015 car accident and that her attorney had advised her not to respond to FINRA’s requests without his supervision. *Id.* at \*2–\*3. However, the Commission found that Hsu had not established that she could not comply with FINRA’s document requests – she neither substantiated her alleged injuries nor established that those injuries prevented her from responding to document requests, and it appeared that her failure to provide document request responses that were entirely within her control resulted from her attorney’s advice to be cautious about the impact document request

responses could have on Ameriprise's litigation against her.

In short, Ms. Hsu could easily have prevented suspension by simply complying with the document requests, and she elected not to do so. Here, however, Potomac did not have control over when its auditor completed the audit. Provision of an audited financial statement was not possible, when Potomac's auditor had not completed the audit. Potomac's agency was all the more limited, because FINRA itself had delayed for 7 months in providing an examination report that the auditor deemed critical for the audit.

FINRA asserts that the report was "irrelevant," but that is a judgment for the auditor to make, and FINRA cannot substitute its judgment for the auditor's reasonable professional judgment. The auditor's judgment here is more than reasonable, as the results of the examination, and Potomac's response to the objections, were objectively important to the audit. A FINRA examination could identify material risks or inaccuracies that an auditor would deem essential, particularly in the highly regulated broker-dealer world. FINRA's examination alleged: that Potomac's books and records were inaccurate with respect to accrual of expenses and computation of Net Capital; that Potomac had failed to comply with various securities laws; that Potomac had failed to file required monthly and quarterly reports; that Potomac had failed to comply with FINRA fidelity bond requirements; and that Potomac had failed to file notice that net capital was below minimum required amounts. All of these issues are material to evaluating the financial health and potential liabilities of the company under audit. The auditor deemed them sufficiently important that he called FINRA to confirm the authenticity of FINRA's sur-reply.

## **2. FINRA Abused Its Discretion in Denying an Extension**

"Dismissal for failure to exhaust administrative remedies may not be appropriate if an applicant can establish that FINRA abused its discretion in denying a request for an extension of time." *Li-Lin Hsu*, 2016 SEC LEXIS 3585, at \*9. As discussed above, failure to deny Potomac's request for extension of time was an abuse of discretion. In ordinary times, the records in the cases FINRA cites show that multiple extensions of time were routinely granted, even though those cases involved investigation of potential securities laws violations, rather than delayed filings. The

Commission has expressly ordered that pandemic conditions make the standard for granting extensions of time more generous than in the past, yet FINRA is being less generous with Potomac than in past proceedings, even though FINRA bears partial responsibility for Potomac's delay.

FINRA's own policy, set in non-pandemic times, allows for requests for extension of time on audits with as little as three days' notice. FINRA, *Annual Audit Extension of Time Request Policy*, <https://finra.org/filing-reporting/annual-audit/extension-time-request-policy>. The Commission has mandated greater flexibility and generosity with time extension requests during the pandemic, and FINRA abused its discretion in failing to exhibit either here.

### **3. FINRA Abused Its Discretion in Failing to Hold a Hearing**

To the extent that FINRA asserts that, in complete contravention of FINRA rules, it was possible for Potomac to seek a hearing on expulsion after April 27, 2020, then FINRA should have either granted Potomac's request for extension of time or offered Potomac an opportunity for hearing. The Commission has exhibited the proper approach to procedural matters in this pandemic year. Just as the Commission treated Potomac's letter to the Commission as a request for extension of time to file, FINRA should have treated Potomac's request for extension of time as a request for hearing, at least insofar as FINRA intended to deny the extension request. FINRA was aware of Potomac's reasons for delay. It could have asked Potomac to file a formal request for hearing. It was an abuse of discretion for FINRA to fail to conduct itself in the manner that the Commission has mandated by order and demonstrated in this case. FINRA's actions would constitute abused of discretion under ordinary circumstances, but all the more so in a year of global pandemic, when the Commission has prescribed a regime with greater procedural flexibility and leniency.

### **4. Expulsion Is an Excessive and Oppressive Sanction**

Pursuant to Exchange Act Section 19(e)(2), if the Commission finds, "having due regard for the public interest and the protection of investors," that a FINRA sanction "is excessive or oppressive," it "may cancel, reduce or require the remission of such sanction." *TMR Bayhead*, 2020 SEC LEXIS 2833, at \*8 (quoting Section 19(e)(2); see *Gremo Investments*, 2011 SEC LEXIS 1695, at \*4. The sanction imposed in both *Gremo* and *TMR Bayhead* was suspension until audited

statements were filed, *not* expulsion regardless of whether such statements were filed. In *TMR Bayhead*, the Commission held that adding a fine to said suspension was “excessive and oppressive.” Potomac was a number of months late with a single audited annual report, but TMR Bayhead was *three years behind* in filing audited annual reports. Even though TMR Bayhead’s conduct was far more objectionable than Potomac’s, the Commission found the combination of suspension and a modest fine in that case to be “excessive and oppressive.” That sanction was less severe than Potomac’s expulsion, and Potomac’s expulsion is therefore excessive and oppressive.

It is worth noting that suspension without expulsion is a typical sanction in cases involving more serious violations than anything Potomac did in this case. For example, in *In re Stephen J. Horning*, the respondent caused a broker-dealer’s violation of Exchange Act Section 17(e) and Exchange Act Rule 17a-5(d) by filing an annual report that contained falsified financial statements, under circumstances that led to illegal taking of \$4.5 million in customer funds, yet the respondent was suspended for a year, rather than having his license terminated. Securities Exchange Act Rel. No. 56886 (Dec. 3, 2007), 92 SEC Docket 207, 223-24.

While the sanction would be excessive and oppressive in ordinary times, it is more so in a year of pandemic, when the Commission has prescribed greater procedural flexibility and leniency.

##### **5. FINRA Failed To Explain Why the Expulsion Should Not Be Reversed**

In *In re Brendan D. Feitelberg*, FINRA suspended and barred an individual for failing to respond to requests for information, and indicated, without explanation, that it would not consider removing the bar even if the individual later provided the information. Exchange Act Release 89365, 2020 SEC LEXIS 2746, at \*12-13 (July 21, 2020). The Commission remanded to FINRA, even though Feitelberg had neither replied to the information requests nor responded to the suspension and bar notices. *Id.* Feitelberg provided the responses over five months after the suspension and bar went into effect. *Id.* at \*4. The Commission remanded in part because FINRA had provided no explanation for why a bar was appropriate, given Feitelberg’s special circumstances. Feitelberg’s circumstances included illness and potential non-receipt of one or more relevant communications from FINRA. *Id.*



In this case, Potomac likewise faced circumstances beyond its control, such as an auditor's delay, FINRA's delay, and a global pandemic. FINRA was aware of Potomac's circumstances, and of its own delay in providing the examination report, yet it provided no explanation whatsoever of why Potomac's request for extension was denied, or why removal of the expulsion would not be appropriate once the audit was submitted. FINRA refused to grant Potomac even one extension, but Feitelberg had received two extensions, one of which was requested the day before documents were due. *Id.*

At a minimum, then, remand is appropriate, because “[a]bsent this explanation, [the Commission is] unable to determine whether [Potomac] failed to exhaust [its] administrative remedies or otherwise opine on the merits of [Potomac’s] appeal.” *Destina M. Mantar*, Exchange Act Release No. 79851, 2017 WL 221653 (Jan. 19, 2017). FINRA's failure to explain its decision would be grounds for reversal or remand in ordinary times, but all the more so in a year of global pandemic, when the Commission has prescribed greater procedural flexibility and leniency.

### **C. Potomac Has Shown that Dismissal Is Inappropriate**

Potomac's petition, the record, and this brief all show that dismissal is inappropriate. FINRA claims that Potomac should have sought a hearing, but in the time before the April 27, 2020 deadline for seeking a hearing, Potomac did not know that its auditor would have difficulty meeting the July 2 deadline, or that that difficulty would arise in part from FINRA's continued delinquency in providing a crucial examination report. Not only did Potomac have no reason to anticipate a hearing was needed – *there was no way for it to include its defenses in a hearing request*, because it did not discover them until after the April 27, 2020 deadline. Potomac wanted to complete the audit as soon as possible, and at that time had reason to believe it would meet the July 2, 2020 deadline. Potomac also had no reason to anticipate how utterly unreasonable FINRA would be with respect to any request for extension of time.

FINRA faults Potomac's July 2, 2020 letter for failing to request termination of the suspension on grounds of full compliance or request a hearing. It was impossible for Potomac to do either under FINRA's rules, and doing either would have been futile.

Potomac acknowledges that it could have monitored the audit's progress more closely, and been more proactive in determining whether it would be completed on time. The request for extension of time admittedly arrived on the due date, although FINRA rules only require 3 days' notice for extension requests. Given the pandemic context, the Commission's order in light of it, and FINRA's own role in the audit delay, failure to grant the extension was an abuse of discretion.

FINRA found nothing in its examination that warranted more than cautionary action or no further action. There is no accusation of securities laws violations by Potomac, beyond the act of filing the audited annual report late. The severity of the sanction, FINRA's lack of explanation for it, FINRA's abuse of discretion in granting extension of time, FINRA's own role in delaying the audit, and the fact that Potomac is now in full compliance all militate against dismissal. The Commission should ultimately either reverse the expulsion, or remand to FINRA to develop a record as to why this sanction is appropriate and should not be terminable.

#### **IV. CONCLUSION**

Potomac filed its 2019 audited annual report, in spite of delays caused in part by FINRA itself, and used the administrative remedies available. FINRA imposed an excessive sanction, after abusing its discretion in denying a request for extension of time, and failing even to explain the denial or FINRA's insistence on expulsion as a sanction. FINRA's motion should therefore be denied.

Respectfully submitted,



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January 15, 2021

## CERTIFICATE OF SERVICE

I, Goodloe Byron, certify that on this 15th day of January, 2021, I caused a copy of Potomac Capital Markets, LLC's Opposition to FINRA's Motion to Dismiss, in the matter of *Application for Review of Potomac Capital Markets LLC*, Administrative Proceeding No. 3-19917, to be served by email on:

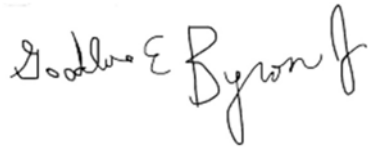
Vanessa Countryman, Secretary  
Securities and Exchange Commission  
apfilings@sec.gov

and by email on

Ashley Martin  
Assistant General Counsel  
FINRA  
Ashley.Martin@finra.org

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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