

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 74216 / February 5, 2015

Admin. Proc. File No. 3-15837

In the Matter of the Application of

POSITRON CORPORATION

For Review of Action Taken by

FINRA

OPINION OF THE COMMISSION

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

Registered securities association found that it was in the public interest to decline to process documents related to an issuer's proposed reverse stock split and change of corporate domicile because the issuer's then chief executive officer and chairman was the subject of a settled regulatory action involving securities laws violations and a Commission administrative proceeding. *Held*, review proceeding is *dismissed*.

APPEARANCES:

Peter Campitiello, of Kane Kessler, P.C., for Positron Corporation

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

Appeal filed: April 11, 2014

Last brief received: July 31, 2014

Positron Corporation, an issuer of securities that are quoted on OTC Pink ("OTC Pink"), which is one of the tiers of OTC Market Group, Inc.'s OTC Link, appeals from FINRA's denial of Positron's request that FINRA process and announce Positron's reverse stock split and change of corporate domicile on FINRA's website.¹ FINRA found that Positron's request was deficient and that processing the announcement was not in the public interest because Patrick G. Rooney, who was then Positron's chief executive officer ("CEO") and chairman, had consented in federal district court to an injunction against future violations of the antifraud and disclosure provisions of the federal securities laws and was the subject of a then-pending Commission administrative proceeding to determine whether a securities industry suspension or bar against him was warranted.² Positron does not dispute Rooney's involvement in one settled and another then-pending regulatory action that alleged fraud and securities law violations, but argues that FINRA's determination was not in the public interest because, among other reasons, Positron's proposed reverse stock split and change in domicile would benefit its shareholders and Rooney's regulatory proceedings were unrelated to his role at Positron. Based on an independent review of the record, we find that FINRA properly exercised its discretion, relied on grounds that exist in fact, and denied Positron's request in accordance with FINRA Rules and the purposes of the Securities Exchange Act of 1934. We accordingly dismiss the appeal.

¹ OTC Link is an alternative trading system that allows broker-dealers to post and disseminate their quotations (prices) to the marketplace and to negotiate trades at agreed-upon prices. *See* <http://www.otcmarkets.com/learn/market-structure>. OTC Link also is an interdealer quotation system, as defined in Rule 15c2-11 under the Exchange Act. *See* 17 C.F.R. § 240.15c2-11. OTC Pink is one of three "tiered marketplaces" within OTC Link. OTC Pink "offers trading in a wide spectrum of equity securities through any broker. [OTC Pink] is for all types of companies that are there by reasons of default, distress or design." Within OTC Pink, issuers are "further sub-categorized by the levels of information that they provide." *See* <http://www.otcmarkets.com/learn/otc-market-tiers>. At the time it filed this appeal, Positron was sub-categorized as "caveat emptor," indicating that "there [was] a public interest concern associated with the company, security, or control person which may include but is not limited to a spam campaign, questionable stock promotion, investigation of fraudulent or other criminal activity, regulatory suspensions, or disruptive corporate actions." Positron is now sub-categorized as "current," which is "based on the level of disclosure and is not a designation of quality or investment risk. This category includes shell or development stage companies with little or no operations as well as companies without audited financial statements and as such should be considered extremely speculative by investors." *Id.* (all websites last visited on January 5, 2015).

² FINRA also noted that the district court had retained jurisdiction to determine the appropriate sanctions for Rooney's violations.

I. Background

A. FINRA's processing of Company-Related Actions

FINRA processes requests to announce and publish certain corporate actions by issuers whose securities are traded on the over-the-counter markets ("OTC Securities"). FINRA publishes these announcements on its website in a document known as the "Daily List."³ These actions, generally referred to as "Company-Related Actions,"⁴ include any 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."⁵ If FINRA elects to process an issuer's Company-Related Action, it will, in turn, announce the action on the "Daily List," which "effectively announces the Company-Related Actions to the [OTC] market."⁶

In 2010, based on a "growing concern that FINRA's Company-Related Action processing services may potentially be used by certain parties to further fraudulent activities," FINRA proposed, and the Commission approved, FINRA Rule 6490, which authorizes FINRA to deny an issuer's request that FINRA announce a Company-Related Action on the Daily List under certain circumstances.⁷ The Commission's 2010 Approval Order observed that, although "[h]istorically, FINRA has viewed its role in performing issuer-related functions as primarily ministerial" given its indirect relationship with issuers, Rule 6490 makes clear "the scope of its regulatory authority and . . . codif[ies] procedures that it will apply when reviewing requests to process Company-Related Actions."⁸ The Rule authorizes FINRA's Department of Operations

³ *FINRA Regulatory Notice 10-38*, 2010 WL 3393960, at *1 (Aug. 27, 2010).

⁴ *FINRA Rule 6490; Order Approving Proposed FINRA Rule 6490 (Processing of Company-Related Actions) to Clarify Scope of FINRA's Authority When Processing Documents Related to Announcements for Company-Related Actions for Non-Exchange Listed Securities and to Implement Fees for Such Services*, Exchange Act Release No. 62434, 2010 WL 2641653, at *2 (July 1, 2010) (the "2010 Approval Order"); *see also* *FINRA Regulatory Notice 10-38*, 2010 WL 3393960, at *3.

⁵ *FINRA Rule 6490* refers to the first category of Company-Related Actions as "SEA Rule 10b-17 Actions" and the second category as "Other Company-Related Actions." Positron's proposed reverse stock split is an SEA Rule 10b-17 Action, and the proposed change of domicile from Texas to Delaware is an Other Company-Related Action. As *FINRA* explains, this is because, "when an issuer initiates a change in domicile, it typically does so by merging with a shell company formed in the new state of incorporation. As a result of the merger with the shell company, the issuer recalls the current stock certificates to reissue the certificates in accordance with the securities laws, rules, and regulations of the new state of incorporation."

⁶ 2010 Approval Order, *supra* note 4, at *1 n.7; *see also* *FINRA Regulatory Notice 10-38*, 2010 WL 3393960, at *1.

⁷ 2010 Approval Order, *supra* note 4, at *2.

⁸ *Id.*

(the "Department") to conduct "in-depth reviews" of issuers' requests⁹ and to deny a request upon finding that (1) the request is "deficient," based on a five-factor inquiry,¹⁰ and (2) denial is "necessary for the protection of investors, the public interest and to maintain fair and orderly markets."¹¹ An issuer may appeal any denial by the Department to a subcommittee of FINRA's Uniform Practice Code Committee ("UPCC Subcommittee") and that subcommittee's decision becomes FINRA's final decision in the matter.¹²

B. Positron's then-CEO Rooney and the regulatory actions against him.

1. Positron

Positron is a "nuclear medicine healthcare company specializing in the field of cardiac Positron Emission Tomography imaging," and manufactures and sells medical imaging devices and radiopharmaceuticals.¹³ Until September 5, 2014, Rooney was Positron's CEO and

⁹ *Id.*

¹⁰ FINRA Rule 6490(d)(3). Under FINRA Rule 6490(d)(3), a Company-Related Action is "deficient" if "one or more" of the following factors exists:

- (1) FINRA staff reasonably believes the forms and all supporting documentation . . . may not be complete, accurate or with proper authority;
- (2) the issuer is not current in its reporting requirements . . . to the SEC or other regulatory authority;
- (3) FINRA has actual knowledge that . . . officers [or] directors . . . connected to the issuer or the [Company-Related Action requested] . . . are the subject of a pending, adjudicated or settled regulatory action or investigation by a federal, state or foreign regulatory agency, or a self-regulatory organization; or a civil or criminal action related to fraud or securities laws violations;
- (4) a state, federal or foreign authority or self-regulatory organization has provided information to FINRA, or FINRA otherwise has actual knowledge indicating that the issuer, associated persons, officers, directors, transfer agent, legal adviser, promoters or other persons connected with the issuer or [Company-Related Action] may be potentially involved in fraudulent activities related to the securities markets and/or pose a threat to public investors; and/or
- (5) there is significant uncertainty in the settlement and clearance process for the security.

¹¹ *Id.*; 2010 Approval Order, *supra* note 4, at *6.

¹² FINRA Rule 6490(e).

¹³ Positron Corporation, Form 10-K for the year ended December 31, 2013, at 2 ("Positron Form 10-K"). Positron is a Texas corporation with offices in Illinois, Indiana, Texas, and New York. Its common stock is registered with the Commission under Section 12(g) of the Securities Act, and at all times relevant to FINRA's action, was quoted on OTC Pink under the ticker

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Chairman of its Board of Directors.¹⁴ At the time of FINRA's March 27, 2014 determination that is the subject of this appeal, Rooney received a salary from Positron, and he owned common stock and securities convertible into common stock equal to seven percent of Positron's outstanding common stock. Rooney is also the founder, sole owner, and managing partner of Solaris Management, a Delaware limited liability company with its principal place of business in Illinois. Solaris Management is the general partner and investment adviser to Solaris Opportunity Fund, LP ("Solaris Opportunity Fund"), a hedge fund based in Delaware, which at the time of FINRA's determination owned 40.9 percent of Positron's outstanding common stock.¹⁵ Through his personal ownership and the interest held by Solaris Opportunity Fund, Rooney controlled 47.9 percent of Positron's outstanding common stock.

2. The District Court Proceeding

On November 18, 2011, the Commission filed a Complaint in federal district court against Rooney and Solaris Management.¹⁶ The Commission alleged that Rooney and Solaris Management "used [Solaris Opportunity Fund] as Positron's piggy bank." According to the

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symbol "POSC." See *OTC Markets Group's Company Directory*, <http://www.otcmarkets.com/stock/POSC/quote>.

¹⁴ On September 8, 2014, Positron filed a Form 8-K, which stated, "On September 5, 2014, Patrick G. Rooney tendered his resignation as our Chairman and Chief Executive Officer, effective immediately. Mr. Rooney will continue to pursue current and future strategic collaborations and expansion opportunities on behalf of the Company." On December 22, 2014, Positron filed another Form 8-K announcing that Yuri Perevalov had been appointed to the Company's Board of Directors. The December 22, 2014 Form 8-K states, "With the addition of Dr. Perevalov, the Company returns to a five member Board of Directors, filling the vacancy created by the resignation of Patrick Rooney on September 5, 2014. Dr. Perevalov's addition completes the transition of Mr. Rooney's exit. Accordingly, and as a result of the transfer of his ownership of the majority of his holdings of the Company's securities, Mr. Rooney has concluded his role with the Company as a control person, employee, consultant, or affiliate and the Company's [sic] presently has no plans to rehire Mr. Rooney in the future." We take official notice of the information about Positron provided in its Commission EDGAR filings. See 17 C.F.R. § 210.323 (permitting official notice of "any material fact which might be judicially noticed by a [U.S.] district court" or "any matter in the public official records of the Commission") and Fed. R. Evid. 201(b) (stating that "judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned").

¹⁵ Rooney formed Solaris Opportunity Fund in mid-2003. As of December 2008, which is the last time that the hedge fund issued financial statements, Solaris Opportunity Fund had thirty investors and reported assets of nearly \$16.3 million. Solaris Opportunity Fund promotes the use of "long, short, and neutral positions to hedge risk, generate income, and maintain equity growth over the long term." Solaris Opportunity Fund trades in equities, options, and futures.

¹⁶ *SEC v. Rooney*, No. 1-11-cv-08264 (N.D. Ill. Nov. 18, 2011).

Complaint, Rooney and Solaris Management used undocumented private transactions and no-interest loans totaling over \$3.6 million to cause Solaris Opportunity Fund to be invested wholly in Positron without informing Solaris Opportunity Fund's investors. The Complaint alleged that this investment of the entire fund in Positron was in contradiction of the fund's offering documents, which stated that its strategy was to "trade and establish long, short, and neutral positions in equities and indices." The Commission alleged that Rooney and Solaris Management did not disclose these investments or Rooney's ties to Positron to Solaris Opportunity Fund's investors for over four years and that when Rooney finally made the required disclosures, he misrepresented that he became the Chairman of Positron only to protect Solaris Opportunity Fund's investment. While Rooney failed to disclose the investment, the Commission also asserted that, "[i]n 2008, the year in which the Solaris Fund made its largest investments in Positron, six investors put in over \$5.7 million into the Fund." The Complaint alleged that Rooney's and Solaris Management's conduct left Solaris Opportunity Fund with "a concentrated, undiversified, and illiquid position in a cash-poor company with a history of net losses [Positron]."¹⁷ The Complaint further alleged that Rooney's misconduct benefited Positron, charging that Rooney "caused [Solaris Opportunity Fund] to finance Positron when it had no other sources of funding." It also noted that Rooney "approved these transactions on behalf of Positron" and "selected an interest rate of 0% because it was best for Positron." Based on Rooney's dual roles with Positron and Solaris Opportunity Fund, the Commission alleged that Rooney "had a conflict of interest" and had "engaged in self-dealing in violation of [his] fiduciary obligations to the Solaris Fund."

On December 19, 2013, Rooney and Solaris Management consented to the entry of permanent injunctions against future violations of the antifraud and disclosure provisions of the federal securities laws (the "District Court Injunction").¹⁸ The district court retained jurisdiction to adjudicate penalties, disgorgement, and a possible officer-and-director bar for Rooney. On July 14, 2014, the district court issued a Memorandum Opinion in which it ordered Rooney and Solaris Management to pay, jointly and severally, disgorgement of \$715,700, plus prejudgment

¹⁷ The Complaint also alleged that Rooney, as the sole owner and managing partner of Solaris Management, had received more than \$1.4 million in fees from Solaris Opportunity Fund.

¹⁸ *SEC v. Rooney*, No. 11-cv-8264 (N.D. Ill. Dec. 19, 2013). Without admitting or denying the Commission's allegations, Rooney and Solaris Management consented to permanent injunctions against violating the following antifraud provisions of the federal securities laws: Sections 206(1), (2), and (4) of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-6(1), (2), and (4), and Rules 206(4)-8(a)(1) and (a)(2) thereunder, 17 C.F.R. § 206(4)-8(a)(1) and (a)(2); Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a); and Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5 (all prohibiting fraud in the offer and sale of securities). Rooney and Solaris Management also agreed to permanent injunctions against violating the disclosure provisions of the federal securities laws in Section 13(d)(1) of the Exchange Act, 15 U.S.C. § 78m(d)(1), and Rule 13d-1 thereunder, 17 C.F.R. § 240.13d-1 (requiring any beneficial owner of more than five percent of any Exchange Act registered securities to disclose the extent of his or her ownership stake).

interest of \$166,476; imposed a civil money penalty of \$715,700 against Rooney; and imposed a conditional officer-and-director bar against Rooney, prohibiting him from "operating another private fund and barr[ing him] from serving as an officer or director of any other public company except Positron."¹⁹ The district court found that "Rooney acted with a high level of scienter and his conduct of funneling over \$3 million of [Solaris Opportunity Fund's] assets into Positron while he served the important role as investment adviser was quite egregious." The district court concluded that a full officer and director bar was not necessary because "the likelihood of recidivism is low," based largely on Rooney's having consented to permanent injunctions against future violations of the antifraud provisions.²⁰

3. The Administrative Follow-On Proceeding

On January 8, 2014, we instituted administrative follow-on proceedings to determine whether, as a result of the District Court Injunction, remedial action against Rooney was appropriate in the public interest (the "Commission Follow-On Proceeding").²¹ On July 22, 2014, an administrative law judge issued an initial decision barring Rooney from associating with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.²² The law judge found that Rooney's violations were recurrent, egregious, and evidenced scienter.²³ The law judge further determined that Rooney's previous occupations indicated a likelihood that he would have

¹⁹ *SEC v. Rooney*, No. 1-11-cv-08264 (N.D. Ill. July 14, 2014).

²⁰ The district court also stated, "based on Rooney's status as the father of three dependent sons and the caretaker of his ailing domestic partner, this Court finds that Rooney should be able to continue to support his family with the salary he earns at Positron while simultaneously satisfying disgorgement plus prejudgment interest and the civil penalty ordered by this Court."

On July 31, 2014, FINRA requested that the Commission accept a Supplemental Brief in Opposition to Positron Corporation's Application for Review, which FINRA filed after the conclusion of briefing in this appeal to address arguments regarding the July 14 Memorandum Opinion that Positron raised for the first time in its reply brief. Because the Memorandum Opinion was issued after FINRA filed its opposition brief, FINRA had no opportunity to address it earlier in this appeal. Positron did not oppose FINRA's request. Although the briefing order in this proceeding and our Rules of Practice do not specifically authorize the filing of such supplementary briefs, we have determined to grant FINRA's request.

²¹ *Patrick G. Rooney*, Investment Advisers Act Release No. 3751, 2014 WL 68369, at *1 (Jan. 8, 2014).

²² *Patrick G. Rooney*, Init. Dec. Release No. 638, 2014 WL 3588060, at *5 (July 22, 2014).

²³ *See, e.g., Vladimir Boris Bugarski*, Exchange Act Release No. 66842, 2012 WL 1377357, at *4 & n.18 (Apr. 20, 2012) (citing *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981) (setting forth the factors the Commission considers in assessing whether sanctions are in the public interest)).

opportunities to commit future violations in the absence of a full industry bar. Rooney did not appeal the initial decision, which has now become final.²⁴

C. FINRA's Denial of Positron's Request

On January 24, 2014, Positron filed an application with FINRA requesting that it process two Company-Related Actions—specifically, announcements on the Daily List that Positron was issuing a 1-for-100 reverse stock split and was changing its domicile from Texas to Delaware. Positron explained that it sought the reverse stock split in an effort to increase the share price of its common stock.²⁵ The application stated that Positron would be "forced to increase the number of its authorized shares by two-fold to account for full dilution of [Positron's] securities and future investor participation." The company stated that such an increase in authorized shares would "bring [Positron's] total to six billion authorized shares, a number that is clearly extraordinary and not respectable of a growing nuclear medicine healthcare company." Positron further claimed that a low share price would undermine its credibility with investors, joint venture partners, and potential employees.²⁶

On February 19, 2014, the Department issued a deficiency notice, informing Positron that, pursuant to FINRA Rule 6490(d)(3), it had denied the company's request to process the reverse stock split and the change in domicile because Rooney was the subject of a "settled regulatory action . . . related to fraud or securities laws violations," specifically the District Court Injunction. The Department found that this misconduct "raised concerns for FINRA regarding the protection of investors."²⁷ The Department stated that, as a result of its findings, it would "cease processing documentation related to [Positron's] Company-Related Action and would make no announcement on the Daily List."

Positron appealed the Department's decision to the UPCC Subcommittee, arguing that FINRA's determination was "detrimental to the interests of Positron's shareholders and the investing public." Positron claimed that it had already taken the necessary corporate actions and votes and had filed documents in Texas and Delaware to effectuate the Company-Related Actions. According to Positron, it "would have to make an entirely new set of filings with the Secretaries of State of Texas and Delaware to unwind the corporate actions, leading to additional wasted fees and expenses to Positron and its shareholders." Positron also argued for reversal of the Department's deficiency notice because the underlying actions against Rooney did not name Positron and did not (according to Positron) relate to Rooney's role as its CEO or Chairman.

²⁴ *Patrick G. Rooney*, Advisers Act Release No. 3916, 2014 WL 4467878 (Sept. 11, 2014).

²⁵ "A reverse stock split reduces the number of shares and increases the share price proportionately." *Reverse Stock Split*, <http://www.sec.gov/answers/reversesplit.htm>.

²⁶ Positron did not address the reasons for its change of domicile from Texas to Delaware before the Department or the UPCC Subcommittee.

²⁷ The Department did not mention the then-pending Commission Follow-On Proceeding.

On March 27, 2014, the UPCC Subcommittee affirmed the Department's decision, finding Positron's request deficient based on both the District Court Injunction and the Commission Follow-On Proceeding.²⁸ The UPCC Subcommittee found that the Department's denial of Positron's request was necessary "for the protection of investors and the public interest." The Subcommittee stated that "Rooney's beneficial ownership of Positron Corporation, and the corporate positions that he holds, provide Rooney with substantial authority and control [over Positron]." And although the Subcommittee acknowledged that Positron had offered potentially valid business reasons for the Company-Related Actions, it stated that it "place[s] primary importance on [FINRA's] responsibility to protect investors when an issuer's officers or directors are defendants and respondents in pending actions that allege fraud and securities law violations." The UPCC Subcommittee further found that, under Rule 6490, it need not find that Positron itself was involved in the underlying fraud, because Rooney's significant involvement with Positron provided a sufficient basis to support the deficiency determination. Nevertheless, the UPCC Subcommittee noted that Positron "received over \$3.6 million from Solaris Opportunity Fund" in the transactions underlying the District Court Injunction. This appeal followed.

II. Analysis

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

²⁸ The UPCC Subcommittee requested that both parties file briefs "to address what effect, if any, should be given" to the then-pending Commission Follow-On Proceeding. Positron argued that the Commission Follow-On Proceeding "should have no effect on Positron's appeal" of the Department's deficiency notice because the two proceedings were based on the same facts and stated that its arguments regarding the District Court Injunction "remain unchanged by the recent issuance of the [Commission Follow-On] order." FINRA argued that it was appropriate for the UPCC Subcommittee to consider the Commission Follow-On Proceeding, noting that it alone "would have served as a sufficient basis for a determination of deficiency" and, accordingly, "raise[d] substantial concerns for FINRA regarding investor protection and transparency to the marketplace as it relates to Positron's Requested Corporate Action."

²⁹ 15 U.S.C. § 78s(f) (authorizing Commission review of SRO action that prohibits or limits "any person with respect to access to services offered by the [SRO]"); *see Intelispan, Inc.*, Exchange Act Release No. 42738, 54 SEC 629, 2000 WL 511471, at *2 (May 1, 2000).

³⁰ *Fog Cutter Capital Grp., Inc. v. SEC*, 474 F.3d 822, 825 (D.C. Cir. 2007). We have found that FINRA Rule 6490 "is consistent with the [Exchange] Act and the rules and regulations thereunder applicable to a national securities association." 2010 Approval Order, *supra* note 4, at *5 (explaining that FINRA Rule 6490 is consistent with Exchange Act Sections 15A(b)(5) and (6)). Exchange Act Section 19(f) further requires that we set aside FINRA's

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

FINRA Rule 6490(d)(3) requires FINRA to conduct a two-step analysis in determining whether to process a Company-Related Action request. First, FINRA must assess whether the issuer's request is deficient, based "solely . . . [on] one or more" of the five enumerated factors.³¹ Second, in the event that FINRA deems an issuer's request deficient, FINRA then "may determine" not to process the issuer's request if it finds that denial "is necessary for the protection of investors, the public interest and to maintain fair and orderly markets."³²

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

Positron's request was deficient under FINRA Rule 6490(d)(3) because FINRA had "actual knowledge . . . that officers [or] directors . . . connected to" Positron "are the subject of a[n] . . . adjudicated or settled regulatory action . . . related to . . . fraud or securities laws violations."³³ Rooney was Positron's CEO and Chairman of its Board of Directors at the time of the request in January 2014. And the District Court Injunction entered against him on December 19, 2013 involved violations of the antifraud and disclosure provisions of the federal securities laws, specifically, Advisers Act Sections 206(1), (2), and (4) and Rules 206(4)-8(a)(1) and (a)(2) thereunder, Securities Act Section 17, and Exchange Act Sections 10(b) and 13(d) and Rules 10b-5 and 13d-1 thereunder. Rooney was also the subject of a then-pending Commission Follow-On Proceeding relating to the same securities law violations, in which the Commission sought to bar Rooney from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.³⁴ The record further establishes that FINRA had actual knowledge of both the District Court Injunction and the Commission Follow-On Proceeding.

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

FINRA Rule 6490(d)(3) states that "where [a Company-Related Action] is deemed deficient," FINRA "may determine" not to process the request if doing so is "necessary for the

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action if we find that it imposes an undue burden on competition. 15 U.S.C. § 78s(f). Positron does not claim, nor does the record suggest, that FINRA's action imposes such a burden.

³¹ FINRA Rule 6490(d)(3). *See supra* note 10 (listing factors).

³² *Id.*

³³ FINRA Rule 6490(d)(3)(3).

³⁴ *See id.* (stating the FINRA may determine to deny a Company-Related Action where it has actual knowledge that an issuer's officers or directors are the subject of a "pending . . . regulatory action").

protection of investors, the public interest and to maintain fair and orderly markets."³⁵ The Rule's use of the permissive term "may" vests FINRA with discretionary authority in deciding whether to process and announce a Company-Related Action request on the Daily List.³⁶ In the similar context of appeals from a delisting determination, we have long stated that "[t]o the extent that discretion enters into [FINRA's decision to deny inclusion on its systems] . . . the discretion in question is [FINRA's], not ours,"³⁷ and as in those cases, we will not substitute our judgment for FINRA's unless its decision is unsupported by the record.³⁸

Here, we find that the specific grounds on which FINRA based its findings that Positron's action posed a threat to investors and market integrity exist in fact. Rooney's previous misconduct was serious. The Commission's complaint alleged that, over nearly four years, Rooney repeatedly caused Solaris Opportunity Fund to make undocumented and no-interest loans to Positron, while misleading the fund's investors "into believing that they were invested in a diversified hedge fund" and hiding Rooney's role with Positron. The Commission alleged that, in doing so, Rooney "saddled the Fund with a concentrated, undiversified, and illiquid position in a cash poor company with a lengthy track record of losses." The Commission charged Rooney with violating the antifraud and disclosure provisions of the federal securities laws, which are fundamental to the securities industry and the protection of investors. We have repeatedly held that "conduct that violates the antifraud provisions of the securities laws is especially

³⁵ *Id.*

³⁶ *See, e.g., United States v. Rodgers*, 461 U.S. 677, 706 (1983) (stating that, absent "indications of legislative intent to the contrary," "the word 'may,' when used in a statute, usually implies some degree of discretion"). The 2010 Approval Order lends further support for this reading and included, with approval, the following explanation by FINRA of the operation of Rule 6490: "[W]hen the Department reasonably believes that an issuer . . . has triggered one of the explicitly enumerated factors, . . . it would *have the discretion* not to process any such actions that are incomplete or when it determines that not processing such an action is necessary for the protection of investors." 2010 Approval Order, *supra* note 4, at *6 (emphasis added).

³⁷ *Tassaway, Inc.*, Exchange Act Release No. 11291, 45 SEC 706, 1975 WL 160383, at *2 (Mar. 13, 1975) (discussing oversight of the OTC markets by FINRA, then the NASD).

³⁸ *See, e.g., Cleantech Innovations, Inc.*, Exchange Act Release No. 69968, 2013 WL 3477086, at *6 (July 11, 2013) (stating that "we are not free to substitute our discretion for NASDAQ's" but setting aside decision because "the record does not show that the grounds on which NASDAQ relied in delisting CleanTech exist in fact"); *Eagle Supply Grp., Inc.*, Exchange Act Release No. 39800, 53 SEC 480, 1998 WL 133847, at *4 (Mar. 25, 1998) (remanding to NASD for a more definitive statement on its reasoning for denying issuer's inclusion on the NASDAQ SmallCap Market).

serious . . ."³⁹ and that antifraud injunctions, such as those to which Rooney consented here, "have especially serious implications for the public interest."⁴⁰

Further, the disclosures required by Exchange Act Section 13(d) and its rules, which the Commission also charged Rooney with violating, "alert[] the marketplace to every large, rapid aggregation or accumulation of securities . . . , which might represent a potential shift in corporate control," as in a corporate takeover.⁴¹ Failure to comply with these core disclosure obligations deprives investors of information necessary to make informed investment decisions.⁴² It is also troubling, as the UPCC Subcommittee found, that all of the regulatory actions against Rooney were relatively recent.

FINRA also based its denial on its concerns regarding Rooney's ongoing role at Positron. As FINRA found, Rooney's positions as CEO and Chairman of the Board at the time, as well as the substantial percentage of Positron's stock held by Solaris Opportunity Fund and Rooney, provided Rooney "with substantial authority and control [of Positron]." We also agree with FINRA's finding that Positron benefited from Rooney's misconduct, receiving over \$3.6 million in investments at a time when the Commission's Complaint alleged that no other sources of funding for the company existed. Although such a finding is not required to support FINRA's determination, this significant benefit to Positron from Rooney's misconduct undermines Positron's claim that the District Court Injunction had nothing to do with Rooney's role at the company.

3. FINRA properly considered Rooney's District Court Injunction in reaching its decision.

Positron contends on appeal that FINRA should not have considered the District Court Injunction in denying Positron's request because Positron was not a named defendant in the underlying Commission action. Positron further claims that the District Court Injunction had

³⁹ See, e.g., *Vladimir Boris Bugarski*, Exchange Act Release No. 66842, 2012 WL 1377357, at *5 (Apr. 20, 2012) (quoting *Steadman*, 603 F.2d at 1140 (5th Cir. 1979)).

⁴⁰ *Peter Siris*, Exchange Act Release No. 71068, 2013 WL 6528874, at *11 (Dec. 12, 2013) (citing *Jeffrey L. Gibson*, Exchange Act Release No. 57266, 2008 WL 294717, at *7 (Feb. 4, 2008)).

⁴¹ *GAF Corp. v. Milstein*, 453 F.2d 709, 717 (2d Cir. 1971); see also *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989) (explaining that a violator of Exchange Act Section 13(d) improperly benefits by purchasing stock at an artificially low price, because disclosure of a holding in excess of five percent of a company's stock suggests to the rest of the market a likely takeover and therefore may increase the price of the stock).

⁴² See *SEC v. Drexel Burnham Lambert, Inc.*, 837 F. Supp. 587, 607 (S.D.N.Y. 1993) (stating that "Section 13(d) is not a mere 'technical' reporting provision; it is, rather, the 'pivot' of a regulatory scheme that may represent the only way that corporations, their shareholders and others can adequately evaluate . . . the possible effects of a change in substantial shareholdings" (citations omitted)).

nothing to do with Rooney's work at Positron. Based on these arguments, Positron contends that FINRA's deficiency determination was arbitrary and capricious.

We find that FINRA properly considered the allegations in the Commission's complaint against Rooney in assessing its interest in protecting investors. In our order approving Rule 6490, we specifically highlighted the value of FINRA's authority under the Rule to "conduct in-depth reviews of requests to process Company-Related Actions and to provide FINRA staff the discretion not to process . . . requests for which there are certain indicators of potential fraud."⁴³ In assessing Positron's request, FINRA did not invoke the allegations in the Commission's complaint against Rooney to establish any liability against Positron, which was not a party to the District Court Injunction. FINRA imposed no sanction or penalty against Positron, Rooney, or any other Positron shareholder. FINRA's denial of Positron's requests is but one of the several collateral consequences of Rooney's consent to the District Court Injunction and Positron's decision to have Rooney as its CEO and Chairman.⁴⁴ Further, Positron's argument would defeat the purpose of Rule 6490, under which FINRA looks to the conduct of an issuer's officers and directors, and other persons related to the issuer, when determining whether to process a Company-Related Action.

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

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

FINRA, a registered national securities association, adopted Rule 6490 pursuant to Exchange Act Section 15A(b).⁴⁵ That provision authorizes FINRA to adopt rules that, among other things, are "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, [and] processing transactions in securities" and, in

⁴³ See 2010 Approval Order, *supra* note 4, at *2.

⁴⁴ See *DHB Capital Grp., Inc.*, Exchange Act Release No. 37069, 52 SEC 740, 1996 WL 164315, at *3 (Apr. 5, 1996) ("[FINRA]'s decision to deny inclusion [of DHB on NASDAQ]—based in part on the fact that, upon finding that Brooks committed serious securities law violations, we barred him (with his consent) from the industry—is a collateral consequence of Brooks's misconduct . . . [and] a proper exercise of the [FINRA]'s authority under its Qualification Requirements By-Law.").

For example, although Positron was not a party to the District Court Injunction, the entry of the settlement had the collateral consequence of requiring Positron (as long as Rooney remained the CEO and Chairman) to disclose the settlement for the next ten years in its periodic filings with the Commission—a requirement Positron met. Item 401(f) of Reg. S-K, 17 C.F.R. § 229.401(f) (requiring disclosure of a director's, nominee's, or executive officer's involvement in specific legal proceedings "that are material to an evaluation of the ability or integrity" of such a person).

⁴⁵ 2010 Approval Order, *supra* note 4, at *5.

general, "to protect investors and the public interest."⁴⁶ As we stated in the 2010 Approval Order, FINRA adopted Rule 6490 in furtherance of these statutory principles based on FINRA's growing concern that its Daily List services could be used for fraudulent practices.⁴⁷ We concluded that the rule was designed to protect "the OTC marketplace and investors in OTC Securities" by permitting FINRA to deny a Company-Related Action request when there are "certain indicators of potential fraud."⁴⁸

The plain language of FINRA Rule 6490(d)(3) makes clear FINRA's authority to find a Company-Related Action deficient in the circumstances presented here. Among the five deficiency factors that may form the basis for FINRA's denial is whether it has "actual knowledge" of an adjudicated, settled, or pending regulatory action alleging securities law violations against the issuer's officers or directors. If "one or more" of these factors is present, FINRA has the discretion to deny a request if denial is "necessary for the protection of investors, the public interest, and maintenance of fair and orderly markets."⁴⁹ As discussed, FINRA's denial satisfied these requirements.⁵⁰

Positron, citing language from the 2010 Approval Order in which we expressed concern regarding individuals who "usurped the identity of a defunct or inactive publicly traded company . . . based on the apparently false representation that they were duly authorized officers,"⁵¹ claims that "fraud in connection with the [Company-Related Action] was clearly the type of fraud the Commission was concerned with in approving Rule 6490." Because Rooney's fraudulent conduct here was not related to the Company-Related Actions, and because "there has never been even an inference that Positron is not the company that it represents to be," Positron characterizes FINRA's determination at issue as a "fishing expedition," which it claims is inconsistent with the purposes of Rule 6490. But FINRA's discretion under Rule 6490 is not limited in the way Positron suggests. The text of the Rule provides FINRA with discretion to exercise judgment about whether approval of a Company-Related Action is appropriate in the

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

⁴⁷ 2010 Approval Order, *supra* note 4, at *2 (stating that FINRA proposed Rule 6490 "in furtherance of its authority to adopt rules to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, and protect investors and the public interest").

⁴⁸ *Id.*

⁴⁹ *See supra* notes 35-38 and accompanying text (discussing FINRA's discretionary authority).

⁵⁰ In addition to meeting these substantive requirements, we find, as Positron does not dispute, that FINRA properly followed the procedures set forth in Rule 6490(d) and (e) in disposing of Positron's request. *Michael Stegawski*, Exchange Act Release No. 59326, 2009 WL 223618, at *6 (Jan. 30, 2009).

⁵¹ 2010 Approval Order, *supra* note 4, at *2 & n. 9.

public interest. As FINRA argues, Positron's proffered interpretation of Rule 6490 would "render the rule meaningless" because there is no question FINRA would deny a Company-Related Action request if it was aware of ongoing fraudulent conduct in connection with the Company-Related Action; the Rule addresses the risk of *future* harm by providing FINRA with discretion to consider whether the proposed Company-Related Action raises indicators of potential fraud such that it poses a threat to investors and the integrity of the markets.

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

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

FINRA applied its rules in a manner consistent with the purposes of the Exchange Act. In the Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Congress directed the formation of "automated quotation systems for penny stocks . . . [t]o add visibility and regulatory and surveillance data to that market."⁵² In enacting this legislation, Congress amended the federal securities laws by "issu[ing] legislative directives with the intention of curbing the pervasive fraud and manipulation of the penny stock market."⁵³ FINRA Rule 6490 furthers these objectives by authorizing FINRA to deny processing and announcing a Company-Related Action on the Daily List when it finds deficiencies with respect to an issuer's Company-Related Action, including "indicators of potential fraud," and that denial is "necessary for the protection of investors, the public interest and to maintain fair and orderly markets."⁵⁴

Here, FINRA found that Rooney's consent to the District Court Injunction against violations of the antifraud and disclosure provisions of the federal securities laws, the recent nature of the regulatory actions against Rooney, and Rooney's "substantial authority and control" over Positron at the time made denial of the company's request necessary to protect investors.⁵⁵ Positron contends that FINRA lacks authority to deny its Company-Related Action request because FINRA has no direct jurisdiction over issuers. But this argument ignores the critical role

⁵² Pub. L. No. 101-429, 104 Stat. 931 (1990) (codified in the Exchange Act at 15 U.S.C. § 78q-2).

⁵³ *Report to Accompany the Penny Stock Reform Act of 1990*, H.R. Rep. No. 617, 101st Cong., 2d Sess. (July 23, 1990) (reporting H.R. 4497), at 7.

⁵⁴ 2010 Approval Order, *supra* note 4, at *2-3.

⁵⁵ The UPCC Subcommittee noted, in support of its determination, the recent nature of the regulatory actions against Rooney, and the fact that they remained unresolved at the time. Those proceedings have now been fully resolved, but the ultimate findings of the district court and the administrative law judge, which confirmed Rooney's fraudulent misconduct, only serve to add further support to FINRA's deficiency determination and its concerns that processing the Company-Related Actions would not have served the public interest or the protection of investors.

that FINRA occupies in regulating the OTC market.⁵⁶ FINRA has "direct authority for the activities related to OTC trading."⁵⁷ With this comes an obligation to oversee the market in OTC Securities and "protect the integrity of the market it is charged with maintaining."⁵⁸ Investors in OTC Securities are entitled to assume that "the risk associated with investing in [a market over which FINRA has such authority] is market risk rather than the risk that the promoter or other persons exercising substantial influence over the issuer is acting in an illegal manner."⁵⁹

Positron claims that Rule 6490 is inconsistent with the Exchange Act, claiming that it impermissibly gives FINRA *de facto* "oversight over the regulation of officers and directors." But FINRA correctly notes that its determination not to process the requested Company-Related Actions does not "prohibit Rooney from serving as an officer or director of *any* company."⁶⁰ FINRA's refusal to announce Positron's Company-Related Action was a prophylactic measure designed to prevent potential fraud or abuse from occurring through use of the Daily List, and it had no further reach than announcement on that particular FINRA facility.⁶¹ Although Positron contends that FINRA's denial effectively bars Rooney from acting as an officer or director, we note that he remained the CEO and Chairman of the Board of Positron at the time Positron filed

⁵⁶ As one court has observed, "[t]he joint roles taken by [FINRA] and the SEC in the regulation of OTC securities reflects a congressional intent 'to establish a "cooperative regulation" where securities associations would regulate themselves under the supervision of the SEC.'" *Lang v. French*, 154 F.3d 217, 221 (5th Cir. 1998) (quoting *Jones v. SEC*, 115 F.3d 1173, 1179 (4th Cir. 1997) (quoting 115 S. Rep. No. 75-1455, at 3-4 (1938) and H.R. Rep. No. 75-2307, at 4-5 (1938) (legislation authorizing creation of SROs))).

⁵⁷ *Order Granting Approval to Proposed Rule Change and Amendment No.1 Thereto, and Notice of Filing and Order Granting Accelerated Approval to Amendments Nos. 2, 3, and 4 Thereto, Relating to NASD's Direct Authority for the Activities Related to or in Support of Trading in Over-the-Counter Equity Securities*, Exchange Act Release No. 52508 (Sept. 26, 2005), 2005 WL 3734491, at *1, 70 F.R. 57,346 (Sept. 30, 2005).

⁵⁸ *Air L.A., Inc.*, Exchange Act Release No. 34491, 1994 WL 413098, at *2 (Aug. 3, 1994) (order denying stay of delisting from NASD's SmallCap Market).

⁵⁹ *JJFN Servs., Inc.*, Exchange Act Release No. 39343, 53 SEC 335, 1997 WL 722029, at *3 (Nov. 21, 1997) (internal quotation marks omitted) (declining to list issuer's securities on the SmallCap Market because promoter and "key person" of the issuer was previously convicted of filing a false tax return); *see also Fog Cutter Capital Grp., Inc.*, Exchange Act Release No. 52993, 58 SEC 1049, 2005 WL 3500274, at *5 (Oct. 31, 2005) (denying issuer's listing on NASDAQ after guilty plea by issuer's key executive and largest shareholder), *petition denied*, 474 F.3d 822 (D.C. Cir. 2007); *DHB Capital*, 1996 WL 164315, at *4 & n.20 (denying issuer's listing on the SmallCap Market based on consent injunction entered against controlling shareholder, officer, and director).

⁶⁰ Emphasis in FINRA's brief.

⁶¹ *Cf., e.g., United States v. O'Hagan*, 521 U.S. 642, 672-73 (1997) (describing Exchange Act Rule 14e-3(a) as "[a] prophylactic measure, because its mission is to prevent . . . [and] encompasses more than the core activity prohibited").

this appeal. Further, Positron's stock continues to trade in the OTC market and is currently quoted on the OTC Pink.⁶² FINRA merely exercised the authority granted under Rule 6490 to determine whether it was in the public interest to process the Company-Related Actions given Rooney's role at Positron at the time.⁶³

Positron further contends that, because Rooney is not the controlling shareholder of Positron, "this is not a situation where Rooney is 'calling the shots,' . . . and he must answer to a Board of Directors which approved the Company-Related Action after a vote." Positron points to the required approval of the Company-Related Actions by the vote of two-thirds of Positron's shareholders as evidence that the Company-Related Actions were not "being sought at the sole directive of Rooney." But Positron does not deny that Rooney exercised significant control over the company at the time of the Company-Related Actions, and the fact that Positron has taken the necessary corporate votes to approve the Company-Related Actions does not outweigh FINRA's concerns about the risk of future harm in light of the regulatory actions taken against Rooney. FINRA's discretionary authority under Rule 6490 is significant. Our 2010 Approval Order made clear that the Rule would alter FINRA's approval of Company-Related Actions, which had historically been considered to be "ministerial." If, as Positron suggests, FINRA was expected to approve every Company-Related Action 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 Rule.

Positron also claims that FINRA's denial of the Company-Related Actions "is not only unnecessary to protect shareholders and the investing public, but is detrimental to those interests." Positron claims that the reverse stock split would help the company and its shareholders because it would result in a higher stock price, which it claims "would increase Positron's credibility in dealing with the governmental authorities, institutions, and facilities involved in the nuclear medicine industry." It also claims that potential and existing shareholders, brokers, and analysts would think more favorably about Positron if its share price were higher. Positron argues that the change in domicile from Texas to Delaware also would benefit the company and its shareholders because, among other things, Delaware provides "an

⁶² See *supra* note 1. Cf. *Millenia Hope, Inc.*, Exchange Act Release No. 42739, 2000 WL 511439, at *1 (May 1, 2000) (denying stay of OTCBB delisting and stating that "the deletion [from the OTCBB] means only that there will be no prices for those securities on the OTCBB," not that the securities must cease trading); *Cleantech Innovations, Inc.*, Exchange Act Release No. 66064, 2011 WL 6811202, at *3 (Dec. 28, 2011) (same).

FINRA's denial of an announcement on the Daily List and our affirmance of that decision imposes no bar; nor does the denial prevent Positron from effectuating these Company-Related Actions outside of FINRA's services.

⁶³ Cf. *Eagle Supply*, 1998 WL 133847, at *3 & n.12 ("Eagle argues that the NASD has effectively established a rule . . . that prevents an entity's securities from being listed if an officer or director engaged in prior criminal or civil violations of the federal securities laws. We disagree. As noted, the NASD has broad discretion in these matters. This discretion necessarily involves a fact-specific inquiry in determining whether to list particular securities.").

extensive and well-developed corporate jurisprudence that creates predictability and expediency in adjudication" and "Delaware statutes and regulations are favorable to corporations and their shareholders and provide sophisticated and regularly applied rules and structure to meet the evolving needs of businesses and their investors."⁶⁴

FINRA considered Positron's business reasons before reaching its deficiency determination, but it found that they did not provide a compelling basis to outweigh FINRA's concerns based on the regulatory actions against Rooney relating to fraudulent misconduct. FINRA's mandate under Rule 6490 is "aimed not only at facilitating trading and settlement, but also promoting investor protection and market integrity."⁶⁵ In light of this mandate, and given FINRA's thorough consideration of Positron's business reasons for its request, we find that FINRA's determination is in the public interest and is consistent with the purposes of the Exchange Act.

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

An appropriate order will issue.⁶⁶

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

Brent J. Fields
Secretary

⁶⁴ Positron did not specify these or any other reasons for its change in domicile before the Department or the UPCC Subcommittee.

⁶⁵ 2010 Approval Order, *supra* note 4, at *1.

⁶⁶ We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74216 / February 5, 2015

Admin. Proc. File No. 3-15837

In the Matter of the Application of

POSITRON CORPORATION

For Review of Action Taken by

FINRA

ORDER DISMISSING REVIEW PROCEEDINGS

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

ORDERED that the application for review filed by Positron Corporation is hereby dismissed.

By the Commission.

Brent J. Fields
Secretary