

SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934  
Release No. 88006 / January 17, 2020

Admin. Proc. File No. 3-18869

In the Matter of the Application of  
TMR BAYHEAD SECURITIES, LLC  
For Review of Disciplinary Action Taken by  
FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION - REVIEW OF DISCIPLINARY  
PROCEEDING

Failure to Comply with Reporting Requirements

FINRA member firm filed annual reports that failed to comply with reporting requirements. *Held*, FINRA's findings of violations and the suspension imposed are *sustained* but the fine imposed is ordered to be *remitted*.

APPEARANCES:

*Todd M. Roberts*, for TMR Bayhead Securities, LLC.

*Alan Lawhead, Gary Dernelle, and Celia L. Passaro*, for FINRA.

Appeal filed: October 9, 2018  
Last brief received: January 28, 2019

TMR Bayhead Securities, LLC, a FINRA member firm, seeks review of a FINRA disciplinary action. FINRA found that TMR Bayhead violated Section 17(e) of the Securities Exchange Act of 1934, Exchange Act Rule 17a-5, and FINRA Rule 2010 by failing to file annual reports that were audited by an accounting firm registered with the Public Company Accounting Oversight Board (“PCAOB”). As a result, FINRA suspended TMR Bayhead until it filed audited annual reports. We sustain FINRA’s finding of violations and the suspension it imposed.

## **I. Background**

TMR Bayhead has been a FINRA member since January 2006. It is a registered broker-dealer with primary offices in Poughkeepsie, New York. Todd M. Roberts is TMR Bayhead’s President, Chief Compliance Officer, and Financial Operations Principal.

### **A. FINRA’s questions about TMR Bayhead’s business activities**

In 2014, FINRA noted that TMR Bayhead had last reported revenue in 2009 and sent the Firm a letter that requested that the Firm provide information about its business activities. Roberts responded in a letter that TMR Bayhead provided services “for private company fundraisings” and was “engaged and transacting in more than one branch of the investment banking and securities business . . .” Roberts added that TMR Bayhead had two customers—Fountainhead Mobile Solutions LLC, a mobile medical computing company, and an unnamed renewable energy and eco-construction company.

After FINRA requested additional information in 2014 as part of an examination of the firm that was scheduled for 2014, Roberts informed FINRA that TMR Bayhead had active “sell side assignments” with two companies—Fountainhead and Medical Wizards, which were both owned by his brother. Roberts also told FINRA that he had discussions with a third company, a former customer in the orthopedics technology business, about engaging in “sell side assignments.” Roberts further told FINRA that he was developing prospects in the solar and wind business to obtain sell side assignments for TMR Bayhead.

FINRA again requested more information about TMR Bayhead’s business in 2014, and Roberts produced an email he sent to his brother asking whether there is “anything new on the strategic and/or financial buyer’s interest front.” Roberts also produced another email that he sent to the CEO of Solar Krafte Utilities about potential solar energy projects for TMR Bayhead.

### **B. TMR Bayhead’s unaudited annual reports**

TMR Bayhead filed unaudited annual reports with FINRA for its fiscal year ending March 31, 2015. TMR Bayhead claimed that it was exempt under Exchange Act Rule 17a-5(e)(1)(i)(A) from the requirement that its annual reports be audited. Exchange Act Rule 17a-5(e)(1)(i)(A) conditionally exempts from the audit requirement brokers that act as an agent for a single issuer in soliciting subscriptions for the securities of the issuer. In the reports, Roberts signed an oath stating that “[s]ince the date of the previous report, [TMR Bayhead] has limited its securities business to acting as a broker or dealer for a single issuer.” The reports showed no revenue and no expenses other than FINRA fees.

TMR Bayhead again filed unaudited annual reports for its fiscal year ending March 31, 2016. The reports showed no revenue and no expenses other than FINRA fees and once more relied on the single issuer exemption to avoid the audit requirement. After reviewing these annual reports, FINRA sent Roberts an email that requested supporting documents to show that TMR Bayhead met the requirements for the single issuer exemption. Roberts responded that TMR Bayhead qualified for the exemption, but he did not provide supporting documentation. In an email, Roberts stated that TMR Bayhead was “an advisory business” and that the “recent FINRA audit” had included a “review of the [firm’s] business plan and activities.”

TMR Bayhead filed additional unaudited annual reports for its fiscal year ending March 31, 2017. The reports again showed no revenue or expenses other than FINRA fees and again relied on the single issuer exemption. In response to a May 1, 2017 FINRA inquiry about TMR Bayhead’s compliance with the audit requirement, Roberts sent FINRA two documents. The first was a May 8, 2017 letter from Roberts’s brother as the president of PDA Verticals Corporation. Roberts’s brother stated that, “[b]y this letter, we confirm our intention and agreement to continue our relationship under which your company promotes our company as a non-exclusive broker and agent acting on our behalf to solicit suitable investors who might be interested in a substantial subscription of our equity securities.” The second document was an undated and unsigned form engagement agreement between TMR Bayhead and PDA Verticals.

### **C. The proceedings below**

On May 11, 2017, FINRA’s staff determined that TMR Bayhead was ineligible for the single issuer exemption and was therefore required to provide audited financial statements unless it could provide documentation supporting its eligibility for the exemption. In response to a request from Roberts for the reasons for determining that the exemption did not apply, FINRA explained in a May 17, 2017 email that the firm appeared to be inactive and that the single issuer exemption did not apply to an inactive firm.<sup>1</sup> On August 1, 2017, FINRA sent Roberts another email requesting documentation supporting TMR Bayhead’s reliance on the single issuer exemption. After receiving no response, FINRA sent a follow-up email to Roberts on August 15, 2017. TMR Bayhead did not provide the requested documentation

In a “Notice of Suspension” dated March 23, 2018, FINRA notified TMR Bayhead that it would be suspended pursuant to FINRA Rule 9552 unless it filed audited annual reports for the fiscal years ending March 31, 2015, March 31, 2016, and March 31, 2017 by April 16, 2018. The Notice of Suspension explained that TMR Bayhead had failed to demonstrate that it qualified for the single issuer exemption and therefore was required to file audited annual reports for the relevant fiscal years. The Notice of Suspension also informed TMR Bayhead that it could request a hearing, which would stay the effectiveness of the notice. TMR Bayhead timely

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<sup>1</sup> We note that, although not at issue in this case, Exchange Act Section 15(b)(5) authorizes the Commission, by order, to “cancel the registration” of a broker or dealer if the Commission finds that the registered broker or dealer “is no longer in existence or has ceased to do business as a broker or dealer.” 15 U.S.C. § 78o(b)(5). In the future, we encourage FINRA to alert the Commission when it believes a broker has ceased doing business so that the Commission may determine what, if any, action is appropriate.

requested a hearing, and a FINRA Hearing Panel conducted a hearing on June 7 and June 18, 2018. Roberts and FINRA staff testified by telephone at the hearing.

In a September 10, 2018 decision, the Hearing Panel found that TMR Bayhead failed to meet its burden to show that it qualified for the single issuer exemption and therefore found that it violated Exchange Act Section 17(e), Exchange Act Rule 17a-5, and FINRA Rule 2010. The Hearing Panel found that TMR Bayhead “has not provided any documentation to establish that its business was limited to a single issuer or that it solicited or effected any transactions for any issuers.” In so finding, the Hearing Panel did “not credit Roberts’ testimony that, during the relevant fiscal years, Respondent was exclusively soliciting subscriptions for securities in a single issuer.” The Hearing Panel found that “Roberts’ testimony at the hearing contradicts his prior representations to FINRA about the firm’s business operations.” Roberts “represented to FINRA staff twice that he was engaged in business or seeking business opportunities with multiple entities.” The Hearing Panel suspended TMR Bayhead until it filed audited annual reports for the relevant fiscal years, and imposed costs of \$5,169.50. This appeal followed.

## II. Analysis

Exchange Act Section 19(e) governs the Commission’s review of FINRA disciplinary actions.<sup>2</sup> It requires the Commission to sustain the action if the Commission finds that the member firm engaged in the conduct FINRA found, that the conduct violated the provisions of the securities laws that FINRA found it to have violated, and that such provisions are, and were applied in a manner, consistent with the purposes of the Exchange Act.<sup>3</sup> We base our findings on an independent review of the record and apply a preponderance of the evidence standard.<sup>4</sup>

### A. TMR Bayhead filed unaudited annual reports in violation of the securities laws.

Exchange Act Section 17(e)(1)(A) and Rule 17a-5(d) thereunder generally require registered broker-dealers to file timely annual reports that contain financial statements audited by a PCAOB-registered accounting firm.<sup>5</sup> TMR Bayhead claims that its financial statements did not need to be audited by an accounting firm registered with the PCAOB because it was able to rely on the exemption under Rule 17a-5(e)(1)(i)(A) for brokers whose business is limited to soliciting

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<sup>2</sup> See 15 U.S.C. § 78s(e)(1).

<sup>3</sup> *Id.*

<sup>4</sup> See *Richard G. Cody*, Exchange Act Release No. 64565, 2011 WL 2098202, at \*1, \*9 (May 27, 2011), *aff’d*, 693 F.3d 251 (1st Cir. 2012).

<sup>5</sup> 15 U.S.C. § 78q(e)(1)(A); 17 C.F.R. § 240.17a-5(d). FINRA Rule 2010 requires that FINRA member firms “observe high standards of commercial honor and just and equitable principles of trade.” We have held that “a violation of another Commission or NASD rule or regulation constitutes a violation of . . . FINRA Rule 2010.” *Lek Sec. Corp.*, Exchange Act Release No. 82981, 2018 WL 1602630, at \*10 (Apr. 2, 2018) (internal quotation marks omitted).

subscriptions for the securities of a single issuer. TMR Bayhead bears the burden of establishing that it was entitled to rely on the single issuer exemption.<sup>6</sup>

Exchange Act Rule 17a-5(e)(1)(i)(A), as it appeared in the Code of Federal Regulations at the time TMR Bayhead filed the annual reports at issue, provided that a broker-dealer's financial statements need not be audited if "[t]he securities business of the broker or dealer has been limited to acting as a broker (agent) for the issuer in soliciting subscriptions for securities of the issuer, the broker has promptly transmitted to the issuer all funds and promptly delivered to the subscriber all securities received in connection with the transaction, and the broker has not otherwise held funds or securities for or owed money or securities to customers."<sup>7</sup> We have explained that the exemption in Rule 17a-5(e)(1)(i)(A) is available to a broker "only if it acted as an agent in soliciting subscriptions for a single issuer."<sup>8</sup> TMR concedes that in order to avail itself of the exemption its business had to be limited to acting as an agent for a single issuer.

The Hearing Panel did not credit Roberts's testimony "that, during the relevant fiscal years, Respondent was exclusively soliciting subscriptions for securities in a single issuer." The "credibility determination of an initial fact finder is entitled to considerable weight and deference because it is based on hearing the witnesses' testimony," and "[su]ch determinations generally can be overcome only where the record contains substantial evidence for doing so."<sup>9</sup> We find no such substantial evidence in the record here.

As the Hearing Panel recognized, Roberts's claim that TMR Bayhead solicited subscriptions for the securities of a single issuer was inconsistent with his prior representations to FINRA. Roberts represented to FINRA repeatedly in 2014 that he was seeking business opportunities with multiple entities. Although Roberts claimed at the hearing that PDA Verticals, Fountainhead, and Medical Wizards were actually a single issuer, the Hearing Panel "did not find this credible, particularly in light of Roberts' failure to substantiate his claim with any supporting documentation." In any case, Roberts's representations to FINRA discussed business opportunities with other entities as well. And in a 2016 email, Roberts described TMR Bayhead as "an advisory business." We also agree with the Hearing Panel that, despite "numerous opportunities" to "gather and obtain documentation to support Respondent's claimed single issuer exemption," Roberts "failed to provide a single document to demonstrate the purported limited nature of Respondent's business operations" during the relevant period.

The only evidence Roberts produced to support his contention that TMR Bayhead's business was limited to soliciting subscriptions for the securities of a single issue was a letter from Roberts's brother asserting that TMR Bayhead was PDA Verticals's broker and an undated

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<sup>6</sup> See, e.g., *FCS Sec.*, Exchange Act Release No. 64852, 2011 WL 2680699, at \*5 (July 11, 2011).

<sup>7</sup> 17 C.F.R. § 240.17a-5(e)(1)(i)(A) (2017).

<sup>8</sup> *Sharemaster*, Exchange Act Release No. 83138, 2018 WL 2017542, at \*8 (Apr. 30, 2018).

<sup>9</sup> *Kirlin Sec., Inc.*, Exchange Act Release No. 61135, 2009 SEC LEXIS 4168, at \*53 (Dec. 10, 2009).

and unsigned form engagement agreement between the two entities. However, these documents do not show that TMR Bayhead's business was limited to a relationship with PDA Verticals.

Nor do the documents show that TMR Bayhead was engaged in the business of soliciting subscriptions for the securities of PDA Verticals. We have held that the exemption under Rule 17a-5(e)(1)(i)(A) "applies only to a firm engaged in specified types of business, not to a firm that is not engaged in business at all."<sup>10</sup> This is because it is "the limited nature of the business of a broker that solicits subscriptions for a single issuer and the relationship between the broker and that issuer, such as when the broker is engaged only in underwriting the issues of its parent, that renders the audit requirement unnecessary."<sup>11</sup> As a result, we have rejected a claim that the exemption applies to a broker that "had done no business during [the relevant] fiscal year."<sup>12</sup>

Here, if anything, the documents that Roberts produced show that the firm had no current securities business. We agree with the Hearing Panel that the "undated and unexecuted form agreements" and the "letter from Roberts' brother that postdates the relevant fiscal years" do not establish that TMR Bayhead was soliciting subscriptions for the securities of PDA Verticals. The Hearing Panel also found not credible Roberts's testimony that TMR Bayhead assisted PDA Verticals with awarding stock to its employees or consultants during the relevant fiscal years. And, as the Hearing Panel found, TMR Bayhead "offered no testimony from Roberts' brother or other witnesses to corroborate or bolster Roberts' testimony that TMR Bayhead was engaged in any securities business on behalf of PDA Verticals."

TMR Bayhead's filings showed that it had no revenues and had no expenses except those related to regulatory fees and compensation. The Hearing Panel found Roberts's testimony that TMR Bayhead solicited subscriptions for securities for nearly three years without incurring any expenses to "def[y] credulity." At the least, the evidence does not show that TMR Bayhead was soliciting subscriptions for the securities of PDA Verticals.

TMR Bayhead did not satisfy its burden of demonstrating its eligibility for the single issuer exemption for the relevant fiscal years. It also did not file compliant annual reports in a timely manner. As a result, TMR Bayhead violated Exchange Act Section 17(e)(1)(A), Exchange Act Rule 17a-5(d), and FINRA Rule 2010.<sup>13</sup> These provisions are, and were applied in a manner, consistent with the purposes of the Exchange Act. One of the "basic purposes" of

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<sup>10</sup> *First Nev. Sec., Inc.*, Exchange Act Release No. 30772, 1992 WL 129516, at \*2 & n.6 (June 4, 1992).

<sup>11</sup> *Sharemaster*, 2018 WL 2017542, at \*7.

<sup>12</sup> *First Nev. Sec.*, 1992 WL 129516, at \*2.

<sup>13</sup> *See Gremo Invs., Inc.*, Exchange Act Release No. 64481, 2011 WL 1825020, at \*2 & n.9 (May 12, 2011) (recognizing that a violation of Exchange Act Section 17(e)(1)(A) and Rule 17a-5(d) also constitutes a violation of FINRA Rule 2010 because it is well established that a violation of the securities laws or regulations also constitutes a violation of Rule 2010).

the Exchange Act “is to regulate the conduct of broker-dealers.”<sup>14</sup> Applying these provisions to TMR Bayhead furthered that basic purpose.<sup>15</sup> We therefore sustain FINRA’s finding of violation.

**B. TMR’s Bayhead’s arguments against liability are unpersuasive.**

TMR Bayhead argues that the Hearing Panel unfairly denied its motion to compel production of evidence under FINRA Rule 9251 and that this denial limited the Firm’s ability to represent itself. But the Hearing Panel ruled that TMR Bayhead sought internal FINRA communications that were not discoverable under Rule 9251. TMR Bayhead does not explain why the Hearing Panel’s ruling denying the motion to compel was erroneous or how any internal FINRA communications could have allowed it to meet its burden of establishing that it was entitled to the single issuer exemption in Rule 17a-5(e)(1)(i)(A).<sup>16</sup>

TMR Bayhead also argues that FINRA unfairly excluded documents from the record. But the Hearing Panel excluded these documents on the ground that they were irrelevant. The documents did not discuss TMR Bayhead’s business. Indeed, they did not mention TMR Bayhead at all. Again, TMR Bayhead does not explain why the Hearing Panel’s ruling was an abuse of discretion.<sup>17</sup>

TMR Bayhead argues further that FINRA’s investigation was incomplete because it failed to conduct certain interviews and made no attempt to contact TMR Bayhead’s customers. But the burden was on TMR Bayhead to provide evidence to establish its eligibility for the single issuer exemption. TMR Bayhead points to no evidence that FINRA prevented it from doing so, and the record shows it had multiple opportunities to establish that the exemption applied.

TMR Bayhead also contends that FINRA is biased against smaller firms and that this bias affected FINRA’s consideration of its eligibility for the single issuer exemption. TMR Bayhead contends further that FINRA reached a judgment in its case too quickly, conducted an inadequate investigation, and manipulated evidence to support its decision. TMR Bayhead provides no substantiation for these claims, which we reject because we find none in the record.

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<sup>14</sup> *MKM Partners LLC*, Exchange Act Release No. 79700, 2016 WL 7473302, at \*5 (Dec. 28, 2016) (internal quotation marks and citation omitted).

<sup>15</sup> *Id.* (finding disciplinary action for failing to file timely a required annual report under Rule 17a-5 was consistent with the purposes of the Exchange Act).

<sup>16</sup> *Guang Lu*, Exchange Act Release No. 51047, 2005 WL 106888, at \*7 (Jan. 14, 2005) (finding no error in Hearing Officer’s denial of a motion to compel where the record indicated that Enforcement “produced to Lu all the materials that NASD rules required it to produce”).

<sup>17</sup> *Fuad Ahmed*, Exchange Act Release No. 81759, 2017 WL 4335036, at \*23 (Sep. 28, 2017) (recognizing that FINRA Rule 9362(a) affords the Hearing Officer discretion in determining whether to reject evidence as “irrelevant, immaterial, unduly repetitious, or unduly prejudicial,” and finding no abuse of discretion in Hearing Officer’s determination to exclude evidence that “did not concern the central inquiry in this case”).

Finally, TMR Bayhead contends that it lacked fair notice of the requirements for the single issuer exemption. According to TMR Bayhead, it was never told that to avail itself of the single issuer exemption there was an “implicit requirement . . . that a transaction close each year in which the broker dealer takes possession of the issued securities.” We agree with the Hearing Panel that we need not address whether “a completed transaction is necessary to qualify for the single issuer exemption” because there was no “credible evidence that Respondent either solicited or effected any securities transactions for any issuer.” As discussed above, we have long held that the single issuer exemption is not available to a broker who does no business.<sup>18</sup>

### III. Sanctions

Pursuant to Exchange Act Section 19(e)(2), if we find, “having due regard for the public interest and the protection of investors,” that a sanction imposed by FINRA “is excessive or oppressive,” or imposes an unnecessary or inappropriate burden on competition, we “may cancel, reduce, or require the remission of such sanction.”<sup>19</sup> Here, the Hearing Panel suspended TMR Bayhead from FINRA membership and stated that the suspension “will remain effective until Respondent files a report, or reports, complying with the requirements of Section 17(e) of the Exchange Act and Exchange Act Rule 17a-5.” This sanction is not excessive or oppressive.

The reporting provisions are important to monitor the financial status of broker-dealers and to protect investors.<sup>20</sup> Reporting violations are therefore serious.<sup>21</sup> The Commission has emphasized that the reporting rules “are not technical but involve fundamental safeguards imposed for the protection of the investing public on those who wish to engage in the securities business.”<sup>22</sup> FINRA’s sanction ensures that TMR Bayhead complies with these fundamental safeguards before it may continue to be a FINRA member. The suspension is an appropriate remedial response to TMR Bayhead’s failure to file compliant annual reports.

TMR Bayhead states that it is “instructive to note the SEC’s reversal of penalties in the *Sharemaster* case.” In *Sharemaster*, we ordered FINRA to remit a \$1,000 fine that had been imposed on a firm for its failure to file annual reports that complied with Exchange Act Section 17(e) and Rule 17a-5 because the “Hearing Panel did not explain why it was appropriate to fine

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<sup>18</sup> See *supra* note 9. TMR Bayhead suggests that it is being treated unfairly because FINRA allowed the firm to rely on the exemption before it instituted this proceeding. To the contrary, the record establishes that FINRA in fact did not allow the firm to rely on the exemption and continually questioned the firm’s reliance on the single issuer exemption.

<sup>19</sup> 15 U.S.C. § 78s(e)(2); see, e.g., *Gremo Invs.*, 2011 WL 1825020, at \*4; *FCS Sec.*, 2011 WL 2680699, at \*9. TMR Bayhead does not contend, and the record does not show, that the sanctions FINRA imposed here impose an unnecessary or inappropriate burden on competition.

<sup>20</sup> *Gremo Invs.*, 2011 WL 1825020, at \*4 (sustaining suspension for failing to file compliant annual report in violation of Rule 17a-5 until the firm filed a compliant annual report).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*



Sharemaster for filing its 2009 annual report late under the circumstances.”<sup>23</sup> Although the fine had been imposed in the Notice of Suspension, the Hearing Panel “did not mention the late fee at all despite Sharemaster’s argument that the \$1,000 late fee assessed in the Notice of Suspension should be withdrawn.”<sup>24</sup> We ordered FINRA to remit the \$1,000 because Exchange Act Section 15A(h)(1)(C) requires that FINRA’s determination to impose a disciplinary sanction “be supported by a statement setting forth . . . the sanction imposed and the reasons therefor,” and the Hearing Panel “did not comply with Exchange Act Section 15A(h)(1)(C).”<sup>25</sup> As in *Sharemaster*, the Notice of Suspension sent to TMR Bayhead assessed a fine of \$3,000 (\$1,000 for each fiscal year), but the Hearing Panel did not mention the fine in its decision. We order FINRA to remit the \$3,000 fine to TMR Bayhead for the same reasons as in *Sharemaster*.

*Sharemaster*, however, does not support overturning the suspension. In *Sharemaster*, the firm was also suspended until it filed compliant annual reports. FINRA lifted the suspension after the firm filed annual reports that complied with Rule 17a-5. TMR Bayhead is subject to the same suspension as was the firm in *Sharemaster*. Accordingly, *Sharemaster* provides no support for TMR Bayhead’s argument that the suspension here is excessive or oppressive.

The Hearing Panel also assessed costs on TMR Bayhead. These costs are simply “the sunk transactional costs of pursuing an administrative appeal.”<sup>26</sup> TMR Bayhead does not explain why it was inappropriate for the Hearing Panel to assess these costs on TMR Bayhead.

An appropriate order will issue.<sup>27</sup>

By the Commission (Chairman CLAYTON and Commissioners JACKSON, PEIRCE, ROISMAN, and LEE).

Vanessa A. Countryman  
Secretary

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<sup>23</sup> *Sharemaster*, 2018 WL 2017542, at \*8.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* (quoting 15 U.S.C. § 78o-3(h)(1)(C)).

<sup>26</sup> *Sharemaster v. SEC*, 847 F.3d 1059, 1070 (9th Cir. 2017).

<sup>27</sup> 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  
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ORDER SUSTAINING DISCIPLINARY ACTION IN PART

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

ORDERED that the suspension imposed by FINRA on TMR Bayhead Securities LLC is sustained and that the fine imposed by FINRA on TMR Bayhead is ordered to be remitted.

By the Commission

Vanessa A. Countryman  
Secretary