UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 91172 / February 19, 2021

Admin. Proc. File No. 3-19917

In the Matter of the Application of

POTOMAC CAPITAL MARKETS, LLC

For Review of Action Taken by

FINRA

Appeal filed: August 3, 2020
Application for stay filed: January 29, 2021
Last brief received: February 11, 2021

ORDER DENYING STAY

Potomac Capital Markets, LLC, moves to stay FINRA action expelling it from FINRA membership for failing to file its 2019 annual audit report pending its appeal of that action. FINRA filed an opposition to the motion, and Potomac filed a reply. Because Potomac has not met its burden for granting a stay, the motion is denied.

I. Background

Potomac failed to file its annual audit report for 2019 by the due date of March 2, 2020. It had also failed to file its annual audit report by the due date the previous year.

In a letter dated April 2, 2020 (the "Pre-Suspension Notice"), FINRA notified Potomac that its continued failure to file the annual audit report for 2019 would subject it to a suspension on April 27, 2020. FINRA explained that Potomac could request a hearing to contest the suspension before April 27, 2020, which would "stay the effectiveness of [the] notice."[1] FINRA

[1] *See* FINRA Rule 9552(d) (stating that a suspension "shall become effective 21 days after service of the notice, unless stayed by a request for a hearing pursuant to Rule 9559"); *see also* Rule 9559(c)(1) (stating that "a timely request for a hearing shall stay the effectiveness" of a Pre-Suspension Notice issued under Rule 9552).

also explained that, if it was suspended, Potomac could file a written request to terminate the suspension "on the ground of full compliance with the notice of suspension."[2] FINRA further explained that, if Potomac was suspended and failed to request termination of the suspension within three months of the Pre-Suspension Notice, Potomac would be automatically expelled.[3]

On July 2, 2020, Potomac sent FINRA a letter indicating that it would not file the annual audit report for 2019 until after July 8, 2020. Potomac stated that the person from the audit firm working on the audit had left for vacation on June 30, 2020, and would not return to the office until July 8, 2020. Potomac indicated that it was "fully aware that the deadline for submission of the audit was today" and requested an extension of time to submit the annual audit report.

On July 6, 2020, FINRA notified Potomac in a letter (the "Expulsion Notice") that the firm was expelled from FINRA membership. The Expulsion Notice informed Potomac that it could appeal the action by filing an application for review with the Commission within 30 days of receipt of the notice. On August 3, 2020, Potomac appealed the expulsion to the Commission.

On September 9, 2020, FINRA moved to dismiss Potomac's appeal due to Potomac's failure to exhaust its administrative remedies. After the Commission granted an extension, Potomac filed an opposition to FINRA's motion to dismiss on January 15, 2021. On January 29, 2021, Potomac filed a motion for a stay of its suspension and expulsion pending its appeal.[4]

II. Analysis

A stay pending appeal is an "'extraordinary remedy,'" and the moving party bears the burden of establishing that relief is warranted.[5] In deciding whether to grant a stay under Rule of

---

[2] *See* FINRA Rule 9552(f) (stating that "[a] member or person subject to a suspension pursuant to the Rule may file a written request for termination of the suspension on the ground of full compliance with the notice or decision").

[3] *See* FINRA Rule 9552(h) ("A member or person who is suspended under this Rule and fails to request termination of the suspension within three months of issuance of the original notice of suspension will automatically be expelled or barred.").

[4] FINRA's brief in opposition to the motion for a stay attached as an exhibit a copy of Potomac's 2019 annual audit report, which Potomac had sent to FINRA on November 17, 2020. We consider the 2019 audit report pursuant to Commission Rule of Practice 452, which provides that the Commission "may allow the submission of additional evidence" where "such additional evidence is material" and "there were reasonable grounds for failure to adduce such evidence previously." 17 C.F.R. § 201.452. The 2019 annual audit report meets this standard.

[5] *Bloomberg L.P.*, Exchange Act Release No. 83755, 2018 WL 3640780, at *7 (July 31, 2018) (quoting *Nken v. Holder*, 556 U.S. 418, 432-34 (2009)); *accord, e.g., Alpine Secs. Corp.*, Exchange Act Release No. 87599, 2019 WL 6251313, at *5 & n.51 (Nov. 22, 2019); *Mark E. Laccetti*, Exchange Act Release No. 79138, 2016 WL 6137057, at *2 & n.10 (Oct. 21, 2016).

Practice 401,[6] we consider whether the moving party has established that: (i) there is a strong likelihood that it will eventually succeed on the merits of the appeal; (ii) it will suffer irreparable harm without a stay; (iii) no other person will suffer substantial harm as a result of a stay; and (iv) a stay is likely to serve the public interest.[7]

"The appropriateness of a stay turns on a weighing of the strengths of these four factors; not all four factors must favor a stay for a stay to be granted."[8] "The first two factors are the most critical, but a stay decision rests on the balancing of all four factors."[9]

To obtain a stay under this framework, a movant need not necessarily establish that it is likely to succeed on the merits of its appeal but it must at least show "that the other factors weigh heavily in its favor" and that it has "raised a 'serious legal question' on the merits."[10] "In other words, 'even if a movant demonstrates irreparable harm that decidedly outweighs any potential harm to the [stay opponent] if a stay is granted, [it] is still required to show, at a minimum, serious questions going to the merits.'"[11] "Because the moving party must not only show that there are 'serious questions' going to the merits, but must additionally establish that the 'balance of hardships tips *decidedly* in its favor,' its overall burden is no lighter than the one it bears under the 'likelihood of success' standard."[12] Potomac has not met its burden under this standard.

A. Potomac fails to raise a serious question on the merits.

"We have held repeatedly that applicants who fail to exhaust administrative remedies before FINRA thereby forfeit any future challenge to FINRA's actions before the

---

6 17 C.F.R. § 201.401(d)(1); *see also* Exchange Act Section 19(d)(2), 15 U.S.C. § 78s(d)(2) (authorizing Commission to stay challenged self-regulatory organization action).

7 *Windsor Street Capital, L.P.*, Exchange Act Release No. 83340, 2018 WL 2426502, at *3 (May 29, 2018); *Ahmed Gadelkareem*, Exchange Act Release No. 80586; 2017 WL 1735943, at *1 (Apr. 28, 2017).

8 *Bloomberg*, 2018 WL 3640780, at *7.

9 *Id.*

10 *Bruce Zipper*, Exchange Act Release No. 82158, 2017 WL 5712555, at *6 (Nov. 27, 2017) (quoting *Sherley v. Sebelius*, 644 F.3d 388, 398 (D.C. Cir. 2011)); *see also Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) (stating that the "necessary 'level' or 'degree' of possibility of success will vary according to the court's assessment of the other factors" and that a "court, when confronted with a case in which the other three factors strongly favor interim relief may exercise its discretion to grant a stay if the movant has made a substantial case on the merits").

11 *Zipper*, 2017 WL 5712555, at *6 (quoting *In re Revel AC, Inc.*, 802 F.3d 558, 570 (3d Cir. 2015)).

12 *Id.* (quoting *Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010) (emphasis in original) (internal quotation marks and citation omitted)).

Commission."[13] Here, Potomac does not dispute that it failed to file its annual audit report for 2019 by the due date of March 2, 2020, that it received the Pre-Suspension Notice informing it of the consequences of its failure and the steps it could take to avoid suspension and expulsion, or that it failed to take any of these steps within three months of the Pre-Suspension Notice. Consequently, it appears that Potomac failed to exhaust its administrative remedies and has not demonstrated either a likelihood of success or a serious legal question on the merits.

Potomac makes a number of arguments in support of its motion for a stay. Final resolution of these issues must await the Commission's determination of the merits of Potomac's appeal.[14] At this stage, Potomac has failed to demonstrate a likelihood of success on the merits or that its appeal raises a serious legal question on the merits.

First, Potomac argues that "[t]o the extent the Commission decides that Potomac failed to exhaust its administrative remedies, the Commission should apply the futility exception to the exhaustion requirement." According to Potomac, a number of factors over which it had no control caused it to be unable to meet the July 2, 2020 deadline, including a "change in auditor, global pandemic constraints, delays caused by FINRA's 7-month delay in providing an examination report, and unfortunately timed vacations by auditor staff." Potomac argues that by the time it realized the auditor would not complete the audit by July 2, 2020, it was too late to request a hearing and no longer possible to terminate the suspension based on full compliance.

To rely on the futility exception to the exhaustion requirement, a party must show that "pursuing administrative remedies would have been 'clearly useless.'"[15] That is not the case here. Potomac could have made a written request for an extension in advance of its filing deadline.[16] Or, after FINRA issued the Pre-Suspension Notice, it could have requested a hearing to raise the issues it says prevented it from timely filing the 2019 audit report.[17] But Potomac

---

[13] *Patrick H. Dowd*, Exchange Act Release No. 83710, 2018 WL 3584177, at *4 (Jul. 25, 2018); *see also Gilbert Torres Martinez*, Exchange Act Release No. 69405, 2013 WL 168913, at *3 (Apr. 18 2013) (discussing the Commission's "well-established precedent" in dismissing appeals where the applicant failed to exhaust his remedies before FINRA).

[14] *Southeast Invest., N.C., Inc.*, Exchange Act Release No. 86097, 2019 WL 2448245, *2 (Jun. 12, 2019) (quoting *Harry W. Hunt*, Exchange Act Release No. 68755, 2013 WL 325333, at *4 (Jan. 29, 2013)).

[15] *Dowd*, 2018 WL 3584177, at *5 (quoting *Marine Mammal Conservancy, Inc. v. Department of Agriculture*, 134 F.3d 409, 413 (D.C. Cir. 1998)).

[16] *See FINRA Annual Audit Extension of Time Request Policy*, https://www.finra.org/filing-reporting/annual-audit/extension-time-request-policy ("When a firm determines that an extension is necessary, it must submit a written request to its assigned FINRA Coordinator as early as possible—**but no later than three business days prior to the audit due date**.") (emphasis in original).

[17] In an affidavit submitted with Potomac's motion, Goodloe E. Byron, Jr., Potomac's President, states that "[Potomac] spoke with its assigned [Risk Monitoring Analyst from FINRA] to request an extension for filing." The affidavit does not indicate when this conversation occurred or the result of this conversation. There is no other evidence of this conversation in the

chose not to avail itself of those options before the applicable deadlines. We consistently have held applicants responsible for their choices not to utilize remedies available before FINRA.[18]

Potomac argues in its reply brief that "FINRA's rules and the correspondence it sent to Potomac expressly denied that such a hearing was available to Potomac under the circumstances." But the correspondence from FINRA made clear that Potomac could request a hearing prior to April 27, 2020. Potomac has not shown that it would have been "clearly useless" to have requested a hearing prior to that date and to have raised the issues of its changing auditing firms, the pandemic, and the open FINRA examination at such a hearing.

Second, Potomac argues that FINRA abused its discretion in denying its request for an extension of the time to file its 2019 annual audit report and in failing to hold a hearing. In Potomac's reply brief, the firm argues that it "requested an extension, and FINRA did not even respond, much less grant it." But Potomac did not request an extension of the time to file its 2019 annual audit report until July 2, 2020. And Potomac requested this extension to file its 2019 annual audit report three months after the April 2, 2020 Pre-Suspension Notice informed the firm that, once the time to request a hearing expired on April 27, 2020, the only means to avoid an expulsion was a request for termination on the grounds of full compliance. Potomac never requested a hearing and never requested a termination of the suspension on the ground of full compliance with the Pre-Suspension Notice. Potomac cites FINRA's policy of allowing a request for an extension of time to file the annual audit report "with as little as three days' notice," but FINRA requires that such requests be made no later than three business days prior to the due date of the annual audit report.[19] Here, Potomac requested an extension of the time to file its 2019 annual audit report four months after the audit report due date of March 2, 2020, and on the date by which it needed to file the report in order to avoid an automatic expulsion pursuant to the terms of the Pre-Suspension Notice and FINRA's rules.

Third, Potomac argues that the sanction of expulsion "is excessive or oppressive." Potomac relies on *TMR Bayhead Securities, LLC*,[20] and *Gremo Investments, Inc.*,[21] as examples of cases in which the sanction FINRA imposed "was suspension until audited statements were filed, not expulsion regardless of whether such statements were filed." But in both cases the

---

record. In any event, even if this conversation occurred prior to March 2, 2020, it would not have satisfied the requirement that requests for an extension of the filing deadline be in writing. The only written extension request in the record appears to be the letter dated July 2, 2020.

18 *See, e.g.*, *Dowd*, 2018 WL 3584177, at *5 ("Given his failure . . . to take advantage of the available FINRA avenues for explaining his actions and avoiding imposition of the bar, we find that Dowd forfeited his right to challenge the bar before us."); *Gregory S. Profeta*, Exchange Act Release No. 62055, 2010 WL 1840609, at *3 (May 6, 2010) ("Applicant chose not to respond to FINRA's letters to raise these issues or request a hearing to challenge his impending sanction, and therefore cannot complain at this stage about the consequence of his choice.").

19 *See supra* note 16.

20 Exchange Act Release No. 88006, 2020 WL 263490 (Jan. 17, 2020).

21 Exchange Act Release No. 64481, 2011 WL 1825020 (May 12, 2011).

applicant timely requested a hearing after receiving a suspension notice, a FINRA hearing panel conducted a proceeding, and the FINRA hearing panel made findings and imposed sanctions.[22] Here, Potomac failed to request a hearing at any point after receiving the Pre-Suspension Notice. As a result of that decision and its failure to attain full compliance through submission of the 2019 annual audit report within three months of the Pre-Suspension Notice, Potomac was expelled pursuant to FINRA Rule 9552.[23] Potomac has not established it may argue about the merits of the expulsion because it appears to have failed to exhaust its administrative remedies.[24]

Fourth, relying on *Brendan D. Feitelberg*,[25] Potomac argues that the Commission must reverse or remand FINRA's action because FINRA failed to adequately explain why its July 2, 2020 request for an extension of the time to file its 2019 annual audit report was denied or why the expulsion was appropriate once the annual audit report was submitted. But in *Feitelberg*, it appeared that the applicant had not received the notices concerning his impending suspension and bar.[26] Unlike the applicant in *Feitelberg*, Potomac does not contest that it received the FINRA notices concerning its suspension and expulsion.[27]

Finally, Potomac argues that it has shown a likelihood of success on the merits because it sent the 2019 annual audit report to FINRA on November 17, 2020. But Potomac sent the report over four months after it had been expelled. Given that Potomac sent the report to FINRA well after it was expelled from membership, it has no bearing on the question of whether Potomac exhausted its administrative remedies before FINRA.

---

22 *See TMR Bayhead*, 2020 WL 263490, at *3 (describing proceedings below before FINRA hearing panel and panel's decision); *Gremo Investments, Inc.*, 2011 WL 1825020, at *2 (same).

23 *See* FINRA Rule 9552(h) ("A member or person who is suspended under this Rule and fails to request termination of the suspension within three months of issuance of the original notice of suspension will automatically be expelled or barred.").

24 *See, e.g.*, *Khalid Morgan Jones*, Exchange Act Release No. 80635, 2017 WL 1862331, at *5 (May 9, 2017) ("Jones cannot argue about the merits of the bar since he did not timely raise this issue in the first instance to FINRA through its administrative process by, for example, requesting a hearing in response to the Pre-Suspension Notice.").

25 Exchange Act Release No. 89365, 2020 WL 4196029 (Jul. 21, 2020).

26 *See id.* at *6-7 (explaining that the decision to remand to FINRA was based on the totality of circumstances, including that the reason Feitelberg may have failed to exhaust his administrative remedies was "that Feitelberg may have lacked actual notice of FINRA's second Rule 8210 request and notices as a result of a serious illness").

27 *See id.* at *6 (stating that the Commission has "dismissed appeals of bars imposed in expedited proceedings for failures to exhaust administrative remedies . . . where 'there was evidence that the applicants had actual notice of the requests for information'") (citation omitted).

B. Any showing of irreparable harm does not establish that a stay is warranted.

To establish irreparable harm, a movant "must show an injury that is 'both certain and great' and 'actual and not theoretical'" and "'that the alleged harm will directly result from the action which the movant seeks to [stay].'"[28] Potomac claims that if it "is not able to resume operation as a broker-dealer pursuant to a stay, its business will be destroyed" and its clients will be harmed. The Commission has held that in some circumstances "the destruction of a business, absent a stay . . . rises to the level of irreparable injury."[29] Here, Potomac's claim of irreparable harm is at least somewhat undercut by its delay in seeking a stay.[30] FINRA sent the Expulsion Notice on July 6, 2020, but Potomac waited nearly seven months—until January 29, 2021—to file a motion to stay that expulsion.[31] Potomac's 2019 annual audit report also calls into question Potomac's claims that its clients will suffer harm. The financial statements in the report reflect total revenue of $7,500 in advisory fees and $13 in other income for 2019, raising questions about how much business Potomac was doing for clients. Ultimately, we need not determine whether Potomac has established irreparable harm because any harm to Potomac is outweighed by the other factors such as the fact that it has not raised a serious question on the merits.[32]

---

[28] *Zipper*, 2017 WL 5712555, at *4 (citations omitted).

[29] *Scottsdale Cap. Advisors Corp.*, Exchange Act Release No. 83783, 2018 WL 3738189, at *3 (Aug. 6, 2018) (quoting *Scattered Corp.*, 52 S.E.C. 1314, 1997 LEXIS 2748, at *15 (Apr. 28, 1997)).

[30] For the first time in its reply brief, Potomac asserts that the recent change in administration represents a "sea change in the direction of federal environmental policy" and that this change in policy will increase business opportunities for Potomac and its clients and explains Potomac's delay in moving for a stay. "[G]enerally, any argument raised for the first time in a reply brief shall be deemed to have been waived." *Bruce Zipper*, Exchange Act Release No. 84334, 2018 WL 4727001, at *7 (Oct. 1, 2018). In any case, as discussed above, we need not determine the extent to which Potomac has demonstrated irreparable harm.

[31] *See Kenny A. Akindemowo*, Exchange Act Release No. 78352, 2016 WL 3877888, at *2 (Jul. 18, 2016) (stating that "weighing against Akindemowo's concern that he will suffer irreparable harm is that he did not seek a stay until five months after he initiated this review proceeding"); *cf. Tough Traveler, Ltd. v. Outbound Prods.*, 60 F.3d 964, 968 (2d Cir. 1995) ("[T]he failure to act sooner undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury." (citation omitted)); *Miller v. Cal. Pac. Med. Ctr.*, 991 F.2d 536, 544 (9th Cir. 1993) (stating that, although "[d]elay by itself is not a determinative factor in whether the grant of interim relief is just and proper," that the movant "tarried so long before seeking this injunction is nonetheless relevant in determining whether relief is truly necessary" (citations and quotations marks omitted)).

[32] *Zipper*, 2017 WL 5712555, at *5 (stating that "we need not decide whether Zipper has satisfied his burden of establishing an irreparable injury because any harm to Zipper is outweighed by the other factors" such as that he had not raised a serious question on the merits); *id*. at *6 (stating that "'even if a movant demonstrates irreparable harm that decidedly outweighs any potential harm to the [stay opponent] if a stay is granted, [it] is still required to show, at a minimum, serious questions going to the merits'") (quoting *In re Revel AC*, 802 F.3d at 570).

C. The risk of harm to others and the public interest weigh against a stay.

We view the third and fourth factors—the risk of harm to others from a stay and the public interest —as supporting the denial of a stay. As it does throughout much of the motion, with respect to these factors Potomac argues that "there is no suggestion of wrongdoing by Potomac" and that "FINRA has made no allegation . . . that the audit itself reveals any problem with Potomac's operations." Potomac fails to appreciate the significance of its failure to submit timely annual audit reports. The Commission has emphasized that the annual audit report requirement is "not technical but involve[s] fundamental safeguards imposed for the protection of the public on those who wish to engage in the securities business."[33] Potomac neglected to submit its 2019 annual audit report until November 17, 2020, over eight months after the due date and over four months after the firm had been expelled from FINRA membership. This failure interfered with FINRA's ability to monitor Potomac's financial status, and the financial statements in its 2019 annual audit report that it filed late disclosed liquidity and going concern issues. As a result, the risk of harm to others and the public interest militate against a stay.[34]

* * *

Potomac has not satisfied its burden of establishing that a stay is warranted. Accordingly, it is ORDERED that Potomac's motion for a stay is denied.

For the Commission, by the Office of the General Counsel, pursuant to delegated authority.

Vanessa A. Countryman
Secretary

---

33 *Gremo*, 2011 WL 1825020, at *4.

34 *See MKM Partners, LLC*, Exchange Act Release No. 79700, 2016 WL 7473302, at *8 (Dec. 28, 2016) (stating that "the failure to timely submit annual audit reports can harm investors and the markets because it may impede an SRO's ability to detect problems with a broker-dealer's solvency"); *see also id.* at *5 (stating that the "obligation to timely submit such reports ensures that the Commission and the SRO have access to information about the broker-dealers's compliance with financial responsibility requirements, its stability as a participant in the markets, and the risks that it may present to investors and counterparties")).