

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 94059 / January 25, 2022

Admin. Proc. File No. 3-19631

In the Matter of the Application of

KJM SECURITIES, INC.

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 failed to file audited annual report in violation of reporting requirements. *Held*, FINRA's finding of violation and the imposition of sanctions are *sustained*.

APPEARANCES:

Kosta J. Moustakas, for KJM Securities, Inc.

Alan Lawhead, Andrew Love, and Celia L. Passaro, for FINRA.

Appeal filed: December 23, 2019
Last brief received: April 13, 2020

KJM Securities, Inc. (“KJM”), an expelled FINRA member firm, seeks review of FINRA disciplinary action. FINRA found that KJM violated Section 17(e) of the Securities Exchange Act of 1934, Exchange Act Rule 17a-5(d) thereunder, and FINRA Rule 2010 by failing to file an annual report that was audited by an accounting firm registered with the Public Company Accounting Oversight Board (“PCAOB”) for the fiscal year ending March 31, 2019. FINRA imposed a \$1000 fine and a suspension to convert automatically to an expulsion if KJM failed to file the report by January 1, 2020—two months from FINRA’s order. KJM failed to file its audited annual report by that date, and FINRA expelled the firm. KJM appealed to the Commission and sought a stay of the sanctions. The Commission denied the stay,¹ and KJM then attempted to file its report with FINRA. It now argues, among other things, that the Commission should set aside its expulsion in light of its belated attempted filing. Based on our independent review of the record, we now sustain the finding of violation and sanctions imposed.

I. Background

A. KJM filed its audited annual report for 2018 almost three months late.

Exchange Act Section 17(e) and Rule 17a-5(d) required KJM to file by May 30, 2018, an audited annual report for its fiscal year ending March 31, 2018 (the “2018 Report”).² KJM did not do so. In July 2018, FINRA issued a notice of suspension as to KJM’s FINRA membership given KJM’s failure to timely file the 2018 Report. KJM then filed a request for a hearing in which it represented that the 2018 Report was “in the process of being completed by [KJM’s] new PCAOB [a]uditor who replaced [its] previous auditors, due to the untimely death of [KJM’s] previous auditor.” On August 29, 2018, twelve days before the scheduled hearing, and nearly three months after it was due, KJM filed its 2018 Report.

In the 2018 Report, KJM’s new auditor, Morey, Nee, Buck & Oswald (“Morey”), represented that KJM “ha[d] suffered recurring losses from operations and ha[d] a net capital deficiency that raise[d] substantial doubt about its ability to continue as a going concern.” Morey ended its relationship with KJM in February 2019, and a FINRA examination based on the 2018 Report ultimately found inaccuracies in KJM’s financial statements. The FINRA surveillance director who conducted the examination of KJM stated that FINRA wanted to see if in its annual audit report for 2019 KJM’s “books and records were better aligned than it was from last year and if the firm was going to receive a going concern [opinion].”

B. KJM failed to file its audited annual report for 2019.

On May 24, 2019, KJM requested an extension of time to file its audited annual report for the fiscal year ending March 31, 2019 (the “2019 Report”), which was due on May 30, 2019. As part of its request, KJM’s new auditor, AJSH & Co. LLP (“AJSH”), represented that AJSH had not received requested client information needed for the preparation of the 2019 Report and that AJSH did not expect to issue an unqualified audit opinion in the 2019 Report. On May 29,

¹ *KJM Sec., Inc.*, Exchange Act Release No. 88053, 2020 WL 416696 (Jan. 27, 2020).

² 15 U.S.C. § 78q; 17 C.F.R. § 240.17a-5(d).

2019, FINRA notified KJM that it would not grant an extension because AJSH was not able to represent that it expected to issue an unqualified audit opinion.

The next day, KJM submitted a letter from AJSH representing that AJSH did expect to issue an unqualified audit opinion. The record does not reveal a reason for AJSH's abrupt reversal. Later that day, based on AJSH's new representation, FINRA granted KJM an extension to June 17, 2019, to file the 2019 Report. KJM did not file the 2019 Report by June 17.

On July 9, 2019, FINRA notified KJM that KJM would be suspended if it failed to file the report by August 1, 2019.³ FINRA also notified KJM that KJM had been assessed a \$1,000 late filing fee.⁴ On August 1, 2019, KJM submitted to FINRA an unaudited annual report for fiscal year ending March 31, 2019. FINRA rejected the filing the following day and suspended KJM's association. Later that day, KJM requested a hearing pursuant to FINRA Rule 9552(a).⁵ KJM represented to FINRA that the 2019 Report was close to completion and that the delay in preparing it was due to the untimely passing of KJM's prior auditor—the auditor who had passed away in 2017 and whose death was the basis for KJM's late filing of its 2018 Report. FINRA granted the request for a hearing and stayed the suspension.

C. Following a hearing, FINRA ordered that KJM be expelled if it did not file the 2019 Report by January 1, 2020, and KJM did not file the 2019 Report by that date.

On September 13, 2019, a FINRA hearing panel conducted a telephonic hearing. KJM, represented by its owner and president Kosta J. Moustakas, did not contest that the 2019 Report was still delinquent as of that date. Rather, Moustakas testified that the report would be filed "rather soon." Moustakas also testified that "[f]or the past thirty years we've never missed any annual audits." Based on these facts, KJM repeatedly requested that the hearing panel be lenient.

On November 1, 2019, the hearing panel issued its decision concluding that KJM had violated Exchange Act Section 17(e), Rule 17a-5(d), and FINRA Rule 2010 by failing to file the 2019 Report. The hearing panel made findings of fact and credibility determinations based on Moustakas's testimony. Among other things, the panel found that Moustakas's representations that the 2019 report would be filed soon were uncorroborated. The panel also observed that several weeks had passed since Moustakas testified on September 13, 2019, that KJM would soon file its audited annual report. Also according to the panel, Moustakas offered "vague, confusing, and contradictory" testimony when asked why KJM's audited annual report was still delayed. The panel concluded that, for example, Moustakas contradicted himself regarding

³ See FINRA Rule 9552(a) (providing that if a member fails to provide a required report FINRA staff may provide written notice to such member stating that the failure to take corrective action within 21 days will result in a suspension of membership).

⁴ FINRA's By-Laws impose a \$100-per-day late filing fee, up to a maximum of \$1,000, for the failure to timely file required reports. FINRA By-Laws, Schedule A, § 4(g).

⁵ See FINRA Rule 9552(e) (providing that a member served with a notice under Rule 9552(a) may file a request for a hearing); FINRA Rule 9552(d) (providing that a request for a hearing stays a suspension imposed as a result of the notice issued under Rule 9552(a)).

whether KJM’s new auditor, AJSH, was awaiting documentation from the prior auditor and whether AJSH was awaiting more information from KJM.

As to the appropriate remedy, the hearing panel determined that KJM’s reporting violation was serious in light of the importance of annual reporting “in monitoring the financial status of broker-dealers and protecting investors.” The hearing panel also found that, despite Moustakas’s representations that KJM had never missed filing an audited annual report, KJM had been nearly three months late in filing the 2018 Report. Further, the panel noted that the 2018 Report had contained a going concern opinion and that a FINRA examination based on that Report found inaccuracies in KJM’s financial statements. The hearing panel concluded that these facts raised serious questions about KJM’s financial stability and the likelihood of the 2019 Report ever being filed. The hearing panel also noted that there was no explanation for why AJSH “abruptly changed positions” regarding its ability to issue an unqualified 2019 audit opinion. In light of these factors, the hearing panel upheld KJM’s suspension and the imposition of a \$1,000 late fee. The panel ordered that the suspension convert to an expulsion if KJM did not file the 2019 Report within two months of the panel’s order—or January 1, 2020. When KJM failed to file an audited annual report by that date, FINRA expelled it.

KJM appealed to the Commission for review of the hearing panel’s decision and sought to stay its expulsion. After the Commission denied the motion for a stay, KJM attempted to file with FINRA what it represented to be the audited 2019 Report. FINRA indicated that it would “not take any action regarding” the filing because KJM had already been expelled.

II. Analysis

Exchange Act Section 19(e)(1) requires, as part of our review of a final disciplinary sanction that FINRA imposed, that we determine whether the applicant engaged in the conduct FINRA found, whether the conduct violates the provisions of the securities laws FINRA found it to have violated, and whether such provisions are, and were applied in a manner, consistent with the purposes of the Exchange Act.⁶ We base our findings on an independent review of the record and apply a preponderance of the evidence standard.⁷

Exchange Act Section 17(e)(1)(A) and Exchange Act Rule 17a-5(d) thereunder require registered broker-dealers to file timely annual reports that contain financial statements audited by a PCAOB-registered accounting firm.⁸ KJM failed to file the 2019 Report by its original due date, failed to file the 2019 Report after FINRA repeatedly extended the deadline for doing so, failed to file the 2019 Report within the two-month suspension period, and had not filed its 2019

⁶ 15 U.S.C. § 78s(e)(1).

⁷ 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).

⁸ 15 U.S.C. § 78q(e)(1)(A) as amended by the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 205(c)(2), 116 Stat. 745 (2002); see *Gremo Investments, Inc.*, Exchange Act Release No. 64481, 2011 WL 1825020, at *2 (May 12, 2011) (finding violation of these provisions where firm filed audit report that was not audited by a PCAOB-registered accounting firm).

Report when the suspension converted to an expulsion on January 1, 2020. KJM does not contest any of these facts. As a result, KJM violated Exchange Act Section 17(e)(1)(A), Exchange Act Rule 17a-5(d) thereunder, and FINRA Rule 2010.⁹

These provisions are, and were applied in a manner, consistent with the purposes of the Exchange Act. One of the “basic purposes” of the Exchange Act “is to regulate the conduct of broker-dealers.”¹⁰ We have recognized that the reporting rules are not technical requirements but involve fundamental safeguards imposed for the protection of the investing public on those who wish to engage in the securities business.¹¹ Applying these provisions to KJM furthered these investor protection purposes.¹² We therefore sustain FINRA’s finding of violation.

III. Sanctions

A. We find that the sanctions FINRA imposed are not excessive or oppressive.

Exchange Act Section 19(e)(2) permits the Commission to “cancel, reduce, or require the remission of [a] sanction” if we find, “having due regard for the public interest and the protection of investors,” that a sanction FINRA imposed “is excessive or oppressive,” or imposes an unnecessary or inappropriate burden on competition.¹³ The hearing panel suspended KJM from FINRA membership and ordered the suspension to convert to an expulsion if KJM did not file its 2019 Report within two months of its order. The hearing panel also imposed a \$1,000 fine. We see no reason to cancel, reduce, or require the remission of the sanctions FINRA imposed.¹⁴

As we recently reiterated, violations of the broker-dealer reporting provisions are serious because the reporting provisions help regulators monitor the financial status of broker-dealers and protect investors.¹⁵ As discussed above, the reporting rules are not technical requirements but involve fundamental safeguards imposed for the protection of the investing public on those

⁹ See *TMR Bayhead Sec., LLC*, Exchange Act Release No. 88006, 2020 WL 263490, at *5 n.13 (Jan. 17, 2020) (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).

¹⁰ *MKM Partners LLC*, Exchange Act Release No. 79700, 2016 WL 7473302, at *5 (Dec. 28, 2016) (internal quotation marks and citation omitted).

¹¹ *Gremo Inv.*, 2011 WL 1825020, at *4.

¹² *MKM Partners*, 2016 WL 7473302, at *5 (finding disciplinary action for failing to file timely a required annual report consistent with the purposes of the Exchange Act).

¹³ 15 U.S.C. § 78s(e)(2); see also *TMR Bayhead*, 2020 WL 263490, at *6 n.19. KJM does not argue, and the record does not show, that the sanctions imposed a burden on competition.

¹⁴ KJM does not argue before the Commission that the fine should be set aside, and the hearing panel stated that “KJM did not dispute that it is required to pay the fee.” We do not find the \$1,000 fine to be excessive or oppressive on the facts of this case.

¹⁵ *TMR Bayhead*, 2020 WL 263490, at *7.

who wish to engage in the securities business.¹⁶ As a result, expelling a firm that refuses to comply with these requirements is remedial and not excessive or oppressive.¹⁷

We note that FINRA gave KJM numerous opportunities to file its 2019 Report yet KJM failed to comply with its reporting obligations. KJM had five months between the time its 2019 Report was originally due and the hearing panel's decision to file the report. The hearing panel then gave KJM another two months while it was suspended to file its 2019 Report and avoid expulsion. The conversion of the suspension to an expulsion was appropriate given KJM's failure to file the 2019 Report within the time specified by the hearing panel. KJM had already failed to timely file its 2018 Report. And the 2018 Report that it filed almost three months late raised concerns about the firm's financial condition that made the filing of its 2019 Report all the more important. Given these facts, we agree with the hearing panel's conclusion that suspending the firm and having the suspension convert to an expulsion if it did not file the report within two months of the hearing panel's order was "appropriately remedial."¹⁸

B. We reject KJM's arguments that its expulsion should be set aside.

Although KJM does not dispute that it failed to timely file its 2019 Report, it nonetheless asks the Commission to reinstate its FINRA membership. First, KJM argues that its membership should be reinstated because it has now filed the 2019 Report. But KJM's belated filing—which was made seven weeks after its suspension converted into an expulsion and nearly nine months after its original filing deadline—does not mitigate its violation. We have stated repeatedly that an SRO should not have to bring a disciplinary proceeding in order to obtain compliance with its rules.¹⁹ By the time of KJM's filing, FINRA had brought a disciplinary proceedings in an unsuccessful attempt to compel the filing of the 2019 Report. KJM filed the 2019 Report only after failing to prevail in those proceedings. FINRA should not have had to expend extensive regulatory resources and impose an expulsion in order to compel KJM to file the 2019 Report.²⁰ Under the circumstances, expelling KJM is an appropriately remedial sanction.²¹

¹⁶ *Gremo Inv.*, 2011 WL 1825020, at *4.

¹⁷ *See FCS Sec.*, Exchange Act Release No. 64852, 2011 WL 2680699, at *9-10 (July 11, 2011) (finding that a suspension that converted to an expulsion if the firm's failure to file its audited annual reports continued was "an appropriate remedial measure").

¹⁸ *Cf. id.* (finding that the suspension allowed the firm "ample time to file audited annual reports" and that it was appropriately remedial to expel the firm if it continued to fail to do so).

¹⁹ *David Kristian Evansen*, Exchange Act Release No. 75531, 2015 WL 4518588, at *13 (July 27, 2015) (citing *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 WL 4899010, at *6 (Nov. 14, 2008)).

²⁰ *See id.* (finding that a failure to respond until a bar had been imposed and extensive regulatory resources expended aggravated the seriousness of the violation).

²¹ *See Blair C. Mielke*, Exchange Act Release No. 75981, 2015 WL 5608531, at *22 (Sept. 24, 2015) (sustaining bar as an appropriate sanction given "Schultz's complete failure to respond to FINRA's request for testimony until he was about to be barred or suspended").

Second, KJM argues that it could not comply with the deadlines to file its 2019 Report because one of its auditors passed away. But the record belies the notion that the passing of KJM's prior auditor hindered its ability to timely file the 2019 Report. The death of its prior auditor was the reason KJM gave for its failure to timely file the 2018 Report. After that auditor's passing, KJM retained Morey to complete the 2018 Report. Morey did not complete the 2019 Report because it terminated its relationship with KJM. KJM could have retained a new PCOAB-registered auditor to comply with its 2019 filing obligations. There is no evidence that the passing of the prior auditor had any effect on KJM's ability to file the 2019 Report.

Third, KJM argues that it could not timely file the 2019 Report because Moustakas suffered from a severe illness sometime in "September 2017-18." But Moustakas never made this claim before the hearing panel. Nor has KJM introduced any evidence to support this argument other than vague, unsupported assertions in its brief.²² Under the circumstances, the claim that Moustakas suffered an illness is not mitigating.

Fourth, KJM asserts that it wrote to FINRA in October 2019, five months after its 2019 Report was due, and "asked the Membership on how best to remedy the situation as to avoid a suspension" while it awaited the audit of its 2019 financial statements. According to KJM, FINRA failed to respond to this request in violation of FINRA's Certificate of Incorporation and its By-Laws. KJM sent this letter to the hearing panel and not FINRA staff. In any case, KJM does not identify any provision of FINRA's Certificate of Incorporation or By-Laws that would have required FINRA's staff or the hearing panel to respond to KJM's letter. And the onus of compliance with the securities laws falls on FINRA members, who cannot shift their compliance obligations to SRO officials.²³ The record also establishes that FINRA staff repeatedly told KJM that to avoid expulsion KJM was required to file an audited annual report. Thus, FINRA's alleged failure to respond to KJM's letter is not a basis for setting aside the expulsion.

Fifth, KJM argues for the first time in its reply brief that the hearing panel deviated from past practice by providing an unduly short amount of time before the suspension converted to an expulsion. KJM cites *Sharemaster*, in which a hearing panel ordered that a suspension for failing to file a compliant audited annual report would convert to an expulsion after six months if the firm did not file a compliant report by that time.²⁴ Our rules provide that "any argument raised for the first time in a reply brief shall be deemed to have been waived."²⁵ In any event, KJM's argument has no merit. *Sharemaster* involved a firm that filed an audited annual report but claimed the report did not need to be audited by a PCAOB-registered auditor. It did not involve a firm that failed to file its audited annual report. Here, the two-month period the hearing panel gave KJM to file its 2019 Report before its suspension converted to an expulsion

²² See *Kirlin Sec., Inc.*, Exchange Act Release No. 61135, 2009 WL 4731652, at *13 n.87 (Dec. 10, 2009) (stating that the applicant must produce evidence to support his defenses).

²³ *Husky Trading LLC*, Exchange Act Release No. 60180, 2009 WL 1834166, at *6 n.27 (June 26, 2009); see also *Schon-Ex, LLC*, Exchange Act Release No. 57857, 2008 WL 2167941, at *6 n.21 (May 23, 2008) (collecting cases).

²⁴ Exchange Act Release No. 83138, 2018 WL 2017542 (April 30, 2018).

²⁵ Rule of Practice 450(b), 17 C.F.R. § 201.450(b).

was reasonable. The hearing panel explained it was imposing the two-month period based on the five months that had already passed between the 2019 Report's due date and the date of the hearing panel's decision, and the circumstances surrounding the late filing of the 2018 Report.²⁶

Finally, KJM argues again for the first time in its reply brief that because it has no public customers its delinquency cannot threaten the investing public. But the broker-dealer reporting requirements serve both to protect public investors and to enable the monitoring of the financial status of broker-dealers.²⁷ Here, the audit of KJM's books and records in 2018, as well as the subsequent FINRA examination of those records, raised concerns regarding KJM's financial condition. Those concerns made KJM's obligation to timely file an audited annual report for 2019 all the more important. KJM's failure to timely file the 2019 Report, and its continued failure to file that report even after the hearing panel suspended it and gave it two months to file the report and avoid an expulsion, threatened FINRA's ability to ensure KJM's stability as a broker. KJM's conduct with respect to the 2018 Report and the 2019 Report also indicates a risk that KJM might be delinquent in filing future reports, which would threaten the public interest by

²⁶ The fact that KJM did not timely file its 2018 Report in addition to not filing its 2019 Report and did not contend that it was exempt from the requirement that it file an audited annual report in either 2018 or 2019 also distinguishes this case from other cases in which a firm was given more time to file its report before its suspension converted to an expulsion and cases in which the suspension did not convert to an expulsion. *See FCS Sec.*, 2011 WL 2680699 (sustaining a suspension that would convert to an expulsion after four months with respect to a firm that had sought to avail itself of an exemption from the requirement that it file an audited annual report); *see also TMR Bayhead*, 2020 WL 263490 (sustaining a suspension that would last until the firm filed a complaint annual report with respect to a firm that filed unaudited annual reports); *Gremo Inv.*, 2011 WL 1825020 (sustaining a suspension that would last until the firm filed a compliant audited annual report with respect to a firm that filed an annual report that was audited by an accounting firm that was not registered with the PCAOB).

²⁷ *Palm State Equities, Inc.*, Exchange Act Release No. 35873, 1995 WL 380142, at *4 (June 20, 1995).

preventing the timely monitoring of its financial condition. As a result, expelling KJM from FINRA membership was a remedial sanction and not excessive or oppressive.²⁸

An appropriate order will issue.

By the Commission (Chair GENSLER and Commissioners PEIRCE, ROISMAN, LEE, and CRENSHAW).

Vanessa A. Countryman
Secretary

²⁸ See *FCS Sec.*, 2011 WL 2680699, at *9-10 (finding the conversion of a suspension into an expulsion to be an appropriately remedial measure if applicant continued to fail to file report); *cf. PAZ Secs., Inc.*, Exchange Act Release No. 57656, 2008 WL 1697153, at *5 (Apr. 11, 2008) (sustaining expulsion where firm provided information that it was required to provide to FINRA only after bar was imposed in a disciplinary proceeding because FINRA should not have to bring disciplinary proceedings to obtain compliance with its rules), *petition denied*, 566 F.3d 1172 (D.C. Cir. 2009) (finding that Commission “reasonably determined the sanctions were necessary to protect investors” where it found that petitioners posed a clear risk of future misconduct given their “cavalier disregard” for their obligation to provide information to FINRA).

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 94059 / January 25, 2022

Admin. Proc. File No. 3-19631

In the Matter of the Application of
KJM SECURITIES, INC.
For Review of Disciplinary Action taken by
FINRA

ORDER SUSTAINING DISCIPLINARY ACTION

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

ORDERED that the disciplinary action taken by FINRA against KJM Securities, Inc., is sustained.

By the Commission.

Vanessa A. Countryman
Secretary