

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

KJM SECURITIES, INC.
(CRD No. 20277),

Respondent.

Expedited Proceeding
No. FPI190006

STAR No. 20190634989

Hearing Officer–DRS

**EXPEDITED HEARING PANEL
DECISION**

November 1, 2019

For failing to file its annual audit report, KJM Securities, Inc. is suspended, assessed a \$1,000 late fee, and ordered to pay costs. The suspension will convert to an expulsion if, within two months, KJM does not file the required report and pay the late fee.

Appearances

For the Complainant: Adam H. Balin, Esq., Matthew Minerva, Esq. and Kay L. Lackey, Esq., Department of Enforcement, Financial Industry Regulatory Authority.

For the Respondent: Kosta J. Moustakas, an officer of KJM Securities, Inc.

DECISION

I. Background

This expedited proceeding stems from FINRA’s attempt to suspend broker-dealer KJM Securities, Inc. (“KJM” or “Firm”) for failing to file its annual audit report, as required by federal law and FINRA rules. When KJM missed its filing deadline, FINRA issued it a Notice of Suspension (“Notice”). The Notice informed KJM that if it did not file the audit report by a specified date, it would be suspended from FINRA membership and later expelled if the deficiency continued beyond another specified date. The Notice also assessed a \$1,000 late fee. The Firm requested a hearing, which stayed the effectiveness of the Notice pending the hearing. A telephonic hearing was held before a FINRA hearing panel. At the hearing, KJM conceded its annual audit report was overdue, but asked that the Firm not be suspended while its auditor finished the report.

For the reasons explained below, the Hearing Panel approves the sanctions imposed in the Notice, with some modifications. We immediately suspend KJM's FINRA membership, assess a \$1,000 late fee, and order the Firm to pay costs. If, within two months of the date of this decision, KJM does not file the required report and pay the late fee, the suspension will automatically convert to an expulsion.

II. Findings of Fact

A. KJM Fails to File Its Annual Audit Report and FINRA Issues It a Suspension Notice

The material facts are largely undisputed. KJM has been a FINRA member since November 1987.¹ Its main office is in Bronxville, New York.² KJM's sole owner, Kosta J. Moustakas,³ serves as its president, chief executive officer, chief compliance officer, chief operating officer, chief financial officer, and anti-money laundering compliance officer.⁴

KJM's fiscal year ends on March 31,⁵ and its annual audit report for the fiscal year ending March 31, 2019 ("Annual Audit Report"), was due on May 30, 2019.⁶ KJM, however, did not file it on that date.⁷ Rather, a few days beforehand, on May 24, KJM requested an extension of the due date until June 17, 2019, stating that the Firm's new auditor had notified KJM that it would "need to file an extension until" that date.⁸ On May 27, FINRA staff informed KJM that its extension request was deficient because it did not include certain required information.⁹ KJM supplemented its request on May 29, 2019, with a letter from the auditor explaining that it needed additional time to prepare the Annual Audit Report because it had not timely received "the required client information."¹⁰ Later that day, FINRA reviewed the auditor's letter and requested additional information.¹¹ The next day, May 30,¹² FINRA granted

¹ Stipulations ("Stip.") ¶ 1; Joint Exhibit ("JX-__") 1, at 4.

² Stip. ¶ 4; JX-1, at 4.

³ Stip. ¶ 2.

⁴ Stip. ¶ 3.

⁵ Stip. ¶ 5; Hearing Transcript ("Tr. __") 40.

⁶ Stip. ¶ 6; Tr. 40, 86.

⁷ Tr. 40–41, 86.

⁸ JX-3, at 2. KJM terminated its prior auditor in February 2019 and retained its current auditor in March 2019. JX-23, at 2; Tr. 42.

⁹ JX-4.

¹⁰ JX-7, at 2.

¹¹ JX-8, at 1.

¹² JX-9.

the extension after receiving the additional information in a revised letter from the auditor.¹³ In granting the extension, FINRA staff informed KJM that if it failed to file its Annual Audit Report on or before June 17, 2019, it could be assessed a late filing fee of \$100 per day for up to ten days and could also be subject to other regulatory or disciplinary action.¹⁴

KJM, however, did not file its Annual Audit Report by the June 17, 2019 extended deadline.¹⁵ So on July 9, 2019, FINRA issued the Firm a Notice under FINRA Rule 9552.¹⁶ The Notice informed KJM that FINRA members must “timely file their Annual Audit Report as required pursuant to Rule 17a-5 under the Securities Exchange Act of 1934 and FINRA Rule 2010”¹⁷ and that FINRA had not yet received the Annual Audit Report.¹⁸ As a result, the Notice warned, if the Firm “[did] not submit [the] Annual Audit Report, [it would] be suspended on August 2, 2019 (‘Effective Date’) without further notice.”¹⁹

In accordance with FINRA Rule 9552, the Notice also provided KJM with additional information. It said that (1) if KJM wanted a hearing, it must file a written request with the Office of Hearing Officers before the Effective Date;²⁰ (2) the hearing request must “set forth with specificity any and all defenses” to the Notice;²¹ (3) a timely filed, rule-compliant hearing request would stay the effectiveness of the Notice (unless the Hearing Officer assigned to the case ordered otherwise);²² and (4) if KJM were suspended, it could file “a written request for termination of the suspension on the ground of full compliance with the [N]otice”;²³ but if it failed to do so within three months of the date of the Notice, the Firm would “be automatically

¹³ Stip. ¶ 7; JX-10, at 1–2.

¹⁴ JX-10, at 2.

¹⁵ Tr. 53, 87.

¹⁶ Stip. ¶ 8. If a member or person associated with a member fails to provide any information, report, material, data, or testimony requested or required to be filed pursuant to FINRA’s By-Laws or FINRA rules, FINRA Rule 9552(a) permits FINRA staff to serve written notice to such member or person specifying the nature of the failure and stating that the failure to take corrective action within 21 days after service of the notice will result in the suspension of membership or of association of the person with any member. *See also Gremo Invs.*, Exchange Act Release No. 64481, 2011 SEC LEXIS 1695, at *13–14 (May 12, 2011) (“FINRA Rule 9552(a) provides that a member who fails to file an annual report will be suspended if such member fails to take corrective action.”). FINRA Rule 9552(b) provides for service of a suspension notice in accordance with FINRA Rule 9134 (which permits personal service and service by mail or courier), or by facsimile or email. *See* FINRA Rules 9134(a), (b)(1). Here, FINRA staff properly served the Notice by overnight courier, and KJM received it. JX-13, at 1, 4–5; Stip. ¶ 8.

¹⁷ JX-13, at 2.

¹⁸ JX-13, at 1.

¹⁹ JX-13, at 2.

²⁰ JX-13, at 2; FINRA Rule 9552(e).

²¹ JX-13, at 2; FINRA Rule 9552(e).

²² JX-13, at 2; FINRA Rule 9559(c)(1).

²³ JX-13, at 2; FINRA Rule 9552(f).

expelled.”²⁴ Finally, because the Annual Audit Report was delinquent for at least ten days, the Notice assessed a \$1,000 late fee on KJM.²⁵

B. FINRA Rejects KJM’s Unaudited Financial Statements

After receiving the Notice, KJM did not immediately file either its Annual Audit Report or a hearing request. Then, late on August 1, 2019, the day before the suspension’s Effective Date, the Firm filed what purported to be financial statements, a supplemental schedule, a report from an independent registered public accounting firm, and a review report about exemption provisions (collectively, the “August 1 Filing”).²⁶ The August 1 Filing contained a Securities and Exchange Commission (“SEC”) form titled “Annual Audited Report.”²⁷ This form, which must be signed, notarized, and submitted with an annual report, must include certain information about the identity of the auditor and describe the contents of the auditor’s report.²⁸ In the “Accountant Identification” section of the form, which required the Firm to identify the “Independent Public Accountant whose opinion is contained in this Report,” KJM named its current auditor.²⁹ Below that identification, the form contained three boxes and an instruction to “check one.” Pre-printed text relevant to the identified accountant accompanied two of the checkboxes. But the box that was checked had no text next to it.

Notwithstanding the above representations about its contents, the August 1 Filing included nothing from the Firm’s auditor.³⁰ In short, the financials were unaudited.³¹ And for that reason, on August 2, FINRA staff emailed KJM that it was rejecting the August 1 Filing³²

²⁴ JX-13, at 2; FINRA Rule 9552(h).

²⁵ JX-13, at 3. Section 4(g) of Schedule A to FINRA’s By-Laws instructs FINRA to impose on a member a late fee of \$100 for each day that an annual report is delinquent for up to ten business days. “[T]he way the process works is once the firm’s filing is late, they get assessed,” according to Gregory Marro, a FINRA Managing Regulatory Coordinator. Tr. 25, 55. “They get assessed \$100 fine late per day up to 10 days. It maxes out at 10 days, so no more than a \$1,000 fine. After 10 days if the filing still has not been received, then it moves into the next step of the process which is suspension letter processing” Tr. 55. FINRA assessed the \$1,000 fee to KJM’s Central Registration Depository (“CRD”) account. When the fee was assessed, KJM’s CRD account had a positive balance of \$14.97, which was applied to the fee, leaving an unpaid balance of \$985.03 as of September 17, 2019. *See* JX-27.

²⁶ JX-14; Tr. 90–91, 93.

²⁷ JX-14, at 5.

²⁸ JX-14, at 6; Tr. 95. Moustakas signed the notarized oath/affirmation attesting that to the best of his knowledge and belief the “accompanying financial statement and supporting schedules” were “true and correct.” JX-14, at 6; Tr. 162.

²⁹ JX-14, at 5.

³⁰ JX-14; Tr. 98.

³¹ Tr. 99–100.

³² JX-16.

and that the Firm was suspended as of that day [August 2] because it had not filed a written hearing request with the Office of Hearing Officers.³³

C. KJM Requests a Hearing

A few hours later, on August 2, 2019, KJM filed a written hearing request with the Office of Hearing Officers.³⁴ “[I]n the event of a Suspension,” KJM wrote in the request, “it would like to clarify and respond to any question regarding the Firms [sic] March 2019 Annual Audit.” Continuing, the Firm represented that the audit was “in the process of being completed” by its new auditor “who replaced our previous auditors . . . due to the untimely death of our previous auditor”³⁵ The hearing request did not otherwise specify the Firm’s defenses to the Notice.

D. The Hearing

A telephonic hearing was held on September 13, 2019, by which date the Firm had still not filed its Annual Audit Report.³⁶ At the hearing, KJM called Moustakas as its only witness. He did not dispute that the Annual Audit Report was overdue. Instead, he implored FINRA not to suspend the Firm, claiming that in 30 years, the Firm had never failed to file an annual audit.³⁷ Although Moustakas did not specify a date by when the Firm would file its Annual Audit Report, he asked for “a couple more days”³⁸ to do so because the auditor had been paid³⁹ and was “in the homestretch,”⁴⁰ i.e. it was “in the tail end of finishing up.”⁴¹

The Hearing Panel gave no weight to Moustakas’s representation that the Firm would soon file its Annual Audit Report. As a threshold matter, his testimony was uncorroborated: the Firm offered no testimony or documentary evidence from its auditor about the status of the Annual Audit Report.

Moreover, we did not find Moustakas’s testimony credible. When pressed to explain the cause of the filing delay, his testimony was vague, confusing, and contradictory. Moustakas first claimed the auditor was “just looking for accuracy of documentation that they requested,

³³ JX-16.

³⁴ Stip. ¶ 9; JX-18.

³⁵ The Firm stated that it submitted the hearing request “prior to any effective dates.” But KJM filed its request *on* the Effective Date rather than before it. Because the hearing request was only one day late, in the interest of justice, we deem the effectiveness of the Notice stayed by the hearing request and decide this case on the merits.

³⁶ Tr. 62.

³⁷ Tr. 64, 134, 137.

³⁸ Tr. 144.

³⁹ Tr. 135, 148, 184.

⁴⁰ Tr. 144.

⁴¹ Tr. 146.

confirmation from vendors, again from the previous auditor.”⁴² But moments later, he reversed himself and denied that the auditor was awaiting information from the previous auditor.⁴³ Moustakas then claimed that the auditor might still be waiting to receive some documentation from the Firm—“[m]aybe a receipt or something, like a small little gas receipt [I]t would be something very minute.”⁴⁴ Then Moustakas denied the Firm owed the auditor anything. “I have nothing more to give them,” he asserted. “We have done everything.”⁴⁵ Attempting to clarify this testimony, Moustakas explained that he had answered in terms of what the auditor “could be asking for,” but then he admitted they had not asked for anything else.⁴⁶ Moustakas also hedged about when the auditor would complete the Annual Audit Report. He testified that the auditor sent out confirmations to various vendors, and their ability to finish the audit depends on the accuracy of the information they receive in response.⁴⁷

Moustakas’s credibility was also undercut by his testimony about the August 1 Filing. He was asked to explain certain representations in the filing; to identify who completed certain documents; and to explain whether he had altered the SEC form to remove certain pre-printed language next to the box he checked, and if so, why. Throughout this questioning, Moustakas was evasive and appeared deliberately obtuse.⁴⁸

Finally, and most importantly, it has now been seven weeks since Moustakas testified that the Firm would soon file the Annual Audit Report and, to date, it has not done so, thus belying his prediction.

III. Conclusion of Law—By Failing to File an Audited Annual Report, KJM Violated Securities Exchange Act of 1934 Section 17(e) and Exchange Act Rule 17a-5 Thereunder, and FINRA Rule 2010

Under Section 17(e) of the Securities Exchange Act of 1934 (“Exchange Act”) and Exchange Act Rule 17a-5 promulgated thereunder, registered broker-dealers are required to file an annual financial report audited by an independent public accountant.⁴⁹ KJM does not dispute that it was required to file its Annual Audit Report by the extended deadline and that it failed to

⁴² Tr. 142.

⁴³ Tr. 143–44.

⁴⁴ Tr. 146.

⁴⁵ Tr. 147.

⁴⁶ Tr. 146 (“They haven’t asked.”).

⁴⁷ Tr. 146–47.

⁴⁸ Tr. 155–67, 186–90; JX-14; JX-15.

⁴⁹ See, e.g., *Regulatory Operations v. TMR Bayhead Sec.*, Expedited Proceeding No. FPI180002, 2018 FINRA Discip. LEXIS 27, at *4 (OHO Sept. 10, 2018) (“Section 17(e) of the Securities Exchange Act of 1934 . . . and Rule 17a-5(d) thereunder require every registered broker-dealer to file annually a report audited by an independent public accountant.”); *Regulatory Operations v. Fairbridge Capital Mkts.*, Expedited Proceeding No. FPI160004, 2016 FINRA Discip. LEXIS 44, at *8 (OHO July 11, 2016) (same).

do so. Further, the Firm established no defense for this failure. We therefore conclude that the Firm violated Exchange Act Section 17(e) and Exchange Act Rule 17a-5. As a result, the Firm also violated FINRA Rule 2010.⁵⁰

IV. Sanctions

The Hearing Panel has wide discretion when determining the appropriate sanction in an expedited proceeding. Under FINRA Rule 9559(n), it “may approve, modify or withdraw any and all sanctions, requirements, restrictions or limitations imposed by the notice and, pursuant to Rule 8310(a), may also impose any other fitting sanction.”

In determining the appropriate sanction, we considered that the SEC described the reporting provisions as important in monitoring the financial status of broker-dealers and protecting investors.⁵¹ According to the SEC, “[the provisions] involve fundamental safeguards imposed for the protection of the investing public on those who wish to engage in the securities business.”⁵² The SEC thus views reporting violations as serious.⁵³

We also considered that this is not the first time KJM failed to timely file an annual audit report. The Firm failed to do so last year as well,⁵⁴ which prompted FINRA to issue it a notice of suspension under FINRA Rule 9552 in July 2018.⁵⁵ On August 10, 2018, KJM filed a hearing request with the Office of Hearing Officers, stating—in language similar to its hearing request in this proceeding—that its 2018 annual audit report was “in the process of being completed by our new PCAOB Auditors who replaced our previous auditors, due to the untimely death of our previous auditor.”⁵⁶ KJM then filed its 2018 annual audit report on August 29, resulting in the dismissal of that proceeding before a hearing was held.⁵⁷

The circumstances present in the prior expedited proceeding, together with the current filing violation, raise significant questions about the Firm’s financial stability, making KJM’s continued filing delinquency especially troublesome. The Firm’s 2018 annual audit report contained a going concern opinion from the auditor, stating that KJM’s “recurring losses from

⁵⁰ FINRA Rule 2010 requires FINRA members to observe “high standards of commercial honor and just and equitable principles of trade.” A “[f]ailure to comply with Exchange Act Rule 17a-5 violates FINRA Rule 2010.” *TMR Bayhead Sec.*, 2018 FINRA Discip. LEXIS 27, at *4.

⁵¹ *Gremo Invs.*, 2011 SEC LEXIS 1695, at *14–15.

⁵² *Id.* at *15 (quoting *Fox & Co. Inv., Inc.*, 58 S.E.C. 873, 897 & n.50 (2005)).

⁵³ *Gremo Invs.*, 2011 SEC LEXIS 1695, at *15.

⁵⁴ Tr. 59.

⁵⁵ Tr. 59–60; JX-19.

⁵⁶ JX-20, at 2; Tr. 60–61.

⁵⁷ Tr. 61–62, 171. *See* Order Dismissing Proceeding in *Regulatory Operations v. KJM Securities, Inc.*, Expedited Proceeding No. FPI180006 (August 31, 2018) (“Prior Proceeding”); *see also* Order Taking Official Notice of the Record of Prior Proceeding (Oct. 14, 2019).

operations” and “net capital deficiency at March 31, 2018 raise substantial doubt about the [Firm’s] ability to continue as a going concern.”⁵⁸ After the Firm filed that report, FINRA conducted an examination of the Firm and found what it concluded were inaccuracies in the Firm’s financials, according to Glenn Album, FINRA Surveillance Director for District 9.⁵⁹ As a result, he added, “[W]e were looking towards this year’s annual audit to see whether the firm’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].”⁶⁰

But it is has now been five months since the Annual Audit Report was originally due, and it is unclear when, if ever, the Firm will file the report. Further, we are not persuaded that if the Annual Audit Report is filed, it will likely contain an unqualified audit opinion. In support of KJM’s request for an extension until June 17, 2019, to file its Annual Audit Report (discussed above), the Firm submitted conflicting letters from its auditor on this subject. In its May 29, 2019 letter, the auditor stated, among other things, that it was “unable to state that an unqualified opinion is expected to be issued based upon the work completed on the audit.”⁶¹ Upon reviewing the Firm’s submission, FINRA staff determined it could not grant the extension partly because the letter did not contain a representation that “[a]n unqualified opinion is expected to be issued.”⁶² So, the next day, KJM submitted a revised letter from the auditor, which then represented that “an unqualified audit opinion [*was*] expected to be issued based upon the work completed on the audit.”⁶³ The record in this proceeding does not explain why the auditor abruptly changed its position.

Based on these considerations, we uphold the suspension and the \$1,000 late fee⁶⁴ imposed by the Notice. And given how much time has elapsed since the Notice was issued, we shorten the conversion-to-an-expulsion provision in the Notice from three months to two months. We find that these sanctions are appropriately remedial and designed to impress upon the Firm and others the importance of timely filing their annual audit reports and to protect the investing public by reducing the likelihood of a recurrent violation.⁶⁵

⁵⁸ JX-21, at 4, 11.

⁵⁹ Tr. 77, 104–05.

⁶⁰ Tr. 104.

⁶¹ JX-7, at 2.

⁶² JX-8, at 1.

⁶³ JX-9.

⁶⁴ See *Sharemaster v. SEC*, 847 F.3d 1059, 1069–70 & n.8 (9th Cir. 2017) (finding that a late fee was a fine); *Sharemaster*, Exchange Act Release No. 83138, 2018 SEC LEXIS 1036, at *15 (Apr. 30, 2018) (finding that a late fee is “in essence a fine.”). KJM did not dispute that it is required to pay the fee. Tr. 200–01 (closing argument).

⁶⁵ Cf. *Gremo Invs.*, 2011 SEC LEXIS 1695, at *15 (upholding sanctions imposed by the FINRA hearing panel for failure to file an annual report by a PCAOB-registered firm “because they will impress upon the Firm and others the importance of filing annual reports that are audited by PCAOB-registered firms in compliance with the federal securities laws and protect the investing public by reducing the likelihood of any recurrence of a violation.”).

V. Order

For violating Securities Exchange Act of 1934 Section 17(e) and Exchange Act Rule 17a-5 thereunder, and FINRA Rule 2010, KJM is suspended from FINRA membership and assessed a late fee of \$1,000 for failing to file its Annual Audit Report.⁶⁶ The suspension and late fee will be effective upon the issuance of this Decision.⁶⁷

The suspension will convert to an expulsion at the end of two months following the date of this Decision unless KJM has filed an annual audit report for the fiscal year ending March 31, 2019, that complies with Securities Exchange Act of 1934 Section 17(e) and Exchange Act Rule 17a-5 thereunder, and has paid the late fee. If KJM files a compliant report and pays the late fee before it is expelled, then, pursuant to FINRA Rule 9552(f), it may file a written request for termination of the suspension on the ground of full compliance with this Decision.

Finally, KJM is ordered to pay costs of \$2,699.77, which includes an administrative fee of \$750 and the cost of the hearing transcript. The costs shall be due as of a date established by FINRA.


David R. Sonnenberg
Hearing Officer
For the Hearing Panel

Copies to:

Kosta J. Moustakas (via email, overnight courier, and first-class mail)
Adam H. Balin, Esq. (via email and first-class mail)
Matthew Minerva, Esq. (via email)
Kay L. Lackey, Esq. (via email)
Jennifer L. Crawford, Esq. (via email)

⁶⁶ Of this amount, \$985.03 remains unpaid. *See* n.25.

⁶⁷ The Hearing Panel has considered and rejects without discussion all other arguments of the parties.