SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 83138 / April 30, 2018

Admin. Proc. File No. 3-14104r

In the Matter of the Application of

SHAREMASTER
c/o Howard Feigenbaum
8747 Duval Lane
Hemet, CA 92545

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION — REVIEW OF DISCIPLINARY PROCEEDINGS

Registered securities association found that member firm and registered broker-dealer violated Securities Exchange Act of 1934 by failing to file an annual report that had been audited by an accountant registered with the Public Company Accounting Oversight Board. *Held*, association's findings of violations are *sustained* but the sanction is ordered to be *remitted*.

APPEARANCES:

Howard Feigenbaum, Sharemaster, for Sharemaster.

Alan Lawhead and *Gary Dernelle*, for the Financial Industry Regulatory Authority, Inc.

Appeal filed: October 29, 2010
Last brief received: June 30, 2017

Sharemaster, a FINRA member firm and registered broker-dealer, seeks review of FINRA disciplinary action finding that it violated Section 17(e) of the Securities Exchange Act of 1934 and Rule 17a-5 thereunder by filing an annual report that was audited by an accounting firm that was not registered with the Public Company Accounting Oversight Board ("PCAOB").[1] FINRA suspended Sharemaster until it filed a compliant annual report—which it did—and imposed a $1,000 late fee. We sustain FINRA's finding of violation but order it to remit the fee.

I. Background

On February 17, 2010, Sharemaster filed with FINRA an annual report for calendar year 2009 that contained financial statements that were audited by an accounting firm that was not registered with the PCAOB. Although Exchange Act Section 17(e) and Rule 17a-5 required that broker-dealer annual reports be audited by a PCAOB-registered accounting firm, the text of Rule 17a-5(e)(1)(i)(A) in the Code of Federal Regulations provided an exemption from filing audited annual reports if "[t]he securities business of such broker or dealer has been limited to acting as a broker (agent) for the issuer in soliciting subscriptions for securities of such issuer, said broker has promptly transmitted to such issuer all funds and promptly delivered to the subscriber all securities received in connection therewith, and said broker has not otherwise held funds or securities for or owed money or securities to customers."[2] Both we and our staff have stated consistently that this exemption applies only to brokers who act as agents on behalf of a single issuer.[3] Despite having acted as a broker for multiple issuers during the 2009 calendar year, Sharemaster claimed it was able to rely on the exemption provided in Rule 17a-5(e)(1)(i)(A).[4]

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[1] 15 U.S.C. § 78q(e); 17 C.F.R. § 240.17a-5.

[2] 17 C.F.R. § 240.17a-5(e)(1)(i)(A) (2009). Prior to 2009, Rule 17a-5 required that annual audited reports of financial statements be certified by an independent public accountant. 15 U.S.C. § 78q(e)(l)(A), as amended by the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 205(c)(2), 116 Stat. 745 (2002); 17 C.F.R § 240.17a-5(d); *Extension of Order Regarding Broker-Dealer Financial Statement Requirements Under Section 17 of the Exchange Act*, Securities Exchange Act Release No. 34-54920, 2006 WL 3627066 (Dec. 12, 2006) (expired Dec. 2008).

[3] *See, e.g.*, *First Nev. Sec., Inc.*, Exchange Act Release No. 34-30772, 1992 WL 129516, at *2 n.6 (June 4, 1992) (opinion of the Commission); *Lincoln Fin. Distribs., Inc.*, SEC No-Action Letter, 2017 WL 656009, at *1 (Feb. 17, 2017) (staff no-action letter). In its filings, Sharemaster acknowledges the Commission's longstanding "single issuer" requirement. Nonetheless, it contends that that requirement is inconsistent with the rule.

[4] Sharemaster did not seek an exemption under Rule 17a-5(e)(1)(i)(A) prior to the institution in 2009 of the requirement that a broker's financial statements be audited by a PCAOB-registered accountant. According to Sharemaster, the new requirement for an audit prepared by a PCAOB-registered accountant—rather than an independent public accountant—"sharply increased" the cost for it to file its annual statement from $582 to $2800.

Consistent with our longstanding precedent, FINRA deemed the annual report non-compliant because it had not been audited by a PCAOB-registered accounting firm. In a "Notice of Suspension" dated May 3, 2010, FINRA alerted Sharemaster that it was suspended until it filed a compliant annual report and that a $1,000 late fee for its failure to timely file a compliant annual report had been assessed.

On May 17, 2010, Sharemaster requested a hearing before FINRA. FINRA conducted an expedited hearing on June 24, 2010. On October 6, 2010, a Hearing Panel appointed under Rule 9559(d) issued a decision finding, based on "the SEC's long-standing interpretation of its own rule," that the exemption on which Sharemaster sought to rely is available only to brokers that solicit subscriptions for securities of a "single issuer." During the 2009 calendar year, Sharemaster had selling agreements with eight to ten different issuers, sold shares of multiple mutual funds to the firm's customers as a broker, and received commissions and fees from several issuers for the sale of mutual fund securities. On this basis, the Hearing Panel found that Sharemaster could not rely on the exemption provided in Rule 17a-5(e)(1)(A).

The Hearing Panel suspended Sharemaster until it filed the "requisite annual report." It ordered further that the suspension would convert to an expulsion at the end of six months "if Respondent has at that time not filed a properly audited annual report for 2009." The Hearing Panel also assessed $1,785 in fees and costs in connection with the hearing without mentioning specifically the $1,000 late fee that had been assessed in the Notice of Suspension.

On October 29, 2010, Sharemaster filed a timely application for review with the Commission. Sharemaster filed an annual report audited by a PCAOB-registered accounting firm three days later, and FINRA subsequently notified Sharemaster by letter that its suspension "has been lifted." Accordingly, on October 14, 2011, the Commission issued an order dismissing the application for review for lack of jurisdiction pursuant to Section 19(d) of the Exchange Act on the basis that the suspension was no longer in effect.[5]

Sharemaster appealed the Commission's October 14, 2011 order to the U.S. Court of Appeals for the Ninth Circuit. On March 9, 2012, we moved the Court of Appeals to remand the matter to us and, after the Court of Appeals granted our motion, ordered additional briefing on the Commission's review authority under Exchange Act Section 19(d)(2). In its brief filed with us on June 25, 2012, Sharemaster claimed that we had jurisdiction because "FINRA assessed and received payment of a $1000 fine against Sharemaster when the firm was suspended." According to Sharemaster, jurisdiction existed under Section 19(d)(2) because "[i]f the Commission finds that Sharemaster properly filed its first annual report pursuant to the

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[5] *Sharemaster*, Exchange Act Release No. 65570, 2011 WL 4889100, at *4 (Oct. 14, 2011).

exemption provided in Exchange Act Rule 17a-5(e)(1)(i), then the payment of a $1000 fine would be unwarranted and should be refunded."

On August 29, 2013, after considering the additional briefing, we withdrew our October 14, 2011 order dismissing Sharemaster's application. Nonetheless, we again dismissed Sharemaster's application for lack of jurisdiction because there was no "live" sanction for us to review.[6] We reiterated that the suspension did not constitute a "live" sanction because FINRA had lifted the suspension,[7] and we stated that the $1,000 that Sharemaster highlighted "appear[ed] to be another example of costs assessed as part of the FINRA proceeding" and "not a fine."[8]

Sharemaster again appealed our order to the Ninth Circuit. On February 2, 2017, the court remanded the matter to us for further proceedings.[9] The court deferred to our interpretation of Section 19(d) of the Exchange Act as permitting us to review only "live" sanctions.[10] Nevertheless, the court stated that the $1,000 charge "appear[ed] to be a penalty" imposed for Sharemaster's late filing and not the costs of pursuing an appeal.[11] The court remanded because "the Commission unreasonably decided that the monetary penalty that FINRA imposed on Sharemaster was not a sanction and thus not a live disciplinary sanction."[12]

The court noted, however, that on remand the Commission could nonetheless determine "that the $1,000 charge" was "not a sanction."[13] The court held "only that on th[e] record, the Commission has not shown that this controversy is moot."[14]

On April 17, 2017, we ordered the parties to file briefs addressing our jurisdiction to consider Sharemaster's application for review and, if jurisdiction exists, the merits of the firm's appeal.

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6 *Sharemaster*, Exchange Act Release No. 70290, 2013 WL 4647204, at *3 (Aug. 29, 2013).

7 *Id*. at *5.

8 *Id.* at *6 n.37.

9 *Sharemaster v. SEC*, 847 F.3d 1059 (9th Cir. 2017).

10 *Id.* at 1068.

11 *Id.* at 1069-70.

12 *Id.* at 1071.

13 *Id.* at 1070 n.9.

14 *Id.*

II. Analysis

A. Jurisdiction

Our jurisdiction to review FINRA and other SRO disciplinary actions is governed by Exchange Act Section 19(d) and includes—as relevant here—the imposition of a "final disciplinary sanction."[15] We construe Section 19(d) as requiring a "live" sanction—that is, a sanction that exists at the time of review for us to potentially affirm, modify, or set aside.[16] We conclude that the $1,000 late fee imposed in this case satisfies this jurisdictional requirement.

1. The late fee FINRA imposed for Sharemaster's untimely filing constitutes a final disciplinary sanction that we have jurisdiction to review.

We find that the $1,000 late fee FINRA imposed on Sharemaster was a final disciplinary sanction subject to our review under Exchange Act Section 19(d). The Ninth Circuit held that "a fine is a 'disciplinary sanction,'" and it considered the late fee to be a fine because it "appear[ed] to be . . . imposed for not timely filing an annual report prepared by a PCAOB-registered accountant."[17] The Ninth Circuit distinguished this type of late fee from an administrative fee imposed "for pursuing an administrative appeal."[18] The supplemental briefing we ordered following the Ninth Circuit's remand confirms that the late fee was a fine imposed for Sharemaster's failure to timely file an annual report audited by a PCAOB-registered accountant. As a result, it is a sanction.

Although the Ninth Circuit indicated that "[t]he $1,785 sum that FINRA ordered Sharemaster to pay evidently included a $1,000 penalty for not timely complying with Rule 17a-5(d),"[19] the parties agree that the $1,000 late fee was separate from the $1,785 in costs that the Hearing Panel imposed in its October 6, 2010 order.[20] The supplemental briefing clarified that

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15 15 U.S.C. § 78s(d).

16 *Sharemaster*, Exchange Act Release No. 70290, 2013 WL 4647204, at *3-4 (Aug. 29, 2013).

17 *Sharemaster*, 847 F.3d at 1069-70.

18 *Id.* at 1070.

19 *Id.* The court assumed that the $1,785 referenced in the Hearing Panel's decision included a $750 administrative fee, a $35 transcript fee, and a $1,000 penalty on Sharemaster for failing to file a compliant annual report. *Id.* at 1069. The briefs that the parties submitted on remand clarified that the $1,785 in costs comprised "an administrative fee of $750.00 and the cost of the hearing transcript," which was $1,035.00.

20 On this point, we grant FINRA's May 25, 2017 Motion for Leave to Submit Additional Evidence and have considered the parties' related submissions. *See* 17 C.F.R. § 201.452.

the $1,000 charge on which the Ninth Circuit premised jurisdiction is the late fee assessed by FINRA staff several months prior to the issuance of the Hearing Panel's decision.

As discussed above, the Notice of Suspension alerted Sharemaster of its suspension and the imposition of a $1,000 late fee for failure to timely file an annual report audited by a PCAOB-registered accounting firm. The Notice of Suspension also advised Sharemaster that the fee would be automatically deducted from its Central Registration Depository ("CRD") account. FINRA deducted $1,000 from Sharemaster's CDR account to cover the fee on May 14, 2010.

The Notice of Suspension stated further that "if your firm requests a hearing, you should be aware that, pursuant to FINRA Rule 8310(a) and 9559(n), a Hearing Officer, or, if applicable, Hearing Panel may approve, modify, or withdraw any and all sanctions, requirements, restrictions or limitations imposed by this notice, and may also impose any other fitting sanctions."[21] Sharemaster timely requested a hearing on May 17, 2010. In doing so, Sharemaster requested that "the Hearing Officer/Panel deem the firm's annual report filed, withdraw the firm's pending suspension from membership and withdraw fees assessed against the firm." FINRA has conceded that Sharemaster timely challenged both its suspension and the imposition of the $1,000 late fee. In its October 6, 2010 decision, the Hearing Panel suspended Sharemaster until it filed a compliant annual report and imposed an additional $1,785 in administrative costs. The Hearing Panel rejected all other arguments without discussion.

We conclude that the $1,000 late fee is a fine imposed for Sharemaster's failure to timely file an annual report audited by a PCAOB-registered accountant. The assessment of the fee necessarily resulted only from FINRA's determination that Sharemaster was not entitled to the exemption under Exchange Act Rule 17a-5(e)(1)(i)(A).[22] Sharemaster would not have otherwise been subject to a late fee. Indeed, if Sharemaster was entitled to rely on the exemption the financial statements Sharemaster submitted on February 17, 2010 would have been considered timely as they were due March 1, 2010. As a result, the Hearing Panel presumably would have been compelled to withdraw the fee had Sharemaster prevailed on the merits. Because we, too, would be "compelled to set aside the $1,000" charge "if Sharemaster prevails on the merits of

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[21] *See* FINRA Rule 9559(n)(1) (stating that in "any action brought under the Rule 9550 Series . . . the Hearing Officer or, if applicable, the Hearing Panel 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").

[22] *See* Section 4(g) of Schedule A to FINRA's By-Laws ("[T]here shall be imposed upon each member required to file reports . . . a fee of $100 for each day that such report is not timely filed. The fee will be assessed for a period not to exceed 10 business days.").

[its] argument," the $1,000 late fine is a sanction in the form of a fine and is "unlike the sunk transactional costs of pursuing an administrative appeal."[23]

2. We reject FINRA's argument that the late fee is not a sanction.

We reject FINRA's contention that the late fee is not a final disciplinary sanction that is reviewable under the Exchange Act. First, FINRA argues that the late fee "was not the result of a FINRA disciplinary action and thus cannot constitute a final disciplinary sanction." According to FINRA, the late fee cannot serve as a basis for Commission jurisdiction because the assessment of the fee "involved no determination of wrongdoing by FINRA and did not have a disciplinary character"—it was merely a fee levied by FINRA staff in the ordinary course of business several months before the Hearing Panel decision. But FINRA ignores the fact that the only reason the fee was imposed was that it determined that Sharemaster failed to file a compliant 2009 annual report. The late fee was in essence a fine. And the Hearing Panel approved that fine when it did not cancel it despite Sharemaster's explicit objection.

Indeed, we have previously treated this type of late fee as a final disciplinary sanction in the form of a fine. In *Gremo Investments, Inc.*, the applicant submitted an annual report that had not been audited by a PCAOB-registered accounting firm, and FINRA deemed the report not filed and assessed a $1,000 late fee pursuant to the same By-Laws applied in this case.[24] We exercised our jurisdiction to review the applicant's challenge to the imposition of the "fine."[25]

Second, FINRA argues that "[u]nlike the threat of suspension, assessment of the late-filing fee could not be avoided by Sharemaster's request for a hearing" because "[a] late-filing fee is not an element of FINRA Rule 9552 and is not stayed by the filing of a hearing request."[26] As discussed above, we find that the late fee is an element of Rule 9552 because it is "a sanction, requirement, restriction, or limitation" that the Hearing Panel could have "approved, modified, or withdrawn."[27] The fact that the late fee had already been paid—and thus could not have been "stayed" by a request for a hearing—is not relevant to that determination. We see no reason why the late fee is not a fine that should be reviewed as a final disciplinary sanction merely because

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23 *Sharemaster*, 847 F.3d at 1070.

24 Exchange Act Release No. 64481, 2011 WL 1825020, at *2, 4 n.19 (May 12, 2011). Unlike here, the Hearing Panel in *Gremo Investments* mentioned the late fee. But that is not determinative of whether the late fee constitutes a sanction in the form of a fine.

25 *Id.* at *4.

26 *See* FINRA Rule 9552(d) ("The suspension referenced in a notice . . . shall become effective . . . unless stayed by a request for a hearing pursuant to Rule 9559.").

27 *See supra* note 21.

FINRA had already deducted the sum from Sharemaster's CDR account at the time Sharemaster requested a hearing. Sharemaster specifically requested a hearing to challenge the suspension and the late fee. Even if the initial deduction of the late fee from Sharemaster's account could not have been "avoided" by Sharemaster's request for a hearing, the Hearing Panel could have acted to cancel the deduction or otherwise remit the fee had it found for Sharemaster on the merits. Indeed, as discussed above, the Hearing Panel approved the fee when it rejected all of Sharemaster's other arguments, including its argument that the Hearing Panel should "withdraw fees assessed against the firm," without discussion.

Finally, FINRA argues that the Commission lacks jurisdiction over fee assessments generally. FINRA cites *Marshall Financial, Inc.*,[28] in which we noted that "Exchange Act Section 19 does not appear to authorize the setting aside of NASD's Fees assessment or authorize 'remission' of the Fees."[29] But *Marshall Financial* concerned administrative fees assessed in connection with hearings before an SRO.[30] Those fees are akin to the administrative fees and costs that FINRA imposed against Sharemaster after it requested a hearing. Unlike the $1,785 in those fees and costs, the $1,000 late fee was a fine directed at the underlying conduct.[31]

For the reasons set forth above, we find that the $1,000 late fee FINRA imposed on Sharemaster in May 2010 constitutes a final disciplinary sanction that remains "live" and gives the Commission jurisdiction in this matter under Exchange Act Section 19(d).

B. Merits

Exchange Act Section 19(e) governs the Commission's review of FINRA disciplinary action and requires the Commission to sustain such action if the record shows by a preponderance of the evidence that a member firm engaged in the conduct FINRA found, that the conduct violated FINRA's rules, and that FINRA's rules are, and were applied in a manner, consistent with the purposes of the Exchange Act.[32]

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28 Exchange Act Release No. 50343, 2004 WL 2026518 (Sept. 10, 2004).

29 *Id.* at *3 n.21 (discussing fees associated with arbitration proceeding in which the applicant had been named).

30 *Id.* at *1.

31 On May 12, 2017, after the Ninth Circuit remanded the matter, FINRA notified Sharemaster in a letter that it was "forgiving the $1,785 in costs" that the Hearing Panel ordered and that Sharemaster was "released from any obligation to pay this amount to FINRA."

32 *See* 15 U.S.C. § 78s(e)(1).

Sharemaster claims that its 2009 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 provided by Exchange Act Rule 17a-5(e)(1)(i)(A). Sharemaster bears the burden of establishing that it was entitled to rely on the exemption.[33]

Exchange Act Rule 17a-5(e)(1)(i)(A), as it appeared in the Code of Federal Regulations at the time Sharemaster filed its 2009 annual report, provided that a broker-dealer's financial statements need not be audited if "[t]he securities business of such broker or dealer has been limited to acting as a broker (agent) for *the* issuer in soliciting subscriptions for securities of such issuer, said broker has promptly transmitted to such issuer all funds and promptly delivered to the subscriber all securities received therewith, and said broker has not otherwise held funds or securities for or owed money or securities to customers."[34] Sharemaster contends that this exemption may be relied on by a broker—like Sharemaster—that acts as an agent in soliciting subscriptions for *multiple* issuers, so long as the broker neither holds customers' funds or securities nor owes customers money or securities. FINRA contends that the exemption applies only to a broker acting as an agent for a *single* issuer.

We resolved this issue in 1977. At that time, we amended Rule 17a-5(e)(1)(i)(A) to provide that the exemption applied if "[t]he securities business of such broker or dealer has been limited to acting as broker (agent) for *an* issuer in soliciting subscriptions for securities of such issuer . . . ."[35] This change clarified that the exemption applied only to a broker acting as an agent for a single issuer. At the time, our staff recognized that the change was made "in order to clarify precisely" the question of whether the exemption applied to brokers who act as the agent for a single issuer or for multiple issuers.[36] And we ourselves stated after the 1977 amendment that Rule 17a-5(e)(1)(i)(A) "exempts from the audit requirement firms which limit their business to soliciting, as agent, subscriptions for securities of a single issuer . . . ."[37]

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[33] *See, e.g.*, *FCS Sec.*, Exchange Act Release No. 64852, 2011 WL 2680699, at *5 (July 11, 2011).

[34] 17 C.F.R. § 240.17a-5(e)(1)(i)(A) (2017) (emphasis added).

[35] 42 Fed. Reg. 23,786, 23,788 (May 10, 1977) (emphasis added) (adopting the change); *see also* 42 Fed. Reg. 782, 786 (Jan. 4, 1977) (proposing the change and showing the change in the text of the regulation); *cf.* 17 C.F.R. 240.17a-5(e)(1)(i)(a) (1976) (stating that the exemption applied if the "securities business of such broker or dealer has been limited to acting as broker (agent) for *the* issuer in soliciting subscriptions for securities of such issuer") (emphasis added).

[36] *Continental Wingate Capitol Corp.*, SEC No-Action Letter, 1977 WL 13703, at *4 (Jan. 12, 1977).

[37] *First Nev. Sec.*, 1992 WL 129516, at *2 n.6.

Our staff has stated that the exemption in Rule 17a-5(e)(1)(i)(A) "as amended . . . [g]enerally . . . applies only to brokers and dealers engaged exclusively in self-underwriting."[38] In other words, the exemption "is basically designed to relieve a broker-dealer engaged exclusively in underwriting the issues of its parent from the requirement that its annual report of financial statements be audited."[39] As a result, our staff has consistently taken the position that the exemption is available to broker-dealers in this situation.[40] Our staff has also taken the position that the exemption does not apply to a broker that acts for multiple issuers, even if it "usually conducts business with only one [issuer] at any given time," because the exemption applies "only to those situations which in fact involve a single issuer, as in self-underwriting."[41] 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.[42]

Although the 1977 amendment was published in the Federal Register, an error was made when printing the new rules in the Code of Federal Regulations. Despite the amendment, the Code of Federal Regulations continued to describe the exemption as limited to a broker that acts as an agent "for *the* issuer in soliciting subscriptions for securities."[43] Nonetheless, the rules as

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38 *PRI Sec. Corp.*, SEC No-Action Letter, 1978 WL 10735, at *2 (Jan. 8, 1978).

39 *John H. Anderson*, SEC No-Action Letter, 1978 WL 481000, at *1 (Jan. 6, 1978). In *Anderson*, the staff stated that the change in the language of the exemption from applying to brokers that solicited subscriptions "for the issuer" to brokers that solicited subscriptions "for an issuer" "effected no change in the application of this provision." *Id.* That is because the staff took the view that the exemption was limited to brokers that solicited subscriptions for a single issuer even before the change effected by the 1977 amendment. *E.g.*, *John Monroe*, SEC No-Action Letter, 1976 WL 12025, at *1 (June 1, 1976). As discussed above, the staff recognized that the 1977 amendment "clarif[ied]" that the exemption was limited to brokers that solicited subscriptions for a single issuer. *See supra* note 36. We agree that, regardless of any ambiguity in the language of the exemption before the 1977 amendment, the 1977 amendment clarified that the exemption was limited to brokers that solicited subscriptions of a single issuer.

40 *E.g.*, *Westar Fin. Serv., Inc.*, SEC No-Action Letter, 1986 WL 66946 (May 13, 1986).

41 *Allison Waugh & Co., Inc.*, SEC No-Action Letter, 1976 WL 442417 (June 3, 1976).

42 *Cf. First Nev. Sec.*, 1992 WL 129516, at *2 & n.6 (stating that exemption did not apply to broker that "had done no business" during its fiscal year because "the exemption applies only to a firm engaged in specified types of business"—*i.e.*, soliciting subscriptions "for securities of a single issuer"—and not to a broker "that is not engaged in business at all").

43 17 C.F.R. § 240.17a-5(e)(1)(i)(A) (1978) (emphasis added); *see also* 17 C.F.R. § 240.17a-5(e)(1)(i)(A) (2009) (containing the same language as the 1978 CFR).

written in the Federal Register clarified the scope of the exemption.[44] In this case, other information available to the industry also provided Sharemaster with notice. Indeed, although the parties in this proceeding have not cited the amendment to Rule 17a-5 in 1977, other industry participants have recognized the change enacted by that amendment.[45] The 1977 amendment also has been captured in other authorities that publish the text of the Commission's regulations.[46] And our staff has cited the amended language in communications with the industry.[47] Indeed, our staff has informed industry participants repeatedly since 1977 that the exemption is available only to brokers that act on behalf of a single issuer.[48] We have similarly informed industry participants of the single issuer requirement.[49]

Sharemaster cites no statement from the Commission, the staff, or FINRA that led it to believe the exemption applied more broadly. To the contrary, our staff cited the amended language to Sharemaster prior to its filing of the 2009 annual report. On August 21, 2009, in response to an inquiry from Sharemaster, a member of our Office of the Chief Accountant informed Sharemaster via email that Rule 17a-5(e)(1)(i)(A) applies only if "the business of the

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[44] *See Romero v. U.S. Dep't of Justice*, 556 F. App'x 365, 370 (5th Cir. 2014); *Ortiz v. Eichler*, 616 F. Supp. 1046, 1061 n.10 (D. Del. 1985).

[45] *E.g.*, *Pacific Real Estate Sec. Co., Inc.*, SEC No-Action Letter, 1992 WL 59841, at *2 (Mar. 2, 1992); *United Res., Inc.*, SEC No-Action Letter, 1991 WL 273085, at *1 (Dec. 13, 1991); *Metric Capital Corp.*, SEC No-Action Letter, 1991 WL 187403, at *1 (Aug. 29, 1991).

[46] *See, e.g.*, John C. Coffee, et al., Federal Securities Laws: Selected Statutes, Rules, and Forms 1316 (Foundation Press 2008 ed.); Richard W. Jennings and Harold Marsh, Jr., Selected Statutes, Rules and Forms under the Federal Securities Laws 662 (Foundation Press 1982 ed.); *see also* 14B Guy P. Lander, U.S. Securities Law for International Financial Transactions and Capital Markets § 13:199 (2d ed.) (stating that the exemption under Rule 17a-5 applies if "the securities business of the broker-dealer has been limited to acting as broker (agent) for an issuer in soliciting subscriptions for securities of the issuer").

[47] *Compare, e.g.*, *SSMT Secs. Corp.*, SEC No-Action Letter, 1996 WL 108560, at *1 (Mar. 14, 1996) (reciting the language of Rule 17a-5(e)(1)(i)(A) as we amended it and granting no-action relief to a broker whose business was limited to acting as an agent for a single issuer), *with Cosmopolitan Planning, Ltd.*, SEC No-Action Letter, 1981 WL 24810, at *1 (June 6, 1981) (reciting the language of Rule 17a-5(e)(1)(i)(A) as we amended it and denying no-action relief to a broker whose business was limited to acting as an agent for multiple issuers because the exemption applies only to a broker "whose securities business has been limited to acting as a broker (agent) for a single issuer in soliciting subscriptions for securities of such issuer").

[48] *See, e.g.*, *Probity First Fin. Serv.*, SEC No-Action Letter, 2004 WL 3076272, at *1 (Dec. 16, 2004); *Charter Secs. Corp.*, SEC No Action Letter, 1991 WL 178668, at *1 (Mar. 11 1991).

[49] *First Nev. Sec.*, 1992 WL 129516, at *2 n.6.

broker-dealer is limited to acting as an agent for an issuer in soliciting subscriptions for securities."

We apply Rule 17a-5(e)(1)(i)(A), as amended in 1977, to Sharemaster's annual report for 2009. The amendment clarified that the exemption is available to Sharemaster only if it acted as an agent in soliciting subscriptions for a single issuer. Because Sharemaster admits that it acted for multiple issuers, it was not exempt from the requirement that its 2009 annual report contain financial statements that were audited by an accounting firm registered with the PCAOB.

Accordingly, we find that Sharemaster engaged in the conduct FINRA found, that the conduct violated FINRA's rules, and that FINRA's rules are, and were applied in a manner, consistent with the purposes of the Exchange Act.[50] Sharemaster did not file a compliant annual report for 2009 in a timely manner. Section 4(g) of Schedule A to FINRA's By-Laws required that Sharemaster do so. This rule is, and was applied in a manner, consistent with the purposes of the Exchange Act because one of the "basic purposes" of the Exchange Act "is to regulate the conduct of broker-dealers."[51] We therefore sustain FINRA's finding of violation.

In doing so, we note that only the action FINRA took against Sharemaster for its failure to timely file a compliant annual report for 2009 is before us. Although Sharemaster seeks to be "reimburs[ed]"for the amounts it expended in hiring a PCAOB-registered accountant to audit its financial statements in its subsequent annual reports, FINRA has not taken any action against Sharemaster with respect to those reports and Sharemaster has not filed an application for review of any such action. In any case, Sharemaster has provided no reason why our analysis in this opinion would not also apply to its subsequent annual reports.[52]

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50 *See supra* note 32.

51 *MKM Partners LLC*, Exchange Act Release No. 79700, 2016 WL 7473302, at *5 (Dec. 28, 2016) (finding that an exchange's disciplinary action against a member for failing to file timely a required annual report under Rule l7a-5 was consistent with the Exchange Act).

52 In 2013, we published in the Federal Register an amendment to Rule 17a-5(e)(1)(i)(A) in order to "modernize certain terms in the rule in a manner consistent with the Commission's 'plain English' initiative." *Broker-Dealer Reports*, 78 Fed. Reg. 51,910, 51,925 (Aug 21, 2013). The release does not indicate that a change from the language limiting the exemption to brokers that solicit subscriptions "for an issuer" was intended. Nonetheless, the amendment changed the language of the exemption to apply if "[t]he securities business of the broker or dealer has been limited to acting as 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." *Id.* at 51,990. As a result, this amendment reintroduced the language that the exemption applied if the broker

cont. . . .

* * *

For the reasons set forth above, we sustain FINRA's finding that Sharemaster failed to timely file a PCAOB-audited financial report for fiscal year 2009.

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."[53] Section 15A(h)(1)(C) also provides that FINRA's determination to impose a disciplinary sanction "shall be supported by a statement setting forth . . . the sanction imposed and the reason therefor."[54] Here, FINRA did not provide the required statement setting forth the reasons for fining Sharemaster $1,000. The Hearing Panel did not explain why it was appropriate to fine Sharemaster for filing its 2009 annual report late under the circumstances. As discussed above, Sharemaster did not ignore the deadline for filing its 2009 annual report. It filed its 2009 annual report within the deadline and accompanied its filing with the explanation that it had not had its financial statements audited because it was relying on the exemption in Rule 17a-5(e)(1)(i)(A). Although Sharemaster's reliance on that exemption was erroneous, the Hearing Panel did not explain why the $1,000 late fee was justified. Indeed, 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. The Hearing Panel said only that it had "considered and reject[ed] without discussion" all

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cont. . . .
solicited subscriptions for "the issuer" rather than "an issuer." We doubt that this was anything but a scrivener's error resulting from the failure to capture the 1977 amendment in the Code of Federal Regulations. As noted above, the amendment was made to modernize the sentence and not to change its meaning. The other alterations simply change "such broker" or "said broker" to "the broker," "such issuer" to "the issuer," and "in connection therewith" to "in connection with the transaction." Indeed, our staff has continued to refer to the exemption as limited to a single issuer. *Lincoln Fin. Distribs.*, 2017 WL 656009, at *1 (providing the staff's view that the exemption was available to Lincoln Financial Distributors, the wholesale broker-dealer of Lincoln National Corporation). In any case, the effect of this amendment on the applicability of the exemption is not before us.

53 15 U.S.C. § 78s(e)(2); *see, e.g.*, *Gremo Invs.*, 2011 WL 1825020, at *4; *FCS Sec.*, 2011 WL 2680699, at *9. Applicants do not allege, and the record does not show, that FINRA's $1000 late-filing fee imposed an undue burden on competition.

54 15 U.S.C. § 78*o*-3(h)(1)(C).

arguments not addressed specifically. This statement did not comply with Exchange Act Section 15A(h)(1)(C).[55] Accordingly, we order FINRA to remit the $1,000 to Sharemaster.[56]

An appropriate order will issue.[57]

By the Commission (Chairman CLAYTON and Commissioners STEIN, PIWOWAR, JACKSON and PEIRCE).

Brent J. Fields
Secretary

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55 *Cf. Gremo Invs., Inc.*, Expedited Proceeding No. FPI100016 (Sept. 17, 2010) (finding that firm had "presented no persuasive reason to reduce the fine below the level recommended"), *available at* http://www.finra.org/sites/default/files/OHODecision/p123660_0.pdf.

56 Although we might otherwise have remanded the matter to FINRA in order to allow it to attempt to provide the explanation missing from the Hearing Panel's decision, we decline to do so here in light of the protracted nature and unique facts and circumstances of this particular proceeding. *See, e.g.*, *BethEnergy Mines, Inc. v. Director, Office of Workers Compensation Programs*, 39 F.3d 458, 464 (3d Cir. 1994) ("While the Board could have remanded the matter, we hardly can fault it for bringing these protracted proceedings to a close").

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

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 83138 / April 30, 2018

Admin. Proc. File No. 3-14104r

In the Matter of the Application of

SHAREMASTER

For Review of Disciplinary Action Taken By

FINRA

ORDER REMITTING SANCTION

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

ORDERED that the $1,000 fine FINRA imposed on Sharemaster be remitted.

By the Commission.

Brent J. Fields
Secretary