SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 79700 / December 28, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-17262

In the Matter of the Application of

MKM PARTNERS LLC

For Review of Disciplinary Action Taken by

BATS Exchange, Inc.

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION — REVIEW OF DISCIPLINARY PROCEEDINGS

Broker-dealer appeals from a BATS disciplinary action finding that it failed to timely submit to BATS its annual audited reports as required by Exchange Act Rule 17a-5(d). *Held*, BATS's finding of violation is sustained and its sanctions are affirmed.

APPEARANCES:

Steven D. Oppenheim and *Petra v.Z. Davenport*, for MKM Partners, LLC

Alan Lawhead and *Celia L. Passaro* for Financial Industry Regulatory Authority, Inc.[1]

Appeal filed: May 26, 2016
Last brief received: September 16, 2016

MKM Partners, LLC ("MKM"), a broker-dealer and member of the BATS Exchange, Inc. ("BATS"), seeks review of a decision by the Appeals Committee of the Board of Directors of BATS. The Appeals Committee affirmed a hearing panel order imposing a $2,500 fine and public censure because MKM did not timely submit to BATS its 2013 annual audited reports, as required by Rule 17a-5(d) under the Securities Exchange Act of 1934 ("Exchange Act"). MKM

[1] FINRA is litigating this case on behalf of BATS.

also failed to timely submit to BATS its annual audited reports for its three preceding fiscal years.

MKM does not dispute that it engaged in the conduct BATS found, or that this conduct violated the applicable rule. But MKM contends in its application for review that BATS impermissibly resolved this disciplinary proceeding by summary disposition rather than after an in-person hearing. MKM also challenges BATS's decision to impose a public censure. For the reasons explained below, we find that BATS acted within its discretion in resolving this proceeding by summary disposition and we sustain the sanction BATS imposed.

I. BACKGROUND

A. MKM failed to provide BATS with its 2013 annual audited reports.

MKM is a broker-dealer with its principal place of business in Stamford, Connecticut. MKM became a BATS member on August 3, 2009, and has since maintained its registration with BATS. Pursuant to Exchange Act Rule 17a-5(d), MKM was required to provide its annual audited reports to BATS within 60 calendar days of the end of its fiscal year.

MKM's 2013 fiscal year ended on December 31, 2013. In February 2014, BATS issued Regulatory Circular 14-001, reminding BATS members of their obligation to provide their fiscal year 2013 annual audited reports to BATS.[2] The Regulatory Circular emphasized Rule 17a-5(d)(6)'s requirement that members provide copies of their annual audited reports "'to all self-regulatory organizations of which [the] broker or dealer is a member,'" and explained that "BATS members are required to provide copies of their annual audit[ed] reports to [BATS]." Regulatory Circular 14-001 also included instructions on how to provide BATS with the required copies of the 2013 annual audited reports, as well as whom to contact with questions. MKM did not provide BATS with a copy of its fiscal 2013 annual audited reports by the March 1, 2014 deadline.

On March 27, 2014, BATS emailed MKM an informal reminder of its obligation. After MKM failed to respond, BATS referred the matter to FINRA for investigation. On June 16, 2014, FINRA sent MKM a letter noting "that the Firm has failed to provide BATS with a copy of the annual audit reports" for its 2013 fiscal year. It further requested that "[i]n connection with this review" MKM provide its fiscal 2013 annual audited reports along with "a written statement" explaining the reason for MKM's failure to timely submit the annual audited reports. MKM submitted its 2013 annual audited reports to BATS on June 20, 2014, and a week later responded to FINRA's letter, explaining that its failure to timely submit "was the result of an error, now corrected, in failing to maintain this on the Compliance calendar."

---

[2] BATS had no obligation to remind its members of their obligations under Rule 17a-5.

B. MKM also failed to timely submit its annual audited reports to BATS before 2013.

MKM's failure to timely submit its 2013 annual audited reports was not a one-time occurrence. For the three preceding fiscal years—2010, 2011, and 2012—MKM submitted its annual audited reports to BATS more than 60 calendar days after the end of its fiscal year. MKM's failures occurred even though BATS sent each of its members (including MKM) a notice each year reminding them of their obligation to provide their annual audited reports to BATS, and also sent MKM email reminders as well as a formal Cautionary Action Letter:

1. In January 2011, BATS issued Regulatory Circular 11-001, reminding BATS members of their obligation to provide BATS with their fiscal year 2010 annual audited reports. MKM did not submit the 2010 annual audited reports on time, however, and on April 12, 2011, BATS emailed MKM's Chief Compliance Officer an informal reminder of its obligation. MKM submitted the 2010 annual audited reports shortly after receiving the email from BATS.

2. In February 2012, BATS issued Regulatory Circular 12-002, reminding BATS members of their obligation to provide BATS with their fiscal year 2011 annual audited reports. Again, MKM did not submit the 2011 annual audited reports on time. On May 25, 2012, in lieu of an informal email as in 2011, BATS sent MKM a formal letter, designated as a Cautionary Action Letter, determining that MKM had not met its obligation, and "caution[ing] that further evidence of these or other violations related to SEC Rule 17a-5(d)(6) could result in formal disciplinary action against the firm." The Cautionary Action Letter further explained that "[w]hile the Exchange does not contemplate taking further action at this time, . . . Cautionary [Action] Letters and other regulatory actions against a firm for prior violations of a particular rule will be considered by BATS staff in determining an appropriate disciplinary action against the firm for subsequent violations of the applicable rule(s)." BATS directed MKM to submit its 2011 annual audited reports along with "[a] statement of the steps that have been or will be taken to ensure compliance in these areas in the future." MKM provided its 2011 annual audited reports to BATS on May 29, 2012, and stated that it had "taken steps to assure compliance in the future by coordinating with our accounting department and CFO to provide a copy of our annual audit to BATS" "not more than sixty . . . days after our year end per SEC Rule 17a-5(d)(5)."

3. In February 2013, BATS issued Regulatory Circular 13-001, reminding BATS members of their obligation to provide BATS with their fiscal year 2012 annual audited reports. Despite having received a Cautionary Action Letter the previous year and representing to BATS that it had "taken steps to assure compliance in the future," MKM did not submit its annual audited reports on time. On March 27, 2013, BATS emailed MKM another informal reminder of its obligation, as it had in 2011. MKM submitted the 2012 annual audited reports on April 4, 2013.

C. BATS censured and fined MKM for failing to timely submit its 2013 annual audited reports.

In March 2015, FINRA filed a statement of charges on BATS's behalf alleging that MKM violated Exchange Act Rule 17a-5(d)(6) by not timely providing its 2013 annual audited

reports to BATS. On April 28, 2015, the Hearing Officer issued an order stating that he had "confirmed with counsel that there are no material facts in dispute regarding the violation" and that "[c]ounsel agreed that they would discuss the possibility of submitting the case on the papers" rather than at an in-person hearing. The order set a conditional hearing date "[i]n the event a hearing is needed," and ordered the parties to advise the Hearing Officer "if they reach an agreement on proceeding on the papers." Subsequently, the parties proposed a briefing schedule for a motion for summary disposition and briefed FINRA's summary disposition motion. Although MKM suggested that some material facts were in dispute, it did not challenge the Hearing Officer's authority to entertain and decide a motion for summary disposition. Thereafter, the Hearing Officer adjourned the hearing because a new Hearing Panelist needed to be appointed, and stated that the reconstituted "Hearing Panel [would] consider the pending motion for summary disposition" and "if a hearing is required, the case will be rescheduled."

The Hearing Panel issued an order granting FINRA's motion for summary disposition on September 1, 2015. Acknowledging that it was a "novel issue," the Hearing Panel decided that BATS Rule 8.6(d) authorized it "to summarily decide a disciplinary proceeding where there are no genuine, material issues [of fact] in dispute." It then found that MKM violated Exchange Act Rule 17a-5(d)(6), rejected MKM's contention that it had been relieved of its obligation under that Rule, and imposed a censure and $2,500 fine.

An Appeals Committee of the Board of BATS affirmed the Hearing Panel's decision on April 25, 2016. The Appeals Committee agreed that BATS Rule 8.6(d) authorizes a Hearing Panel to decide a motion for summary disposition, and cited the existence of "summary disposition procedures' before "[t]he Commission and other [SROs], including FINRA and the New York Stock Exchange."[3] It further agreed that there was no genuine issue of material fact that MKM violated Exchange Act Rule 17a-5(d)(6). It also rejected MKM's claims that it was the subject of retaliation for not settling, and that the Hearing Officer was biased against it. The Appeals Committee affirmed the sanctions of a censure and $2,500 fine, given MKM's recidivism and "disregard for its obligation to comply with regulatory rules," as well as its "attempt to minimize the importance of its misconduct."

---

[3] The Appeals Committee rejected MKM's argument—raised for the first time at that stage, and not renewed before us here—that it was entitled to an in-person evidentiary hearing under BATS Rule 8.7 ("Summary Proceedings"). Rule 8.7 provides that "[i]f the Respondent requests a Hearing, the matters which are the subject of the hearing shall be handled in accordance with the hearing and review procedures of this Chapter." The Appeals Committee explained that Rule 8.7 provides an "alternative procedure" to disciplinary proceedings, under circumstances where the "respondent has admitted the charges asserted by BATS, failed to answer them, or the charges are otherwise not in dispute"; under this alternative procedure, the "BATS chief regulatory officer can impose a penalty without a hearing" unless the respondent requests one. But Rule 8.7 did not apply, the Appeals Committee said, because "the complaint against MKM was handled under the disciplinary proceedings rules," and in any event "MKM received a hearing before the hearing panel, albeit one on the record."

II. ANALYSIS

We base our findings on an independent review of the record and apply the preponderance of the evidence standard for self-regulatory organization ("SRO") disciplinary actions.[4] Pursuant to Exchange Act Section 19(e)(1), we determine whether MKM engaged in the conduct BATS found; whether that conduct violated the relevant provisions; and whether those provisions are, and were applied in a manner, consistent with the purposes of the Exchange Act.[5] As explained below, we find that BATS's finding of violation meets this standard. We also reject MKM's argument that summary disposition was inappropriate.

A. We sustain BATS's finding that MKM violated Exchange Act Rule 17a-5(d).

1. MKM engaged in the conduct BATS found.

The record supports the Appeals Committee's determination that MKM provided BATS with its 2013 annual audited reports late. Indeed, MKM has conceded that it failed to timely provide the reports to BATS. MKM was required to submit the reports by March 3, 2014, but did not do so until June 20, 2014—and only after FINRA contacted it in connection with its investigation.

2. MKM's conduct violated Rule 17a-5(d).

Exchange Act Rule 17a-5(d)(1)(i) generally requires that every registered broker or dealer file annual reports that meet certain specified requirements and which include reports prepared by an independent public accountant.[6] The reports must be filed within 60 calendar days after the end of the broker's or dealer's fiscal year.[7] Rule 17a-5(d)(6) provides that the annual audited reports must be filed with the Commission and that "[c]opies of the reports must be provided to all [SROs] of which the broker or dealer is a member, unless the [SRO] by rule waives this requirement."[8] MKM did not provide BATS with its annual audited reports within 60 days after the end of MKM's 2013 fiscal year, and BATS had not by rule waived the requirement that it do so. MKM's failure to timely provide BATS with its 2013 annual audited reports violated Exchange Act Rule 17a-5(d)(6).

---

4 *See Richard G. Cody*, Exchange Act Release No. 64565, 2011 WL 2098202, at *9 (May 27, 2011) (preponderance of the evidence standard in SRO disciplinary proceeding) (citing *Seaton v. SEC*, 670 F.2d 309, 311 (D.C. Cir. 1982)), *aff'd*, 693 F.3d 251 (1st Cir. 2012).

5 15 U.S.C. § 78s(e)(1).

6 17 C.F.R. § 240.17a-5(d)(1)(i), (d)(2).

7 *Id.* § 240.17a-5(d)(5).

8 *Id.* § 240.17a-5(d)(6).

MKM contends that its late submission of its 2013 annual audited reports was due to "administrative error" because "MKM unintentionally forg[ot] to email its annual audit[ed] report [to BATS] after it was prepared and sent to the SEC and FINRA." But the reason for MKM's failure to timely submit the reports is irrelevant. "Scienter is not required for a primary violation of Exchange Act Section 17(a)(1) or the rules thereunder."[9] Rule 17a-5(d)(6) is clear: the reports must be provided within 60 days of the end of the broker's fiscal year. And the only exception—that the SRO has "by rule waive[d] th[e] requirement"—does not apply here.

3. Rule 17a-5 is, and was applied in a manner, consistent with the Exchange Act's purposes.

Rule 17a-5 has, since its inception, required broker-dealers to provide annual audited reports both to the Commission and to any national securities exchanges of which they are members.[10] The annual "audit of a broker or dealer is not a mere 'balance sheet audit,'" but is rather "an examination of accountabilities and responsibilities of [the] firm resulting in a report to regulatory bodies concerning that firm's fiduciary obligations to customers."[11] The obligation to timely submit such reports ensures that the Commission and the SRO have access to information about the broker-dealer'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.[12] As the Supreme Court has explained, the reports required to be submitted under Rule 17a-5 are designed to provide "the Commission, the Exchange[s], and other authorities with a sufficiently early warning to enable them to take appropriate action to protect investors before the financial collapse of the particular broker-dealer involved."[13] And "[o]ne of the basic purposes of the Securities Exchange Act of 1934 is to regulate the conduct of broker-dealers and persons associated with them, both through direct Commission controls and through self-

---

9 *Moshe March Cohen*, Exchange Act Release No. 78797, 2016 WL 4727517, at *9 (Sept. 9, 2016).

10 *See, e.g.*, Exchange Act Release No. 3338, 7 Fed. Reg. 9917, 9917 (Dec. 1, 1942).

11 *Study of Unsafe and Unsound Practices of Broker-Dealers*, H.R. Doc. No. 92-231 (serial 12986-1), at 152 (1971).

12 *See Recordkeeping and Reporting Requirements for Security-Based Swap Dealers, Major Security-Based Swap Participants, and Broker-Dealers*, Exchange Act Release No. 71958, 2014 WL 7533978, at *44 (Apr. 17, 2014) (stating that the "reporting program established under Rule 17a-5 is designed, among other things, to . . . assist the Commission, SROs, and state securities regulators in conducting effective examinations of broker-dealers" and is "an integral element in the arsenal for protection of customers against the risks involved in leaving securities with their broker-dealer").

13 *Touche Ross & Co. v. Redington*, 442 U.S. 560, 570 (1979).

regulation by industry groups, with appropriate Commission oversight."[14] We therefore find that Rule 17a-5(d)(6) is, and was applied in a manner, consistent with the Exchange Act's purposes.

B. We find that BATS resolved this proceeding by summary disposition appropriately.

MKM contends that BATS lacked the authority to resolve its disciplinary proceeding by summary disposition. The Appeals Committee recognized that BATS's rules "do not explicitly address motions for summary disposition," but it found the authority to resolve a proceeding by summary disposition to be implicit in BATS Rule 8.6(d), which "gives the hearing panel the broad authority to 'regulate the conduct of the hearing.'" We agree.

At the outset, we note that MKM did not preserve its challenge to BATS's authority to resolve the disciplinary proceeding by summary disposition. MKM had notice nearly from the proceeding's inception that it could be resolved by summary disposition rather than at an in-person hearing. The case management order issued a month after MKM filed its answer provided notice that certain FINRA rules could be used as "guid[ance]" for the conduct of the proceeding authorized under BATS rules: "[g]enerally, the Hearing officer and Hearing Panel will be guided by FINRA's Code of Procedure and the series 9000 FINRA Procedure Rules although those rules are not binding."[15] One of those Rules—FINRA Rule 9264—contemplates the use of and the means for deciding motions for summary disposition. In addition, the Hearing Officer raised the possibility of summary disposition during the first conference call with the parties, and again in a case management order containing a separate section addressing "Motions for Summary Disposition." The parties also submitted a joint proposed order setting a schedule for briefing a motion for summary disposition. And MKM actively participated in the summary disposition process, including by filing a brief in opposition to FINRA's summary disposition motion that requested "findings of fact and conclusions of law that MKM did not violate SEC Rule 17a-5(d)(6)." After briefing was complete, the Hearing Panel issued an order adjourning the hearing to appoint a replacement panelist, and noted that the reconstituted panel "will consider the pending motion for summary disposition."

---

[14] S. Rep. No. 379, 88th Cong., 1st Sess. 38 (1963).

[15] BATS Rule 8.1(d) authorizes BATS to "contract with another self-regulatory organization to perform some or all of [its] disciplinary functions," and to specify which rules "shall govern such actions." Under BATS's and FINRA's plan for allocating regulatory responsibilities between them, FINRA assumed responsibility to conduct "enforcement proceedings" against dual members for violations of certain BATS rules "in accordance with FINRA's Code of Procedure (the NASD Rule 9000 Series) and other applicable FINRA procedural rules." *Program for Allocation of Regulatory Responsibilities Pursuant to Rule 17d-2*, Exchange Act Release No. 58563, 2008 WL 4425351, at *4-5 (Sept. 17, 2008), *approved by* Exchange Act Release No. 58818, 2008 WL 4659943 (Oct. 20, 2008).

MKM did not challenge BATS's summary disposition procedure before the Hearing Panel issued its "Decision Granting Motion for Summary Disposition." That decision acknowledged that it was "a matter of first impression" whether the Hearing Panel had "authority to grant a motion for summary disposition in a BATS disciplinary proceeding." But MKM's opposition to FINRA's motion had not disputed the Hearing Panel's authority to do so, and the Hearing Panel concluded that BATS Rule 8.6(d) provided such authority. Only after the Hearing Panel's decision did MKM—in a letter to the Hearing Officer and in a concurrently filed notice of appeal to the Appeals Committee—first take the position that the summary disposition process deprived it of the hearing required under BATS Rule 8.6(d).[16]

In any case, MKM's argument fails on the merits.[17] We have previously upheld an SRO's decision to resolve a proceeding using summary disposition, even though the SRO's rules did not explicitly provide for summary disposition motions, where the SRO's rules granted the hearing officer broad authority to resolve matters. In *Thomas W. Heath, III*, we upheld the NYSE's decision granting a motion for summary judgment pursuant to NYSE Rule 476(c), which authorized the hearing officer to "'resolve any and all procedural and evidentiary matters and substantive legal motions.'"[18] As was true of the NYSE in *Heath*, BATS has a duty under Exchange Act Section 19(g)(1)(A) to "enforce compliance . . . by its members and persons associated with its members" with "the provisions of the [Exchange Act], the rules and

---

[16] FINRA argued to the Appeals Committee that MKM had waived its objections to summary disposition because it had notice of the summary disposition process and participated actively in it. MKM did not dispute this. The Appeals Committee could have deemed MKM to have conceded the matter of its own waiver, but it did not address waiver and instead considered the interpretation of BATS Rule 8.6 on the merits. *Cf. Carlisle Ventures, Inc. v. Banco Espanol de Credito, S.A.*, 176 F.3d 601, 609 (2d Cir. 1999) (declining to consider appellant's argument when appellee pointed out that appellant had waived it below, and appellee did "not respond . . . in its Reply Brief" or point to where it had "raise[d] th[e] argument below").

[17] *See, e.g., McCarthy v. SEC*, 406 F.3d 179, 186-87 (2d Cir. 2005) ("We are inclined to overlook a party's failure to properly raise an issue on appeal if manifest injustice would otherwise result. No injustice would result in this case because McCarthy's due process and evidentiary challenges . . . are without merit.") (internal citations omitted).

[18] *Thomas W. Health, III*, Exchange Act Release No. 59223, 2009 WL 56755, at *3 n.3 (Jan. 9, 2009), *petition denied*, 586 F.3d 122 (2d Cir. 2009). In that case, "we note[d] that the hearing record for SRO disciplinary action is often best-served by restraint in the granting of summary judgment on the issue of liability, . . . particularly . . . when the central issue is whether the respondent's conduct violated industry norms." *Id.* at *10 n.65. Here, however, the issue of liability was undisputed and MKM did not raise a genuine issue of material fact pertaining to the issue of sanctions. *See id.* (finding that the "disposition of this case [*Heath*] was simplified by. . . the undisputed facts underlying the violation").

regulations thereunder, and its own rules."[19] We have recognized that, "[i]n implementation of the [Exchange Act] duty to enforce regulatory compliance, [SROs] . . . possess inherent authority to administer and interpret their own rules," and are therefore subject to "some level of deference."[20] We find that BATS acted within its authority in interpreting its Rule 8.6(d) as authorizing a hearing panel to resolve a case on summary disposition when there are no genuine disputes of material fact requiring an in-person hearing.

MKM argues that *Heath* is inapposite because NYSE Rule 476(c) explicitly authorized the hearing officer to decide "substantive legal motions," a category that includes a motion for summary judgment. According to MKM, *Heath* cannot be the basis for BATS's implicit authority to resolve a motion for summary disposition because BATS Rule 8.6(d) (unlike NYSE Rule 476(c)) does not refer to substantive legal motions. Instead, MKM argues that the term "hearing panel" in BATS Rule 8.6(d), and that panel's authority under Rule 8.6(d) to "'regulate the conduct of the hearing,'" both "[pre]suppose[] that a hearing would be held."

MKM's argument is based upon the mistaken premise that the term "hearing" necessarily means an in-person or live hearing. We have previously rejected similar constructions of that term. For example, in rejecting a challenge to our own procedure for summary disposition, we explained that "[t]he requirement that adjudicatory proceedings be on the record after notice and opportunity for a hearing"—a requirement applicable to our administrative proceedings under, among other provisions, Section 203(f) of the Investment Advisers Act of 1940[21]—"does not necessitate an in-person hearing" when the respondent has not "identif[ied] any specific evidence or additional facts to be adduced at such a hearing that would create a genuine issue of material fact."[22] In addition, the Supreme Court has held, in the context of formal rulemaking proceedings, that "the term 'hearing' . . . does not necessarily embrace either the right to present evidence orally and to cross-examine opposing witnesses, or the right to present oral argument to the agency's decisionmaker."[23] Consistent with these principles applicable in the context of more formal administrative proceedings, BATS reasonably interpreted its Rule 8.6(d) as

---

19 15 U.S.C. § 78s(g)(1)(A).

20 Exchange Act Release No. 55646, File SR-NYSE-2007-02, 2007 WL 1342096, at *2 (Apr. 29, 2007); *Philip L. Spartis*, Exchange Act Release No. 64489, 2011 WL 1825026, at *11 (May 13, 2011) (citing *Heath*, 586 F.3d at 139); *see also, e.g.*, *Fogel v. Chestnutt*, 533 F.2d 731, 753 (2d Cir. 1975) (Friendly, J.) ("'[A]n exchange has a substantial degree of power to interpret its own rules.'").

21 15 U.S.C. § 80b-3(f).

22 *Conrad P. Seghers*, Advisers Act Release No. 2656, 2007 WL 2790633, at *4 (Sept. 26, 2007).

23 *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 240 (1973).

authorizing a "hearing" framed as a dispositive motion decided through written submissions when the parties have identified no genuine issues of material fact requiring an in-person hearing.[24]

We also find no merit to MKM's suggestion that, because BATS did not hold an in-person hearing, MKM has not "be[en] heard on the issue of . . . sanctions." Although MKM complains that it was not able to conduct discovery on the issue of sanctions, it has not indicated what discovery it would request or how such discovery would be probative of the appropriate sanctions. And the Hearing Panel and Appeals Committee heard MKM's arguments as to the appropriate sanctions on the papers; we consider those arguments below.

III. SANCTIONS

Exchange Act Section 19(e)(2) directs us to sustain BATS's sanctions unless we find, having due regard for the public interest and the protection of investors, that the sanctions are excessive or oppressive or impose an unnecessary or inappropriate burden on competition.[25] As part of our review, we must consider any aggravating or mitigating factors and whether the sanctions imposed are remedial in nature and not punitive.[26] Here, BATS imposed a $2,500 fine and a public censure for MKM's failure to timely provide its 2013 annual audited reports to BATS. MKM explicitly acknowledges the appropriateness of the $2,500 fine and is not challenging it on appeal. We view both the fine and the censure as not excessive or oppressive and as necessary to protect the investing public, and accordingly we sustain both sanctions.

---

[24] This is also consistent with courts' interpretations of the term "hearing" in other contexts. *Cf., e.g., Marks 3 Zet-Ernst Marks GmBh & Co. KG v. Presstek, Inc.*, 455 F.3d 7, 14-15 (1st Cir. 2006) (explaining that the Federal Arbitration Act's mandate that a "court shall hear the parties" on a motion to compel arbitration does not necessarily contemplate "a live evidentiary hearing," as "a 'hearing' on the papers may be all that is required" to carry out that statute's policy goals of "simplif[ying] and expedit[ing] . . . dispute resolution").

[25] 15 U.S.C. § 78s(e)(2). MKM does not claim, and we see no basis for concluding, that the fine and censure are an unnecessary or inappropriate burden on competition. *Cf. FOCUS Broker-Dealer Reports*, Exchange Act Release No. 11935, 1975 WL 183327, at *84 (Dec. 17, 1975), 40 Fed. Reg. 59706, 59711 (Dec. 30, 1975) (explaining that the Commission has determined that Rule 17a-5 "impose[s] no burden on competition not necessary or appropriate in furtherance of the purposes of the [Exchange] Act and [is] not inconsistent with the public interest or the protection of investors").

[26] *PAZ Sec., Inc., v. SEC*, 494 F.3d 1059, 1064-65 (D.C. Cir. 2007), *on remand*, *PAZ Sec., Inc.*, Exchange Act Release No. 57656, 2008 WL 1697153 (Apr. 11, 2008), *petition denied*, 566 F.3d 1172 (D.C. Cir. 2009); *accord McCarthy*, 406 F.3d at 188.

MKM contends that a censure is too harsh and has no remedial purpose because its failure to timely submit its 2013 annual audited reports was due to an "administrative error." But it has not explained the nature of the "administrative error" in its briefs on appeal or provided reasons why the error should invalidate the censure. In any event, we find that a censure is warranted because MKM's misconduct "fits within a broader pattern of noncompliance."[27] MKM submitted its annual audited reports late four years in a row. It submitted the 2013 reports late even after BATS issued a Cautionary Action Letter in May 2012 warning MKM of the need to make timely submissions,[28] and after MKM represented that it had taken steps to ensure that it would timely submit future reports. MKM's pattern of noncompliance underscores the need for a public censure because it will deter MKM and other SRO members from such misconduct and remind them of the need to comply with their regulatory obligations.[29]

MKM contends that BATS should not have imposed a censure because FINRA would not have done so. In support of this argument, MKM points to an email that FINRA sent to MKM explaining that "[i]f an annual audit is submitted late, the filing may be subject to administrative fees, as outlined in FINRA's By-Laws, not to exceed $100.00 per day up to a maximum amount of $1,000." But this email does not state that FINRA would not also impose a censure. And even assuming the email supports MKM's argument, BATS is not required to impose the same sanction as another SRO. We agree with BATS that MKM's pattern of repeated noncompliance with its obligations under Rule 17a-5(d)(6) justifies a censure.

MKM contends further that a censure is inappropriate because no customers were harmed from its failure to timely submit its annual audited reports. But we have explained that a failure to comply with a given regulatory requirement may warrant sanctions even if that failure will "rarely, in itself, result in a direct harm to a customer."[30] In any event, the failure to timely

---

[27] *Dratel Grp., Inc.*, Exchange Act Release No. 77396, 2016 WL 1071560, at *14-15 (Mar. 17, 2016) (finding this to be an "aggravating factor[]").

[28] That letter also specified that BATS would consider such letters with respect to "prior violations of a particular rule . . . in determining an appropriate disciplinary action against the firm for subsequent violations of the applicable rule(s)."

[29] *See North Woodward Fin. Corp.*, Exchange Act Release No. 60505, 2009 WL 2488066, at *6-7 (Aug. 14, 2009) (affirming fine against respondents for whom it was "not the first time [they] have run afoul of regulatory requirements," and noting that the fine would "encourag[e] the [respondents], who remain in the securities industry, as well as others in the industry, to take their . . . responsibilities seriously in the future").

[30] *PAZ Sec.*, 2008 WL 1697153 at *5 (finding that even if a failure to respond to an NASD information request "does not result in direct . . . harm to investors, it is serious because it impedes detection of . . . violative conduct").

submit annual audited reports can harm investors and the markets because it may impede an SRO's ability to detect problems with a broker-dealer's solvency.[31]

Finally, MKM suggests that a public censure is excessive or oppressive because BATS notified its members in early 2016 that it would begin accepting submissions of annual audited reports through a FINRA system.[32] MKM contends that this constitutes "tacit approval" of its earlier conduct, in which it timely submitted its annual audited reports to FINRA but not to BATS, and that had this provision been in effect at the time of its misconduct MKM would have satisfied Rule 17a-5(d)(6). That MKM may now submit its annual audited reports to BATS through a FINRA system is irrelevant.[33] It is undisputed that MKM was required to submit its 2013 annual audited reports to BATS as well as FINRA yet did not do so. It is also undisputed that it failed to timely submit to BATS its annual audited reports for the previous three years. And nothing in the record suggests that BATS has approved of any of this conduct. The censure that BATS imposed is not excessive or oppressive in light of MKM's undisputed violation of Rule 17a-5(d)(6) and pattern of repeated noncompliance with its obligations under that rule.

An appropriate order will issue.[34]

By the Commission (Chair WHITE and Commissioners STEIN and PIWOWAR).

Brent J. Fields
Secretary

---

31 *Cf. supra* notes 11-14 and accompanying text.

32 *See* BATS Regulatory Circular 16-001 (Jan. 27, 2016), http://cdn.batstrading.com/resources/regulation/circulars/regulatory/RC-2016-001.pdf.

33 With respect to MKM's 2013 annual audit reports, Rule 17a-5(d)(6) recognized that an SRO may "by rule waive[] th[e] requirement" to provide copies of the annual audit reports to the SRO. *See Broker-Dealer Reports*, Exchange Act Release No. 70073, 2013 WL 4456076, at *1, 25 (July 30, 2013) (adopting proposed amendment to Rule 17a-5(d)(6) effective December 31, 2013). But the early 2016 announcement from BATS upon which MKM relies confirmed that "[t]he Exchange has not waived this requirement." It specified instead that "the manner in which Members of the Exchange are required to provide copies of their annual audit reports to the Exchange has been modified." Regulatory Circular 16-001.

34 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. 79700 / December 28, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-17262

In the Matter of the Application of

MKM PARTNERS LLC

For Review of Disciplinary Action Taken by

BATS Exchange, Inc.

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY BATS EXCHANGE, INC.

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

ORDERED that the disciplinary action taken by the BATS Exchange, Inc., against MKM Partners LLC is sustained.

By the Commission.

Brent J. Fields
Secretary