

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of the Securities of
Corporation K

DECISION

Eligibility Proceeding
No. OTC

ISS Docket No.

Dated: 2009

Issuer is ineligible for continued quotation on the OTC Bulletin Board.

Decision

Corporation K (“Corporation K” or “Issuer”) initiated the instant proceeding under FINRA Rule 6530(f)(2). Corporation K requested review by a Hearing Officer of FINRA Operations staff’s determination that Corporation K’s securities were ineligible for continued quotation on the OTC Bulletin Board® (“OTCBB”). Pursuant to FINRA Rule 9750, the Hearing Officer forwarded her draft decision to the National Adjudicatory Council’s (the “NAC”) Review Subcommittee, and the Review Subcommittee called for review the draft decision pursuant to FINRA Rule 9760. After a complete review of the record, we find that Corporation K is ineligible for continued quotation on the OTCBB pursuant to FINRA Rule 6530(a).

I. FINRA’s Eligibility Rule

The issue before us is a narrow one; however, an explanation of the relevant FINRA rules is vital for a comprehensive understanding of the matter currently under consideration.

“The OTCBB is a facility for the publication of quotations in eligible OTC equity securities[.]” See *FINRA Regulatory Notice 08-34* (July 2008). FINRA Rule 6530 sets forth requirements for an issuer’s securities to be eligible and remain eligible for quotation on the OTCBB. FINRA Rule 6530(a) provides that a FINRA member may quote:

- (a) any domestic equity security that satisfies the requirements of subparagraph (1) and either subparagraph (2) or (3) or (4) below:

- (1) the security is not listed on a national securities exchange in the U.S. . . . and

- (2) the issuer of the security is required to file reports pursuant to Section 13 or 15(d) of the Exchange Act . . . and, subject to a thirty calendar day grace period, the issuer of the security is current in its reporting obligations[.]¹

FINRA Rule 6530(e)(1), however, prohibits FINRA members from quoting an issuer's security if that issuer has repeatedly filed late reports with the Commission or has repeatedly been removed from the OTCBB for failing to file timely reports pursuant to Rule 6530(a).² If an issuer's security is removed from the OTCBB because of multiple late filings or prior removals from the OTCBB pursuant to Rule 6530(e), such security will remain ineligible for quotation for a one-year period. *See* Rule 6530(e)(2). FINRA Rule 6540(d)(2) prohibits a FINRA member or person associated with a member from quoting an issuer's security on the OTCBB if the security is ineligible for quotation pursuant to Rule 6530.³

Upon determining that an issuer's security would be ineligible for quotation, FINRA sends notification to the issuer informing it of the date upon which the security will be removed unless the condition causing the ineligibility has been cured. *See* Rule 6530(f)(1). An aggrieved party may request a Hearing Officer's review of the determination that an issuer's security is ineligible for quotation. *See* Rule 6530(f)(2); Rule 9700 *et seq.* Rule 6530(f)(2) provides that:

¹ FINRA Rules 6530(a)(3)-(4) and 6530(b), (c), and (d) list a number of other categories of securities that a FINRA member may quote on the OTCBB, which are not at issue in this matter. Section 13(a) of the Securities Exchange Act of 1934 ("Exchange Act") generally requires issuers that have registered securities under Section 12 of the Exchange Act to make periodic reports in accordance with the Commission's rules, and Section 15(d) of the Exchange Act generally requires certain issuers that have registered transactions in securities under the Securities Act of 1933 to make periodic reports under Exchange Act Section 13.

² FINRA Rule 6530(e)(1) is not at issue in this case. That rule provides that:

(1) Notwithstanding the foregoing paragraphs, a member shall not be permitted to quote a security if:

(A) while quoted on the OTCBB, the issuer of the security has failed to file a complete required annual or quarterly report by the due date for such report (including, if applicable, any extensions permitted by [Exchange Act] Rule 12b-25) three times in the prior two-year period; or

(B) the security has been removed from the OTCBB due to the issuer's failure to satisfy paragraph (a)(2), (3), or (4), above, two times in the prior two-year period.

³ In addition, member firms must satisfy the requirements of Exchange Act Rule 15c2-11 and FINRA Rule 6440 before they initiate or resume the quotation of a security on the OTCBB.

A request for review under this paragraph (f)(2) will stay the removal of the issuer's security from the [OTCBB] until the Hearing Officer issues a decision under Rule 9750. The Hearing Officer will consider only the issues of whether the issuer's security is then eligible for quotation in the [OTCBB] and/or whether the issuer filed a complete report by the applicable due date taking into account any extensions pursuant to [Exchange Act] Rule 12b-25. The Hearing Officer shall not have discretion to grant any extensions of time for ineligible securities to become eligible.

After a hearing, the Hearing Officer sends a draft decision to the NAC's Review Subcommittee, which may call the decision for review. See Rules 6530(f)(3), 9750, and 9760. If the draft decision is called for review, the scope of our review is limited to "whether the issuer's security, at the time of the initial review under paragraph (f)(2), was eligible for quotation in the [OTCBB] and/or whether the issuer filed a complete report by the applicable due date taking into account any extensions pursuant to [Exchange Act] Rule 12b-25." See Rule 6530(f)(3), 9760.⁴

II. Factual and Procedural History

During all relevant time periods, Corporation K's securities were quoted on the OTCBB. Consequently, Corporation K was required to comply with FINRA Rule 6530(a)(2) to remain eligible for continued quotation on the OTCBB.⁵ Corporation K was required to file with the Commission its Form 10-K for the period ending March 2009, no later than June 2009. Corporation K obtained from the Commission an extension of time, pursuant to Exchange Act Rule 12b-25, to file its Form 10-K to July 2009. Corporation K, however, failed to timely file its Form 10-K pursuant to the Commission's extended deadline, and in July 2009, FINRA Operations staff sent Corporation K an OTCBB Delinquency Notification pursuant to FINRA Rule 6530(f)(1) (the "Notification"). The Notification informed Corporation K that it had until August 2009 (i.e., 30 calendar days from July 2009, pursuant to Rule 6530(a)(2)) (the "OTCBB Grace Period") to file its Form 10-K with the Commission and remain eligible for quotation on the OTCBB. The Notification stated that:

The Company may request a review by a FINRA Hearing Officer of the determination that an issuer's security is ineligible for quotation under this Rule 6530. *Please note that Hearing Officers do not have authority to grant extensions of time for companies to file delinquent Commission reports.* A Hearing Officer is limited to determining whether the Staff determination is in error as to a Company's compliance with the NASD Rule 6530.

⁴ Similar to the Hearing Officer, the NAC has no discretion to grant extensions of time for ineligible securities to become eligible, and removal of an issuer's security from the OTCBB is stayed pending the NAC's review. See Rule 6530(f)(3).

⁵ There is no dispute that Corporation K satisfied Rule 6530(a)(1).

In August 2009, one day before the OTCBB Grace Period was set to expire, Corporation K requested a hearing pursuant to Rule 6530(f)(2). In August 2009, while its request for review was pending but five days after expiration of the OTCBB Grace Period, Corporation K filed its Form 10-K with the Commission.

The Hearing Officer conducted a telephonic hearing in September 2009. At the hearing, Corporation K did not dispute that it filed its Form 10-K five days after the OTCBB Grace Period expired, and presented several exigent circumstances to explain its late filing. Corporation K also argued that removal of its securities from the OTCBB could harm the company's shareholders by potentially triggering a provision in the loan agreement with its secured lender that would give the lender the option to seize control of the company. Corporation K also questioned the practical purpose of removal because it intended, if removed, to immediately reapply to have its securities quoted on the OTCBB. FINRA staff argued that although Corporation K was current with its Commission filings at the time of the hearing, because Corporation K filed its Form 10-K after the OTCBB Grace Period it must be removed from the OTCBB. Staff further argued that a Form 211 must be re-filed to resume quotations of Corporation K's securities on the OTCBB.⁶ The Hearing Officer subsequently requested that the parties submit briefs.

In October 2009, the Hearing Officer submitted her proposed decision to the Review Subcommittee for its review pursuant to Rule 9750. The Review Subcommittee called this matter for review shortly thereafter.

III. Discussion

We must determine whether Corporation K's filing of its Form 10-K, after expiration of the OTCBB Grace Period but while its timely request for review of FINRA's eligibility determination was pending, rendered Corporation K in compliance with Rule 6530(a) and thus eligible for continued quotation on the OTCBB. Stated another way, we must decide whether a request for a hearing under Rule 6530(f) serves to extend the OTCBB Grace Period deadline and grants an issuer additional time in which to file a required report with the Commission. This is a matter of first impression.

We find that Corporation K's securities are ineligible for continued quotation on the OTCBB. Corporation K admittedly failed to file its Form 10-K before the OTCBB Grace Period expired, and its securities became ineligible for continued quotation upon expiration of the OTCBB Grace Period. It is undeniable that but for Corporation K's request for a hearing, which stayed the removal process, Corporation K's ineligible securities would have been removed from the OTCBB. The stay, however, only temporarily halts the removal process to give an issuer the

⁶ A Form 211 is the form that must be completed and submitted to FINRA to initiate or resume quotations on the OTCBB, the Pink Sheets, or any other comparable quotation medium pursuant to Exchange Act Rule 15c2-11. Issuers cannot, without sponsorship from a FINRA market-making firm, apply to be quoted on the OTCBB.

opportunity to present evidence to the Hearing Officer that FINRA staff erroneously concluded that its securities were ineligible for continued quotation on the OTCBB. The stay does not alter the fact that Corporation K missed the OTCBB Grace Period deadline. Nor does the stay serve to extend the OTCBB Grace Period and grant an issuer such as Corporation K additional time to become current with its filings and thus eligible for quotation on the OTCBB pursuant to Rule 6530(a).

Indeed, permitting an issuer such as Corporation K to file a last minute request for a hearing on staff's eligibility determination and obtain additional time to file a financial report would contradict Rule 6530(f)(2)'s express prohibition on extensions of time for ineligible securities to become eligible. A finding that Corporation K's securities are eligible for quotation on the OTCBB because it filed its Form 10-K after the OTCBB Grace Period expired but before the Hearing Officer reviewed the matter would grant Corporation K a de facto extension of the OTCBB Grace Period and would render the OTCBB Grace Period—already an extended deadline from the extension provided by Exchange Act Rule 12b-25—meaningless.

Moreover, such de facto extensions of the OTCBB Grace Period would undermine the very purpose of Rule 6530. FINRA amended Rule 6530 to require that issuers of securities on the OTCBB make current, publicly-available reports with the Commission after it studied the OTCBB market and abuses in the trading and sales of thinly traded and capitalized securities. The Commission's order approving the rule change explained:

The proposed rule change was developed in an effort to balance the benefits that the transparency of the OTCBB provides with the public need for information about the issuers being quoted. The NASD is concerned that where there is no public information available regarding a security, the broad-based automated display of quotations in that security creates an unjustified perception of reliability. While the NASD realizes that the new rule may result in the lack of real-time quotations for those securities that become ineligible for the OTCBB, it believes that this loss is outweighed [sic] by the benefit to investors who would, under the proposed rule, have access to information about the companies in which they may invest. . . . The filing requirement ensures that companies trading on the OTCBB market will have current, public information that investors can access, from the appropriate regulatory agency, when considering whether to invest in an OTCBB traded security. . . . [and] may help to reduce fraud and manipulation.⁷

Our determination that an issuer's securities are ineligible for continued quotation on the OTCBB if the issuer fails to file a required financial report before the OTCBB Grace Period expires—regardless of any hearing request and temporary stay of removal—furtheres the

⁷ See *Order Granting Approval of Proposed Rule Change and Amendment No. 1 To Be [sic] Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Microcap Initiatives—Amendments to NASD Rules 6530 and 6540*, Exchange Act Rel. No. 40878, 64 Fed. Reg. 1255 (Jan. 8, 1999) [hereinafter *1999 Order*].

underlying purpose of Rule 6530 by ensuring that investors and potential investors have access to current financial information for issuers. *See* FINRA Rule 0130 (providing that FINRA’s rules “shall be interpreted in light of the purposes sought to be achieved by the Rules and to further FINRA’s regulatory programs”); *cf. Dep’t of Enforcement v. Jordan*, Complaint No. 2005001919501, 2009 FINRA Discip. LEXIS 15 (FINRA NAC Aug. 21, 2009) (holding that interpreting FINRA’s rules (including the predecessor to FINRA Rule 0130) to impose obligations on research analysts to make disclosures in research reports “is the *only* way to achieve the specific purposes of Rule 2711, advance FINRA’s mission of protecting investors and maintaining market integrity, and achieve just practices”). Our holding will prevent issuers that are unable to file reports by the OTCBB Grace Period deadline from remaining listed for quotation on the OTCBB (despite investors’ lack of current financial information for the issuer) by simply filing a request for a hearing. This will discourage issuers from filing hearing requests solely to extend the OTCBB Grace Period, which would subvert the fundamental purpose of the rule and the requirement that issuers file reports with the Commission to remain eligible for quotation on the OTCBB. *See In the Matter of JD Am. Workwear, Inc.*, Exchange Act Rel. No. 43283, 2000 SEC LEXIS 1906, at *12 (Sep. 12, 2000) (noting the public’s interest in an issuer’s “compliance with the disclosure requirements so that both existing and prospective investors on the OTCBB will have current information”).

Further, strict enforcement of the OTCBB Grace Period deadline promotes certainty regarding deadlines for investors, as well as for issuers and member firms quoting issuers’ securities on the OTCBB. As an initial matter, if an issuer’s eligibility is not dependent upon whether it files a required financial report before the OTCBB Grace Period expires, it is unclear what date would be used to assess an issuer’s eligibility. For example, hearing officers might use the date of the hearing to assess whether an issuer was current with its required financial reports, or use the date they draft the proposed decision pursuant to Rule 9750 as the last date upon which an issuer could make its filing and become eligible. This would lead to disparate treatment of issuers (as well as investors in such issuers) depending upon the parties’ availability for a hearing, scheduling quirks, and a hearing officer’s individual preferences.

Moreover, this uncertainty would contravene the purpose of Rule 6530(f) and the Rule 9700 Series, which is to promote clarity and transparency in the review process.⁸ The rules simply require an issuer to file a required report before the OTCBB Grace Period expires for it to remain eligible for continued quotation on the OTCBB. If an issuer does not file its report prior to the expiration of the OTCBB Grace Period, it is not eligible for continued quotation on the OTCBB, regardless of any subsequent filings while the review process is pending.⁹

⁸ *See Order Granting Approval to Proposed Rule Change and Amendment Nos. 1, 2, and 3 Thereto Relating to Amendments to NASD Rule 6530 to Clarify the Review Process for OTCBB Eligibility Determinations and to Implement Fees for Such Review*, Exchange Act Rel. No. 54028, 71 Fed. Reg. 36847 (Jun. 28, 2006).

⁹ *See also 1999 Order* (“After the [OTCBB Grace Period], quotations in the security of the delinquent issuer would not be permitted on the OTCBB.”); *see also Order Approving Proposed Rule Change as Modified by Amendment No. 1, Relating to Amendments to the NASD Rule 9700*

In so ruling, we reject the parties' reliance on several notices issued in 2006 in support of their respective positions. At the hearing before the Hearing Officer, FINRA Operations staff pointed to language contained in a footnote within a notice of filing and immediate effectiveness of a rule change to Rule 6530 (the "Clarification Notice") stating that "[a] delinquent issuer may not prevent its security from being removed from the OTCBB by filing the required complete periodic report after the grace period expires but before notice of removal is published on the OTCBB Daily List and the security is removed from the system[.]"¹⁰ In its post-hearing brief, Corporation K argued that additional language in another footnote contained in the Clarification Notice supported a determination that its securities were eligible for continued quotation. This language states that "[a]n issuer that is not removed because it files a late report after requesting a hearing but before a decision by the [hearing officer] has been issued in the matter would not be considered to have failed to file for purposes of [Rule 6530(e)(1)(B)]. However, that issuer would be considered to have filed late for purposes of [Rule 6530(e)(1)(A)]." Corporation K also argued that another FINRA rule-filing notice issued in 2006 (the "Proposed Rule Notice") stated generally in a footnote that "[i]f a valid filing is made before the [Hearing Officer's] decision is issued, the issuer would not be rendered ineligible for further quotation on the OTCBB."¹¹

We find that the language in the notices is of limited use in assessing whether Corporation K's securities are eligible for continued quotation on the OTCBB. First, the footnoted language in the Clarification Notice cited by the parties can be read to support both parties' respective positions, which undermines generally the notice's persuasiveness. Second, the language in the Clarification Notice referencing Rule 6530(e)(1)(B), cited by Corporation K, does not state whether it applies to an eligibility determination pursuant to Rule 6530(a). Rather, by its terms the language only addresses an issuer's second removal from the OTCBB in a two-year period under Rule 6530(e). Third, the Clarification Notice also states that the Hearing

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Series to Streamline the Procedural Rules Applicable to General Grievances Related to FINRA Automated Systems, Exchange Act Rel. No. 57786, 73 Fed. Reg. 27595 (May 13, 2008) (stating that reviews pursuant to Rule 9700 Series "are solely to determine whether the issuer filed a complete report by the applicable due date and, thus, whether the security of the issuer is eligible for continued quotation").

¹⁰ See *Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Amendments to Rule 6530 to Clarify the Removal Process for Securities of OTCBB Issuers That Fail to Remain Current With OTCBB Reporting Requirements*, Exchange Act Rel. No. 53542, 71 Fed. Reg. 15790 (Mar. 29, 2006).

¹¹ See *Notice of Filing of Proposed Rule Change and Amendment Nos. 1, 2, and 3 Thereto Relating to Amendments to NASD Rule 6530 to Clarify the Review Process for OTCBB Eligibility Determinations and to Implement Fees for Such Review*, Exchange Act Rel. No. 53546, 71 Fed. Reg. 16350 (Mar. 31, 2006).

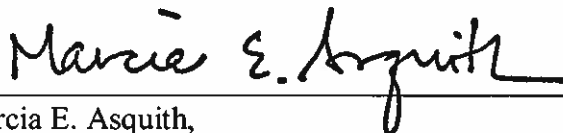
Officer shall not have any discretion to allow the securities of delinquent issuers to trade on the OTCBB, which is consistent with the rule's express prohibition on extensions of the grace periods by the Hearing Officer. Fourth, the footnoted language in the Proposed Rule Notice was not in the final notice approving the rule change, and language in more recent notices supports our holding. *See, e.g., FINRA Regulatory Notice 08-34* ("With respect to OTCBB eligibility reviews, both of these reviews pursuant to the Rule 9700 Series are solely to determine whether the issuer filed a complete report with the Commission or other appropriate regulator by the applicable due date and, thus, its security is eligible for continued quotation. There is no discretion to grant extensions of time for ineligible securities to become eligible or for any other form of relief."). For these reasons, and given the rule's underlying purpose of ensuring that investors have access to current financial information for OTCBB quoted issuers, we give little weight to the notice language cited by the parties.

Finally, Corporation K argues that its shareholders may be negatively impacted by the removal of its securities from the OTCBB. Any potential detriment to Corporation K's shareholders, however, "is outweighed by the public interest in [Corporation K's] compliance with the disclosure requirements so that both existing and prospective investors on the OTCBB will have current information about [Corporation K]." *See JD Am. Workwear, Inc.*, 2000 SEC LEXIS 1906, at *12. We also note that Corporation K may continue to trade in other markets or may seek reinstatement for quotation on the OTCBB. *Id.* at *11. We therefore reject Corporation K's argument that potential harm to its shareholders caused by the removal of its securities from the OTCBB supports a finding that its securities are eligible to remain quoted on the OTCBB.

IV. Conclusion

We find that Corporation K's securities are ineligible for continued quotation on the OTCBB because it failed to file timely its Form 10-K prior to the expiration of the OTCBB Grace Period. Corporation K's securities shall promptly be removed from the OTCBB. This decision shall constitute final FINRA action on this matter.¹²

On behalf of the National Adjudicatory Council,



Marcia E. Asquith,
Senior Vice President and Corporate Secretary

¹² We have considered and reject without discussion all other arguments of the parties.