

November 24, 2015

Brent J. Fields  
Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

**Re: Comment Letter on Securities Exchange Act Release No. 75977  
Proposed Amendments to the Commission's Rules of Practice (File  
No. S7-19-15)**

Dear Mr. Fields:

FINRA staff<sup>1</sup> appreciates the opportunity to provide comments on the Securities and Exchange Commission's ("Commission") proposed amendments to the Commission's Rules of Practice, as published in the *Federal Register* on October 5, 2015.<sup>2</sup> The Commission is proposing to amend its Rules of Practice to require persons involved in administrative proceedings to submit all documents and other items electronically. The proposed amendments also would require filers to exclude or redact "sensitive personal information" from electronic filings and submissions.

FINRA supports and applauds the Commission's effort to move to an electronic filing system in its administrative proceedings. FINRA believes that the electronic filing of materials will lower reproduction and delivery costs that a self-regulatory organization ("SRO"), such as FINRA, typically incurs in appeals brought pursuant to SEC Rule of Practice 420. As to the proposed requirement that SROs redact or exclude sensitive personal information from certified records, however, FINRA is concerned that these amendments do not account sufficiently for the substantial burden on FINRA to comply. FINRA renders decisions in a variety of proceedings that can be appealed to the Commission, including FINRA disciplinary proceedings, statutory disqualification proceedings, membership proceedings, and expedited proceedings. When these cases are appealed, FINRA files with the Commission a certified record of the proceeding. A certified record, which often contains thousands of pages, must be filed within two weeks of the petition for review. Under the Commission's proposed amendments,

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<sup>1</sup> The comments provided in this letter are solely those of FINRA staff; they have not been reviewed or endorsed by the FINRA Board of Governors. For ease of reference, this letter may use "we," "FINRA" and "FINRA staff" interchangeably, but these terms all refer only to FINRA staff.

<sup>2</sup> Amendments to the Commission's Rules of Practice, 80 Fed. Reg. 60,082 (Oct. 5, 2015) (File No. S7-19-15).

FINRA would be required to certify that the certified record and its filings contain no sensitive personal information.

FINRA believes that the certification requirement has the potential to require FINRA to spend more than 585 hours of redacting per year. FINRA therefore recommends several changes to the proposed amendments to address its concerns. These recommended changes include exempting SROs from filing redacted copies of exhibits and trial-level hearing transcripts in SRO proceedings, allowing FINRA a one-year period to implement the technology and procedures necessary for compliance with the proposed amendments and to account for the cases currently docketed before FINRA,<sup>3</sup> and permitting SROs to certify that they have taken reasonable efforts to exclude or redact sensitive personal information from filings.

### **FINRA's Disciplinary Program and Other Appealable Matters**

FINRA is the largest of the SROs in the United States and provides the first line of oversight for broker-dealers and the securities markets. FINRA oversees approximately 4,000 brokerage firms, 161,000 branch offices and 637,000 registered brokers. FINRA's core mission is to pursue investor protection and market integrity. One of FINRA's key functions in pursuit of this mission is the examination of broker-dealers for compliance with FINRA rules, the federal securities laws, and rules of the Municipal Securities Rulemaking Board and the enforcement of these rules and regulations for brokerage firms and brokers in the United States. FINRA also conducts examinations of market making and trading firms to assess compliance with FINRA trading rules and the federal securities laws.

Given FINRA's wide-ranging responsibilities in an effort to protect America's investors by making sure the securities industry operates fairly and honestly, FINRA brings the most disciplinary actions of any SRO. In 2014, FINRA brought 1,397 disciplinary actions against registered brokers and firms.<sup>4</sup> FINRA also litigated 246 disciplinary cases in the last three years. Seventy of these cases appealed to FINRA's National Adjudicatory Council, which resulted in 32 disciplinary cases appealing to the Commission.

While the bulk of FINRA's cases appealed to the Commission involve disciplinary appeals, the Commission also reviews other categories of FINRA actions. These include FINRA actions to determine individuals' eligibility to become or to remain

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<sup>3</sup> The proposed amendments do not provide any guidance on the form or manner of electronic filing that the Commission will require other than stating such guidance will be available on the Commission's website. FINRA believes that there should be clear standards disclosed in the proposed amendments.

<sup>4</sup> FINRA 2014 Annual Report at 6, *available at* [http://www.finra.org/sites/default/files/2014\\_YIR\\_AFR.pdf](http://www.finra.org/sites/default/files/2014_YIR_AFR.pdf); *see also* <http://www.finra.org/about/what-we-do>.

associated with FINRA member firms; appeals of FINRA decisions issued in connection with membership proceedings, removals or modifications of business restrictions, and changes in firm ownership, control or operations; FINRA decisions resulting from certain expedited proceedings; and appeals of certain categories of exemption request denials (together, “Appealable Proceedings”). In the last three years, the Commission reviewed 19 appeals of these Appealable Proceedings involving FINRA actions.

**The Proposal’s Requirement for Certifying the Record in SRO Appeals Should Be Amended to Exempt SROs from the Redaction Requirement for the Filing of Exhibits and the Trial-Level Transcript**

FINRA believes that the redaction requirements under the proposed amendments to SEC Rule of Practice 420(e) pose unique challenges for FINRA given the volume of sensitive personal information<sup>5</sup> present in its records that are filed with the Commission.<sup>6</sup> Because making redactions will be an extremely time- and labor-intensive process, FINRA requests that the Commission exempt from the redaction requirement the exhibits and trial-level transcript in FINRA proceedings. Rule 420(e) should be amended to classify exhibits and the transcript of the trial-level hearing (“Trial-Level Transcripts”)<sup>7</sup> as non-public portions of the record in an SRO appeal.

FINRA investigations often generate the types of cases that result in FINRA’s certified records having large amounts of sensitive personal information. FINRA examines aspects of broker-dealers that present heightened regulatory risk and risk to customers. For example, FINRA analyzes sales practices to determine whether a firm has dealt fairly with customers when making recommendations, executing orders, and charging commissions or markups and markdowns, and scrutinizes a firm’s anti-money laundering program, business continuity plans, and financial integrity and internal control programs. Similarly, FINRA rigorously reviews firms for financial

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<sup>5</sup> The Commission defines sensitive personal information broadly to include Social Security numbers, taxpayer identification numbers, financial account numbers, credit card or debit card numbers, passport numbers, driver’s license numbers, state-issued identification numbers, home address (other than city and state), telephone number, date of birth (other than year), names and initials of minor children, and any sensitive health information identifiable by individual. Amendments to the Commission’s Rules of Practice, 80 Fed. Reg. 60,083.

<sup>6</sup> See Amendments to the Commission’s Rules of Practice, 80 Fed. Reg. 60,090.

<sup>7</sup> Trial-Level Transcripts mean the opening statements, witness testimony and cross-examination, and closing arguments that are presented to FINRA adjudicators in disciplinary cases, membership application appeals, statutory disqualification hearings, and hearings in expedited proceedings. See NASD Rule 1015(f); FINRA Rules 9261, 9524(a), & 9559.

and operational compliance. FINRA follows a corporate policy that safeguards confidential information from unauthorized disclosure. During its investigations, FINRA handles information such as social security numbers, financial account numbers, and driver's license, state-issued identification card and passport numbers as confidential and restricts its use on a "need to know" basis. Accordingly, "FINRA investigations are non-public and confidential."<sup>8</sup>

During the hearing of a disciplinary case or as part of other Appealable Proceedings, however, parties can make filings containing information that falls under the Commission's proposed definition of sensitive personal information, especially exhibits. Exhibits often include investigatory records (e.g., FINRA Rule 8210 requests, responses to Rule 8210 requests, transcripts of on-the-record interviews, notes of interviews with customers), customer account records, and Central Registration Depository (CRD<sup>®</sup>) records. Customer account records and information can include financial account numbers, home addresses, phone numbers, dates of birth, and Social Security numbers. When FINRA's disciplinary cases and Appealable Proceedings involve alleged sales practice violations, the testimony and exhibits frequently involve details of the transactions and the customer's background, which include sensitive personal information.

If a decision in a FINRA proceeding is appealed to the Commission, FINRA's usual practice is to submit the entire record to the Commission in the form in which it was maintained, without redactions. There are no FINRA rules that mandate exclusion or redaction of sensitive information when parties file documents in FINRA disciplinary cases and Appealable Proceedings, and parties often file exhibits and other filings that contain sensitive personal information, without redactions. Under the proposed amendments, however, FINRA staff (possibly sharing this responsibility with respondents) will be required to conduct a page-by-page review of the entire record in order to redact all sensitive personal information.

FINRA's experience shows that redaction will be a highly costly endeavor that intensively consumes time and labor. During the first nine months of 2015, FINRA filed approximately 85,622 record pages in 11 appeals to the Commission. The costs involved in redacting a large record are dramatic. When recently redacting a record with 39,266 pages, FINRA expended 201.5 man hours.<sup>9</sup> Based on the first nine months of 2015, FINRA projects that it will file 114,160 pages of certified records this year. Under the redaction requirements of the Commission's proposal, FINRA

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<sup>8</sup> *FINRA Regulatory Notice 09-17*, 2009 FINRA LEXIS 45, at \*4 (Mar. 2009); see *N. Woodward Fin. Corp.*, Exchange Act Release No. 74913, 2015 SEC LEXIS 1867, at \*23-24 (May 8, 2015).

<sup>9</sup> FINRA undertook the unusual step of reviewing and redacting the record in this case because it perceived unique risks related to the case. FINRA's 201.5 man hours consisted of 200 paralegal hours and one and one-half hour of attorney supervision.

estimates that the total amount of paralegal and attorney hours to review and redact its certified records would be 586.7 per year.<sup>10</sup> FINRA believes that the burdens of redaction receive scant recognition from the Commission's proposed amendments and far outweigh any assumed potential benefits of public access to every page of the record in FINRA proceedings. FINRA therefore requests that the redaction requirement not apply to copies of the exhibits admitted, as well as documents offered but not admitted, in FINRA proceedings under Commission review. FINRA also believes there should be no redaction requirement for Trial-Level Transcripts.

The Commission's motives in trying to make its records more readily available to the public are laudable, and FINRA appreciates why the Commission seeks to shift its redaction burdens to SROs. But the Commission's proposal does not demonstrate that the public accessibility benefits that would accrue from its proposal would justify the burdens that will be imposed. The Commission's proposal discloses the number of requests that were made in fiscal years 2011-2013 for records related to administrative proceedings, and it explains that the Commission currently redacts sensitive personal information from those records. The mere number of requests, however, provides no information about the nature of those requests, the extent to which they included records in the Commission's review of SRO proceedings under SEC Rule 420, or the number of pages that were requested. Moreover, the Commission's proposal does not indicate whether the proposal would eliminate, or even reduce, the need for SEC staff to review records for sensitive personal information in Rule 420 proceedings when records have been requested by the public.<sup>11</sup>

Without providing such additional information, the Commission has not demonstrated that it is more cost effective to require SROs to redact sensitive personal information from all exhibits and Trial-Level Transcripts contained in certified records than to continue the Commission's current practice of having Commission staff redact only those filings that are requested by the public or posted on the Commission's website. In fact, FINRA believes that the total man hours that would be spent redacting the exhibits and Trial-Level Transcripts—even if the proposal would eliminate the need

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<sup>10</sup> FINRA's redacting averaged to .3056 minutes per page. We note that sales practice cases usually include customer-related documents, and that customer account opening documents, for example, typically contain multiple pieces of sensitive personal information, including Social Security numbers, financial account numbers, driver's license or state-issued identification numbers, home addresses, telephone numbers and dates of birth. These documents will take much longer than the average of 18 seconds to redact. In projecting redaction time for 114,160 pages, FINRA calculates that redacting will require 581 paralegal hours and 5.7 hours of attorney supervision (1 hour of supervision per 20,000 pages).

<sup>11</sup> FINRA believes that the Commission should clarify that, while its proposal would increase the speed with which it responds to requests for filings, it intends to post on its website only select filings.

for Commission staff to review materials for sensitive personal information—would be far greater under the Commission’s proposal compared to the status quo.<sup>12</sup>

Thus, the proposed requirement that SROs redact all sensitive personal information from certified records will impose substantial burdens that have not been justified. The benefits of public access to SRO appeals can be achieved by allowing the public access to the complaint, answer, Hearing Panel and National Adjudicatory Council decisions, Hearing Officer Orders, and motions and briefs of the parties. FINRA urges the Commission to exclude SROs from the requirements to redact and certify that the exhibits and Trial-Level Transcripts contained in records submitted pursuant to SEC Rule of Practice 420(c) do not contain sensitive personal information.

**As an Alternative, the Commission Should Provide a Streamlined Process for an SRO to Obtain a Protective Order for Exhibits in the Record**

If the Commission rejects FINRA’s request for an exemption from the redaction requirements, FINRA believes that the Commission should provide alternative relief to SROs in the form of protective orders in appeals of SRO proceedings.<sup>13</sup> FINRA suggests that a protective order provision for use in SRO proceedings be streamlined to recognize the realities of the records in proceedings that contain voluminous amounts of sensitive personal information without SROs bearing the burdens of redaction. FINRA proposes that in such matters, the SRO would file a motion for a protective order along with all of the exhibits in the record and the Trial-Level Transcripts under seal. The SRO would demonstrate good cause by representing that redacting all sensitive personal information from the exhibits and Trial-Level

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<sup>12</sup> In contrast, FINRA supports the proposed amendments to SEC Rule of Practice 151 that would require that sensitive personal information not be included in, and be redacted or omitted from, all “filings,” provided that the term “filings” does not encompass either the exhibits or Trial-Level Transcripts included in a certified record that an SRO submits pursuant to Rule of Practice 420(e). FINRA agrees that in appeals pursuant to SEC Rule of Practice 420, the parties making filings are well-positioned to redact the documents and initially draft the documents they file to avoid the use of sensitive personal information. Moreover, FINRA understands that the Commission is already making many filings publicly available on the Commission’s website.

<sup>13</sup> Current SEC Rule of Practice 322 allows a party or a person to seek to “limit from disclosure . . . to the public documents or testimony that contain confidential information.” 17 C.F.R. §201.322. FINRA recognizes that protective orders under Rule of Practice 322 have been utilized in SRO appeals in past proceedings. *See, e.g., Gately & Assocs., LLC*, Exchange Act Release No. 62656, 2010 SEC LEXIS 2535, at \*5 n.7 (Aug. 5, 2010) (granting partial protective order pursuant to Rule of Practice 322 in appeal of disciplinary action taken by the PCAOB).

Transcripts would be unduly burdensome. Upon an SRO's showing of good cause, the motion for the protective order would be granted. Unlike the Commission's proposed amendments to Rule 322(b), a motion for protective order filed by an SRO would not require the SRO to create redacted exhibits or Trial-Level Transcripts that would be available for public review.

A streamlined motion for a protective order would greatly reduce the burdens on SROs when filing the certified record on appeal. The benefits of public access to SRO appeals would be achieved in large part by making the key findings of adjudicators and pleadings and arguments of parties publicly available.

### **FINRA Requests that the Commission Permit SROs Additional Time to File Redacted Copies of the Certified Record**

FINRA believes that the redaction of large records will result in SROs needing additional time to file certified records with the Commission. FINRA therefore requests that the Commission permit SROs 40 days after the receipt of the application for review to file a redacted copy of the record. FINRA would continue to file the unreacted copy of the record with the Commission within 14 days of the application for review, which is consistent with the current Rules of Practice and eliminates any delay in the Commission's consideration of the record.

### **FINRA Requests that the Commission Adopt a Lengthy Implementation Time for the Electronic Filing Requirement**

The Commission's rule proposal is silent on the period of time between the adoption of the amended Rules of Practice and the date on which filers would be required to make all filings electronically. FINRA respectfully requests that the Commission adopt an implementation period that allows FINRA to prepare for electronic filing by converting its case processing from the current procedure, which is a mixed system that is predominately paper based, to an all-electronic system. FINRA requests that the Commission adopt a one-year implementation period, during which SROs can prepare for electronic filing. During this one-year implementation period, the amended Rules of Practice would not be in effect.

Before FINRA issues its final decision in a disciplinary case or Appealable Proceeding, it presides over an adjudicatory process that can involve several stages of review, conducted by several different FINRA departments or adjudicatory bodies. For example, in the typical FINRA disciplinary case that results in an appealable decision, the matter is first considered by a FINRA Hearing Panel or Extended Hearing Panel, then by FINRA's National Adjudicatory Council. The records of FINRA's proceedings include numerous kinds of materials, including pleadings, correspondence, motions, briefs, certificates of service, pre-hearing filings, exhibits, transcripts of pre-hearing conferences and hearings, orders, and decisions. Although FINRA has electronic filing options, FINRA does not currently require electronic filing in most proceedings. For example, when a case is before the Office of Hearing Officers or the National Adjudicatory Council, the parties may file motions and briefs

by e-mail, but this method is optional. Parties may file motions and briefs in paper as well. Even where FINRA offers an electronic filing option, the official records that FINRA maintains in proceedings that are the subject of appeals pursuant to SEC Rule of Practice 420 are currently in paper.

Absent a reasonable implementation period, the proposed electronic filing requirement will impose substantial costs on FINRA in the short term. Unless and until FINRA imposes its own mandatory electronic filing requirement for FINRA proceedings—and develops its own system to accept mandatory electronic filings in all of its various administrative proceedings—FINRA will be required to convert large volumes of paper records into electronic format.

It will take time for FINRA to design and implement its own in-house electronic filing system to facilitate its compliance with the Commission's proposed electronic filing requirement. Just as the Commission is amending its rules to implement its new electronic filing requirement, FINRA will need to amend various rules governing filing requirements in FINRA proceedings, which currently permit non-electronic ways of filing. Further complicating FINRA's development of an electronic filing system is that there are numerous kinds of FINRA Appealable Proceedings presided over by different FINRA offices and departments.<sup>14</sup> Moreover, because FINRA is not aware of the technical details of the Commission's electronic filing system, FINRA has not yet begun to develop its own electronic filing system. The manner in which FINRA adjusts its own electronic filing processes will be affected and influenced by the technical details of the Commission's new electronic filing system. To date, however, the Commission has not made those details available to the public or to FINRA.<sup>15</sup>

Even if FINRA were able to require electronic filing immediately in its own proceedings, FINRA would remain engaged for some time in the inefficient practice of converting the paper elements of a case to an electronic format. FINRA builds records of disciplinary proceedings throughout the Hearing Panel's presiding over a hearing, the Hearing Panel's issuance of a decision, the National Adjudicatory Council's presiding over an appellate proceeding, and its issuance of a decision. Because FINRA's full disciplinary process can often take more than a year, it will be well over a year before FINRA's records of its proceedings are fully electronic. The full benefit of managing a case in electronic format is not realized until FINRA has

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<sup>14</sup> FINRA's Department of Enforcement, Department of Market Regulation, Department of Member Regulation, Department of Qualifications and Exams, Office of Hearing Officers, and Office of General Counsel all have responsibilities for maintaining records of FINRA disciplinary cases and Appealable Proceedings.

<sup>15</sup> For example, the Commission's proposal does not address the electronic formats that will be accepted, file size requirements, naming conventions, or encryption requirements.

adopted an end-to-end electronic filing requirement. Until that time, FINRA's compliance with the proposed electronic filing requirements will be laden with inefficiencies.

FINRA believes that all of these circumstances warrant the use of a year-long implementation period before mandatory electronic filing begins.

### **FINRA Supports an Electronic Filing Requirement**

FINRA believes that, following its conversion to maintaining electronic records of FINRA proceedings, the electronic filing of materials will lower reproduction and delivery costs that FINRA typically incurs in appeals brought pursuant to SEC Rule of Practice 420. Similar cost benefits will accrue from the Commission's proposal to amend SEC Rule of Practice 150 to permit the parties to serve materials electronically.

### **FINRA Requests that the Commission Modify the Certification Requirement**

Proposed SEC Rule of Practice 420(e)(3) would require that the SRO certify that "any sensitive personal information as defined in § 201.420(e)(1) has been excluded or redacted from the filing."<sup>16</sup> Regardless of whether the Commission exempts SROs from the requirement to exclude or redact sensitive personal information from exhibits or Trial-Level Transcripts, FINRA believes that the proposed certification requirement should be modified. Considering the large number of pages contained in the records of FINRA administrative proceedings and the potential for human error in the redacting process, it will be extremely difficult in many instances for FINRA to certify definitively that a record contains no sensitive personal information. FINRA believes that a feasible approach would be to permit an SRO to certify instead that it has undertaken reasonable efforts to exclude or redact from the filing any sensitive personal information.

### **Expanding the Definition of Sensitive Personal Information Would Have an Adverse Effect on Parties in Litigation**

The Commission has invited comments on whether the disclosure of personal e-mail addresses generally and home addresses of parties and persons filing documents with the Commission could have an adverse effect on persons or parties, and whether, as a result, these terms should be included in the definition of sensitive personal information that must be excluded or redacted. FINRA believes that including this kind of information in the definition of sensitive personal information would have an adverse effect on parties in litigation.

FINRA Rule 8210 requests and responses, pleadings, motions, briefs, and certificates of service all can contain individuals' home addresses and phone numbers, especially in investigations or proceedings involving individuals who were not represented by

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<sup>16</sup> Amendments to the Commission's Rules of Practice, 80 Fed. Reg. 60,090.

counsel.<sup>17</sup> FINRA currently submits certified records to the Commission without redacting this information.

Expanding the definition of sensitive personal information in this way would make the SROs' process of redacting and excluding sensitive personal information from pleadings, motions, briefs and certified mailings even more difficult than it will already be. Personal e-mail addresses and home address of parties and persons filing documents with the Commission are items that appear throughout the records of FINRA disciplinary cases and Appealable Proceedings, especially in the many instances in which individual respondents represent themselves.<sup>18</sup> Indeed, the certified records of the many FINRA cases in which a respondent did not avail himself or herself of administrative remedies and cases involving violations of FINRA Rule 8210 would be heavily redacted, because such cases frequently address whether FINRA sent letters to the respondent's residential mailing address as reflected in CRD.<sup>19</sup>

Expanding the definition of sensitive personal information also would increase the burdens of litigating before the Commission. In cases when a party uses his or her home address or personal e-mail address as the service address, there is no way to draft filings to exclude such information. Correspondence needs to be addressed to a party, and certificates of service are required to include the address to which a document is sent.

### **Conclusion**

FINRA appreciates the opportunity to comment on the proposed amendments to the Commission's Rules of Practice. FINRA believes that by addressing the comments included in this letter, the Commission will improve the proposed amendments by reducing the burdens on SROs necessary to comply.

Please contact Alan Lawhead, Director-Appellate Group at (202) 728-8853, Jennifer Brooks, Associate General Counsel, at (202) 728-8083, or Michael Garawski,

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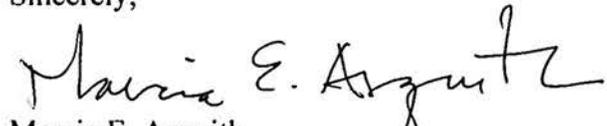
<sup>17</sup> Although the Commission has proposed an exception to the Commission's proposed definition of sensitive personal information for home addresses and telephone numbers of parties and persons filing documents with the Commission, the persons who appeal FINRA actions to the Commission can be a subset of the persons and parties that were respondents in the FINRA proceeding.

<sup>18</sup> For example, in a FINRA disciplinary proceeding where a respondent appears pro se and uses his or her home address as the service address, the record of the proceeding will usually contain that home address in the signature block of filings made by the respondent, in correspondence mailed to the respondent, and in the certificates of service filed by FINRA's prosecuting department.

<sup>19</sup> See, e.g., *Darren M. Smith*, Exchange Act Release No. 75705, 2015 SEC LEXIS 3368 (Aug. 14, 2015).

Associate General Counsel, at (202) 728-8835, if you would like to discuss FINRA's comments or have any questions.

Sincerely,

  
Marcia E. Asquith  
Senior Vice President and Corporate Secretary