



PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION

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July 28, 2015

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

Re: File No. SR-FINRA-2015-019; Proposed Rule Change to Amend FINRA Rule Series 9100,
9200, 9300, 9550, and 9800 Regarding Temporary and Permanent Cease and Desist Orders

Dear Mr. Fields:

I write on behalf of the Public Investors Arbitration Bar Association ("PIABA"), an international bar association comprised of attorneys who represent investors in securities arbitrations. Since its formation in 1990, PIABA has promoted the interests of the public investor in all securities and commodities arbitration forums, while also advocating for public education regarding investment fraud and industry misconduct. Our members and their clients have a strong interest in rules promulgated by the Financial Industry Regulatory Authority ("FINRA") relating to investor protection.

I thank the Commission for the opportunity to comment on the proposed rule change to amend FINRA Rule Series 9100, 9200, 9300, 9550, and 9800 regarding temporary and permanent cease and desist orders. FINRA's proposal would, inter alia, allow the FINRA Hearing Panel to impose a cease and desist order upon a showing of a likelihood of success on the merits, and not by a preponderance of the evidence.

PIABA supports the adoption of the new standard for cease and desist orders. The Rule 9840, which states the standard for cease and desist orders, is especially important for investor protection. Currently, Rule 9840 requires a finding "by a preponderance of the evidence that the alleged violation specified in the notice has occurred." The main feature of the proposed amendment to FINRA Rule 9840 would change the evidentiary standard for temporary cease and desist proceeds to a "showing of a likelihood of success on the merits."

This proposed amendment, if adopted, would apply the appropriate evidentiary standard in cease and desist proceedings, make FINRA disciplinary proceedings consistent with other jurisdictions, and allow FINRA to use this investment protection tool more frequently.

I. The Likelihood of Success on the Merits is the Appropriate Evidentiary Standard in Cease and Desist Proceedings

Currently, to obtain a cease and desist order, Rule 9840 requires a finding:

- (1) by a preponderance of the evidence that the alleged violation specified in the notice has occurred; and

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- (2) that the violative conduct or continuation thereof is likely to result in significant dissipation or conversion of assets or other significant harm to investors prior to the completion of the underlying disciplinary proceeding under the Rule 9200 and 9300 Series.

This is the same evidentiary standard used in the ultimate disciplinary proceeding. The proposed change to Rule 9840 would significantly alter the first prong by requiring “that the Department of Enforcement or Department of Market Regulation has made a showing of a likelihood of success on the merits.”

FINRA should consider defining likelihood of success in a manner that would allow FINRA Enforcement the opportunity to more frequently exercise this important investor protection tool. The Hearing Panel should be empowered to issue a Temporary Cease and Desist Order if it finds that the FINRA Department of Enforcement or Department of Market Regulation has preliminarily demonstrated that it is likely to be able to prove the alleged violative conduct by a preponderance of the evidence at the final hearing.

The “preponderance of the evidence” standard imposes an unnecessarily high burden for injunctive relief. While FINRA’s prosecuting department gathers enough evidence to overcome this burden, investors will continue to suffer considerable harm in the meantime.

The purpose of cease and desist orders is to protect “significant economic interests.”¹ They are an important investor protection tool intended to prevent further harm to investors. As FINRA notes, a temporary cease and desist order would “prevent the likely and significant dissipation or conversion of assets.”² The “likelihood of success on the merits” standard would enable FINRA’s prosecuting department to seek and obtain cease and desist orders more quickly. Consequently, aggrieved investors would receive greater protection the sooner a cease and desist order is obtained.

Further, since a lesser showing is required at the preliminary stage, more time and effort can be devoted to meeting the “preponderance of the evidence” standard at the disciplinary proceeding. The improved efficiency of the proceeding would also enable FINRA’s prosecuting department to initiate more cease and desist orders. Thus, the new evidentiary standard for cease and desist proceedings would not only assist the victimized investors, but also protect potential new investors from ever being harmed by the same scheme.

II. The Proposed Evidentiary Standard is Consistent with Other Jurisdictions

The proposed change to Rule 9840 to the evidentiary standard from “preponderance of the evidence” to “likelihood of success on the merits” would put FINRA in line with other jurisdictions. The Supreme Court of the United States, for example, has recognized that in order to obtain a preliminary injunction, a showing of a “likelihood of success on the merits” is required.³ Further, the Securities and Exchange Commission (“SEC”) uses

¹ *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 208 F.3d 885, 897 (10th Cir. 2000).

² File No. SR-FINRA-2015-019; Proposed Rule Change to Amend FINRA Rule Series 9100, 9200, 9300, 9550, and 9800 Regarding Temporary and Permanent Cease and Desist Orders, at *6.

³ *Glossip v. Gross*, 2015 U.S. LEXIS 4255, at *22 (June 29, 2015); *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008).

this standard when determining whether to issue a stay.⁴ Just as the current and proposed Rule 9840 requires a showing of “significant harm,” the courts⁵ and the SEC⁶ require evidence of “irreparable harm.” Thus, if approved, FINRA’s evidentiary standard for cease and desist proceedings would harmonize the present standard in other jurisdictions.

III. FINRA Should Use Temporary Cease and Desist Proceedings More Frequently When Necessary

Temporary cease and desist orders are intended to protect investors from continuing harm. However, this purpose can only be realized when such orders are actually sought and obtained. FINRA has thus far been too cautious.

As FINRA acknowledges in the rule proposal, only seven temporary cease and desist orders have been obtained in the past 12 years. FINRA further notes that it “intends to continue to use its authority in a similarly judicial manner.” As noted above, the proposed “likelihood of success on the merits” standard would expedite temporary cease and desist proceedings and provide investors with greater protection. However, the benefits of this new evidentiary standard cannot be fully realized if the actual proceedings are used sparingly. In order to make cease and desist proceedings a truly effective investor protection tool, FINRA should use these proceedings more frequently when the circumstances warrant their use.

IV. Conclusion

PIABA thanks the Commission for the opportunity to comment on this important proposed rule change. PIABA fully supports the current proposed rule change. PIABA hopes that FINRA will continue to take steps to ensure that temporary cease and desist proceedings remain an effective investor protection tool.

Very truly yours,



Joseph C. Peiffer, President
Public Investors Arbitration Bar Association

⁴ *Harry W. Hunt*, Exchange Act Release No. 68755, 2013 SEC LEXIS 297, at *9 (Jan. 29, 2013); *Richard L. Sacks*, Exchange Act Release No. 34-57028, 2007 SEC LEXIS 3019, at *5-6 (Dec. 21, 2007).

⁵ *Winter*, 555 U.S. at 20; *Cisco Tech., Inc. v. Certification Trendz Ltd.*, 2015 U.S. Dist. LEXIS 83125, at *3 (2nd Cir. June 26, 2015).

⁶ *Whitehall Wellington Invs., Inc.*, Exchange Act Release No. 43051, 2000 SEC LEXIS 1481, at *4 (July 18, 2000); *Monica J. Lindeen*, Securities Act Release No. 9808, 2015 SEC LEXIS 2408, at*9 (June 16, 2015).