201 South Main Street, Suite 1800
Salt Lake City, Utah 84111
Main 801.532.1234
Fax 801.536.6111
parsonsbehle.com

A Professional
Law Corporation

Aaron Lebenta
Attorney at Law
[redacted]

August 3, 2020

Via the SEC Portal

Ms. Vanessa Countryman
Office of the Secretary
U.S. Securities and Exchange Commission
100 F. Street NE
Washington, D.C. 20549

Re: Comment Letter with respect to SEC Release No. 34-89305; File No. SR-FINRA-2020-011

Dear Ms. Countryman:

This firm represents Alpine Securities Corporation ("Alpine"). We submit this comment letter, on behalf of Alpine, in response to the Financial Industry Regulatory Authority, Inc.'s ("FINRA") proposed rule change, as amended, to "address brokers with a significant history of misconduct." ("Proposed Rule Change"), in accordance with the Securities and Exchange Commission's (the "Commission" or "SEC") request in SEC Release No. 34-89305.[1]

We appreciate Commission's decision to institute formal proceedings with respect to the Proposed Rule Change, and its consideration of comments from interested persons, to ensure that the issues and concerns raised thereby receive the careful consideration that they deserve. Through this comment letter, Alpine respectfully requests that the Commission disapprove the Proposed Rule Change as it relates to the proposed modifications to the FINRA Rule 9200 and 9300 Series, the FINRA Rule 9520 Series, and the FINRA Rule 1000 Series, for the reasons detailed herein.[2]

---

[1] FINRA published the Proposed Rule Change for notice and comment in the Federal Register on April 14, 2020. *See* SEC Release 34-88600 (April 8, 2020), 85 Fed. Reg. 20745 (April 14, 2020) (File No. SR-FINRA-2020-11) (the "Notice"). *Citations to the Notice herein are to SEC Release 34-88600.* On July 2, 2020, FINRA filed an amendment to the Proposed Rule Change. *See* SEC Release No. 34-89305, at 1 (discussing the procedural history of the Proposed Rule Change). Pursuant to SEC Release No. 34-89305, the Commission instituted proceedings to determine whether to approve or disapprove the Proposed Rule Change, and to solicit comments, on July 13, 2020.

[2] Alpine expresses no opinion on the proposed modifications to FINRA Rule 8312.

Background of Alpine

Alpine is a small, self-clearing broker-dealer, registered with the SEC. Alpine's business primarily involves clearing and settlement services for microcap over-the-counter ("OTC") stock transactions for other brokerage firms. Brokers who are not members of the registered clearing agency need the services of a clearing broker in order to clear and settle their own trades or the trades of their customers. To provide clearing and settlement services and function as a clearing firm for its correspondent firms, Alpine must be a member of various self-regulatory organizations ("SROs"), including FINRA and the National Securities Clearing Corporation ("NSCC") Alpine is a member in good standing of FINRA, NSCC and a DTC participant.

Alpine's mission is to provide liquidity to the microcap OTC market. There are more than 10,000 stocks trading in the OTC markets, while the number of listed companies is about 4,397 as of 2018. The total aggregate volume of OTCQX, OTCQB and Pink Securities was approximately $ 375.2 billion in 2018.[3] This is undeniably a critically important segment of the market, that represents the core of the U.S. economy and jobs.

Alpine facilitates tens of millions of dollars of capital financing for small business each month through the deposit, clearance and liquidation of microcap securities on behalf of its correspondent customers who provide direct financing to thousands of innovative, startup and early stage development business that operate in the U.S. However, Alpine is one of a few remaining broker-dealers to fully service this vital market segment. Major clearing firms, such as Merrill Lynch, Fidelity, Morgan Stanley and UBS, choose to no longer service the OTC market. Online discount firms (e.g., E-Trade, Charles Schwab, etc.) do not process this business either.

The decline in firms willing to service the microcap market is a direct result of the intense regulatory pressure and enormous regulatory costs and burdens of compliance. As recognized in an October 2018 article published in Forbes, called *The End of the Penny Stock Market Could be* Imminent: "Because of restrictions imposed by FINRA and the SEC, microcap funders cannot, for all intents and purposes, deposit paper certificates with major clearing firms."[4] Over regulation and zealous enforcement actions have caused a steady decline in the number of small broker dealers during the past 10 years. From 2008-2017, the number of nonbank broker dealers dropped 21.1% from 3,969 to 3,132.[5] In fact, the number of all FINRA members has also dropped

---

[3] *See* OTC Markets Group Reports 2018, Trading Statistics and Highlights, *available at:* https://www.prnewswire.com/news-releases/otc-markets-group-reports-2018-trading-statistics-and-highlights-300779908.html

[4] *See* Levick, R., *The End of the Penny Stock Market Could Be Imminent*, (October 30, 2018), available at https://www forbes.com/sites/richardlevick/2018/10/30/the-end-of-the-penny-stock-market-could-be-imminent/#2865f13f7b22

[5] This information comes from an analysis of FINRA statistics available at: https://www.bdlawcorner.com/2018/08/finra-stats-reveal-horribly-kept-secret-small-firms-are-the-heart-and-soul-of-the-brokerage-industry-but-dying-off-nevertheless/

precipitously every year since 2005, such that by 2019 there were nearly 1,600 less FINRA member firms than in 2005 – an approximately 31% decrease.[6]

The Commission Should Reject FINRA's Propensity-Based Justifications for the Proposed Rule Changes

In the Proposed Rule Change, FINRA seeks, in relevant part to:

- Amend the Rule 9200 and 9300 Series to "allow a hearing officer to impose conditions or restrictions on the activities of a respondent member broker-dealer or respondent associated person, and require the member broker-dealer employing a respondent associated person to adopt heightened supervisory procedures for such associated person, when a disciplinary matter is appealed to the National Adjudicatory Council ("NAC") or called for NAC review";[7]

- Amend FINRA eligibility proceedings under the Rule 9520 Series to require member firm's to "adopt heightened supervisory procedures for statutorily disqualified associated person during the period a statutory disqualification eligibility request under review by FINRA";[8] and

- Amend the member application and association person registration requirements under the Rule 1000 Series to require members to submit written requests to FINRA seeking a "materiality consultation and approval of a continuing membership application," ("CMA"), if required, when a natural person that has, in the prior five years, one or more "final criminal matters" or two or more "specified risk events," seeks to become an owner, control person, principal or registered person of the member firm. The terms "final criminal matter" and "specified risk events" are new and broadly defined in the Proposed Rule Change.[9]

FINRA seeks to justify each of these rule changes as necessary for investor protection by claiming member firms or associated persons who have a disciplinary history are predisposed to commit future violations, and that "[t]his risk cannot always be adequately addressed by FINRA's existing rules and programs."[10] Specifically, FINRA cites "studies" as "evidence that past disciplinary and other regulatory events associated with a member firm or individual can be predictive of similar future events, such as repeated disciplinary actions, arbitrations and

---

[6] *See* FINRA Statistics, at https://www finra.org/media-center/statistics (showing the decrease from 5,106 FINRA member firms in 2005 to 3,517 by 2019).

[7] *See* SEC Release 34-89305, at 2 (summarizing the Proposed Rule Change)

[8] *See id.* at 2-3.

[9] *See id.* at 3.

[10] *See* Notice, SEC Release 34-88600, at 4 (providing FINRA's "Statement of the Purpose" for the Proposed Rule Change).

complaints."[11] In addition to the concerns with specific proposed rule changes detailed below, FINRA's propensity-based justification for the Proposed Rule Change is itself flawed, and should be rejected, for several reasons.

First, regardless of what the cited "studies" may or may not indicate in the abstract, FINRA's own statistical evidence does not support its premise. For instance, to try to provide statistical support for its request to amend the Rule 9200-9300 Series to give hearing officers authority to impose "conditions and restrictions" on disciplinary-action respondents that would not be stayed during the pendency of an appeal to the NAC, FINRA stated:

> In order to evaluate these benefits and assess the potential risk posed by brokers during the appeal period, FINRA examined cases that were appealed to the NAC during 2013-2016 and determined whether the brokers associated with an appeal to the NAC had a new disclosure event—***for this analysis, a final criminal matter or a specified risk event, as defined above***—at any time from the filing of the appeal through the year-end ***after the year in which the appeal reached a decision***. Based on this analysis, FINRA ***estimates that 21 of the 75*** brokers who appealed to the NAC during the 2013-2016 period were associated with a total of 28 disclosure events that occurred during the interstitial period after the filing of their appeal to the NAC.[12]

This analysis, taken on its face, shows a rate of new "disclosure events" by brokers during the pendency of their appeals of *less than 30 %*. This is so even though FINRA expanded the possible disclosure event parameters to make it more inclusive. First, FINRA continued the analysis "through the year-end *after* the year in which the appeal reached a decision." Second, FINRA used the not-yet-approved definition of "specified risk event" from the Proposed Rule Change to identify and measure the number "disclosure events." Given the breadth of this proposed term – which would include any customer-initiated arbitration award *or settlement* for $15,000 or more[13] – FINRA's analysis captures events outside of violations that would be the subject of a disciplinary action, for which the proposed changes to the Rule 9200-9300 Series are targeted.

It is also notable that FINRA seeks these rule changes at a time when the number of FINRA regulatory actions overall are at their lowest point in the last five years, and have steadily declined in nearly every category, every year since 2015[14]:

---

[11] *See id.*

[12] *See* Notice, SEC Release 34-88600, at 44 (emphasis added) (footnotes omitted).

[13] *See* Notice, SEC Release 34-88600, at _ (identifying amendments to Rule 1011 to define "specified risk event" to include customer-initiated arbitration awards and settlements over $15,000, in addition to sanctions imposed in regulatory actions in court or administrative proceedings).

[14] *See* FINRA Statistics, at https://www.finra.org/media-center/statistics.

Regulatory Actions	2019	2018	2017	2016	2015
Investor Complaints Received	2,954	3,136	3,002	3,070	3,250
New Disciplinary Actions Filed	854	921	1,369	1,434	1,512
Fines (in millions)	\$39.5	\$61.0	\$64.9	\$173.8	\$93.8
Restitution (in millions)	\$27.9	\$25.5	\$66.8	\$27.9	\$96.6
Firms Expelled	6	16	20	24	31
Firms Suspended	21	23	29	26	25
Individuals Barred	348	386	492	517	496
Individuals Suspended	415	472	733	727	736

FINRA's own statistics and analysis thus do not support the underlying premise that there is a current regulatory crisis or a pattern of increased risk to customers by FINRA members or associated persons, overall or by those member firms or brokers who are awaiting final decision on appeal, that is unmet by FINRA's current rules. Certainly, and as detailed further below, the statistical evidence does not justify the significant additional costs and loss of rights that would result from approval of these proposed rule changes.

Second, FINRA's reliance on propensity principles as a measure of the likelihood of future violative conduct or to justify a prospective limitation on rights raises due process concerns. Due process is intended to safeguard those "fundamental conceptions of justice which lie at the base of our civil and political institutions."[15] The prohibition against introducing pure propensity evidence as a means to establish guilt of wrongdoing is deeply engrained in Anglo-American jurisprudence.[16] Not surprisingly, Congress expressly incorporated due process principles into provisions of the Exchange Act that govern FINRA specifically, requiring that FINRA's "rules" "provide a fair procedure" for disciplining members and associated persons, denying membership,

[15] *Mooney v. Holohan,* 294 U.S. 103, 112 (1935).

[16] *See, e.g. Boyd v. United States,* 142 U.S. 450, 458 (1892) (observing that introducing proof of prior crimes "tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules proscribed by law."); *Michelson v. U.S.,* 335 U.S. 469, 475-76 (1948) ("The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors" because such propensity evidence "it said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."); *Old Chief v. United States,* 519 U.S. 172 (180-81 (1997) (condemning the practice of proving "a defendant's ... bad character and taking that as raising the odds that he did the later bad act now charged (or, worse, calling for the preventive conviction even if he should happen to be innocent momentarily"); *Spencer v. Texas,* 385 U.S. 554, 572-74 (1967) (Warren, C.J., concurring in part and dissenting in part) ("[O]ur decisions exercising supervisory power ... suggest that evidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due Process Clause.").

barring the association with a member, or otherwise prohibiting or limiting access to the services of a member or FINRA.[17]

While FINRA here attempts to use a prior violation to establish propensity in a different context than that which is commonly prohibited in court proceedings, the result and intent is similar: FINRA hopes to convince the Commission to approve rules which would preemptively curtail rights, and impose additional restrictions and costly burdens on members and associated persons, on the purported basis that because a violation occurred in the past, a new violation will occur in the future, including within the confined period between the Hearing Panel's decision and the NAC's disposition of an appeal. As indicated above, FINRA's own statistical evidence does not support that this is likely to occur, or that the existing rules and procedures are insufficient to protect investors.[18]

It is neither in the public interest, nor good policy, to premise a rule change that has such potentially devasting ramifications for members and their associated persons upon such a flimsy and constitutionally infirm foundation as a purported predilection to commit violations. For these, and the additional reasons detailed below, the Commission should not approve the Proposed Rule Change as presently constituted.

The Commission Should Disapprove the Changes to the Rule 9200-9300 Series that Purport to Authorize Hearing Officers to Impose Additional Interim Conditions and Restrictions Sanctions During the Pendency of an Appeal

Under FINRA's current rules, a disciplinary decision issued by a Hearing Panel, including any sanctions (except a permanent cease and desist order) against a member firm or other persons within FINRA's jurisdiction, are automatically stayed during an appeal of that decision to the NAC.[19] There is obvious utility to this process; the available sanctions – which can include significant fines, suspensions, expulsions, and bars – can be devasting to the continued existence and livelihood of a member firm and all persons associated therewith. As such, it is imperative that an effective appeal process exists to ensure the disciplinary decision is correct, and that the sanctions are warranted, *before they are imposed*.

Through the proposed amendments to the Rule 9200 and 9300 Series, however, FINRA seeks to alter this well-established scheme in several key respects. Upon a motion from the Division of Enforcement, FINRA proposes to authorize a Hearing Officer who participated in the underlying proceeding (instead of the Hearing Panel) to impose any conditions or restrictions on the activities of a respondent as the Hearing Officer considers reasonably necessary for the purpose of preventing customer harm, during the pendency of an appeal, and until FINRA's final decision

---

[17] 15 U.S.C. §78o-3(b)(8)

[18] Additional due process concerns regarding the fairness of the procedures and proceedings under the proposed amendments to the Rule 9200-9300 Series are addressed below

[19] *See* FINRA Rule 9311. The filing of an application for SEC review, in turn, stays the effectiveness of any sanction, other than a bar or an expulsion, imposed in a decision constituting a final FINRA disciplinary action. *See* FINRA Rule 9370.

takes effect. Curiously, FINRA does not explain why the Hearing Officer alone should be vested with this authority, while the initial liability decision and imposition of other sanctions, including cease and desist orders, require a majority determination by the entire Hearing Panel.[20] In addition to resting on faulty premise (as detailed above), Alpine has several concerns with these proposed amendments, and respectfully requests that the Commission deny them.

In the first instance, the standard is vague and allows for arbitrary enforcement. The proposed rule provides no definitions, guideposts or limitations as to what types of "conditions or restrictions" could be imposed by the Hearing Officer under the proposed rule. Instead, the decision is to be left to Hearing Officer's ad hoc conclusion of what is "reasonably necessary to prevent customer harm" – an equally vague standard. This will inevitably lead to wildly divergent conditions and restrictions being imposed on respondents based on little more than the Hearing Officer's unilateral will. After a violation has been found, nearly any condition or restriction could be ostensibly explained as necessary to prevent customer harm, giving the Hearing Officer leave to impose more stringent conditions or restrictions based upon his or her subjective impressions of the respondent or the types of business services it provides (such as for the disfavored microcap markets).[21] FINRA's rules must provide a "fair procedure for the disciplining of members and persons associated with members,"[22] which, at a minimum should include freedom from vague and arbitrary enforcement, and notice of the precise sanctions one faces before FINRA brings an enforcement action.

Notably, moreover, while FINRA is careful to avoid characterizing these "conditions and restrictions" as "sanctions," they are precisely that. They would be imposed only in the context of a disciplinary action, as a punitive consequence for a violation, and would operate similarly to an injunction issued by a court.[23] And, under the proposed amendments to FINRA Rule 9556, failure to comply with one of the conditions or restriction sanctions would result in swift (expedited) enforcement proceedings with dire consequences (suspension, expulsion or a bar), which FINRA equates to a failure to comply with another sanction – a temporary or permanent cease and desist order.[24] Alpine observes that such affirmative injunctive-type sanctions are not among the authorized sanctions available to FINRA in a disciplinary proceeding under 15 U.S.C. § 78o-3(b)(7). FINRA's attempt to grant them to a single Hearing Officer should be rejected.

Second, the fact that the "conditions and restrictions" sanctions would not be stayed by an appeal will likely lead to instances where a member firm or associated person faces punishment – one that could be fatal to their abilities to continue in the industry or as a going concern – based

---

[20] *See* Notice, SEC Release 34-88600, at 7, 9-13.

[21] There are built-in protections from requiring that sanctions be approved by more than one person, which FINRA seeks to circumvent through the proposed rule changes. At the very least, if the Commission were to consider approving some form of FINRA's proposal, the determination to impose such interim restrictions or conditions should be made by the entire Hearing Panel.

[22] 15 U.S.C. § 78o-3(b)(8).

[23] *See, e.g., Charlesbank Equity Fund II v. Blinds To Go, Inc.*, 370 F.3d 151, 157 (1st Cir. 2004) (defining injunctions as orders that "'require a party either to do or to refrain from doing some act'") (citation omitted)).

[24] *See* Notice, SEC Release 34-88600, at 17-18.

upon a charge that is overturned on appeal because it lacked merit and should never have been filed. Avoiding such disastrous circumstances is the reason the Hearing Panel's decision and any sanctions have historically been automatically stayed pending the outcome of any appeals. These protections should not be stripped away, particularly where the asserted basis for the rule is an unfounded and improper propensity theory.

In fact, FINRA acknowledges that the conditions and restrictions could end up being as onerous as the underlying sanctions, even while it attempts to downplay the likelihood of this reality.[25] But, it does not require a large logical leap to foresee a situation where the Hearing Officer's interim restrictions or conditions end up being more punitive than the sanctions actually imposed by the Hearing Panel *because* they are not stayed. For example, suppose that a small member firm who focuses primarily on a particular line of business receives a six-month suspension as a sanction, and appeals that decision to the NAC, staying that sanction. Suppose further that, if the proposed rule change were approved, the Hearing Officer decided to restrict the member from engaging in any activity in its primary line of business for the duration of the NAC appeal process, which can take, under FINRA's estimates, an average of 15 months to complete.[26] Because the interim restriction would not be stayed, it would operate as a de facto suspension of the firm that far exceeds the length of the actual sanction imposed, assuming the firm survived the imposition of the restriction at all. This alone is unjustified. Moreover, it would be a complete travesty to the firm and the livelihoods it represents if the Hearing Panel disciplinary decision and sanctions were overturned on appeal.[27] Given the lack of guidelines or limitations on the types of conditions or restrictions the Hearing Officer could impose under the proposed amendments, FINRA cannot credibly argue such a result is even unlikely to happen.

Alpine acknowledges that FINRA has proposed an expedited process to appeal a Hearing Officer's decision to impose conditions or restrictions to a NAC subcommittee. While this provides some comfort, it does not resolve the concerns for at least two primary reasons. First, as designed, it appears that the NAC subcommittee would only review the Hearing Officer's decision of whether the conditions or restrictions are "reasonably necessary" to prevent investor harm, not whether the conditions or restrictions should be lifted or amended for other reasons, such as to avoid undue harm to the respondent because they are not stayed. Second, as designed there appears to be no mechanism to further appeal the NAC subcommittee's decision to affirm the Hearing Officer's order imposing conditions or restrictions to the SEC. Presumably, such an appeal would not be available while the appeal of the underlying disciplinary decision remained pending before the NAC, because there would be no final disciplinary action by FINRA.

Third, the proposed rule changes are subject to overbroad application. A condition or restriction imposed against an individual broker respondent would inevitably cause detrimental impacts to the member firm that employs the individual respondent, even in circumstances where the member firm is not a respondent and has not been accused of, much less found liable for, any

[25] *See id.* at 11, 43.

[26] *See id.* at 40-41.

[27] A similar possibility exists for individual associated persons, who would be likely to lose their employment if they were restricted from engaging in their specialized business line for nearly and year and a half, and due to the costs associated with the proposed heightened supervisory plan requirements.

wrongdoing. Depending on the form of the condition or restriction imposed, a member firm could face reduced revenue and, at the very least, would incur the costs and resources to develop and implement the proposed interim heightened supervisory plan under proposed Rule 9285(e).

Fourth, there are substantial, additional economic burdens from the proposed process. Compliance with unstayed conditions and restrictions is disruptive and requires additional capital and employee resources. For a small respondent member in particular, or an individual, capital and staff are more limited and additional costs could be prohibitive to their abilities to comply or remain in industry. For example, the proposed rule, as designed, would require additional resources, including legal fees, to respond to the additional motion practice and expedited appellate process with respect to the conditions and restrictions process. Additionally, FINRA contemplates that the types of conditions or restrictions could themselves have a monetary component – such as a bond – of an undefined amount.[28] A condition with a monetary component, such as a bond, could directly impact a firm's net capital obligations.

An unstayed condition or restriction is also likely to negatively impact a firm's relationships with customers, counterparties (other member firms and brokers), and other SROs, such as NSCC and DTC, which the member firm relies upon to conduct business. With respect to customers, if a firm is restricted from engaging in a particular business line, or the conditions are imposed that cause delays or other impediments to processing trades that do not exist at other firms, customers and revenue will be lost, which impacts not just the firm's bottom line, but also its ability to comply with net capital requirements. Maintaining counterparty relationships would be more difficult, if not impossible, for similar reasons; if there are restrictions or impediments to processing a particular type of trade, the counterparties will go elsewhere. These issues would not result from a non-final disciplinary decision and sanctions that are stayed pending appeal by the current rules. Other SROs, such as NSCC or DTC, would almost certainly be aware of the imposition of an unstayed condition or restriction,[29] and may take immediate action adverse to the member that would not otherwise be taken based on a stayed, non-final decision imposing sanctions – such as decreasing a firm's credit rating on the Credit Rating Risk Matrix, requiring additional clearing fund deposits, reviewing a firm's membership qualifications or status, and/or instituting its own disciplinary process. A firm, such as Alpine, must remain in good standing with NSCC and DTC to conduct business.

These are just a few examples of the types of real-world detrimental and disruptive economic impacts that would foreseeably result from a Hearing Officer's imposition of unstayed conditions or restrictions under the proposed rule changes. Yet, they are not accounted for in the proposed rule change, which considers only what the Hearing Officer deems reasonably necessary to protect investors during an appeal.

Finally, all of the issues identified above must also be weighed against the fact that there is no present need for the changes. Not only, as explained, are FINRA's propensity-based justifications invalid and unsupported, but FINRA fails to establish that its existing suite of

---

[28] *See* Notice, SEC Release 34-88600, at 11.

[29] Indeed, NSCC's or DTC's rules may require a member to disclose the imposition of a condition or restriction sanction, despite their interim nature and the non-final status of the underlying disciplinary action.

sanctions do not provide sufficient protections for investors. In particular, permanent cease and desist orders are not stayed during the pendency of an appeal to the NAC, and already provide substantial protection against future violations. The same expedited proceedings, with the same consequences, for violating the proposed conditions and restrictions already exist for violations of cease and desist orders. The additional powers FINRA seeks to imbue in the Hearing Officer are therefore neither warranted nor necessary. The proposed changes to Rule 9200 and 9300 series should be rejected for these additional reasons.

The Proposed Interim Heightened Supervisory Plan Requirements Are Overly Burdensome as Designed And Will Likely Result in the Loss of Employment for Individual Respondents

Two of FINRA's proposed rule changes would impose mandatory requirements to impose interim heightened supervisory plans. In proposed Rule 9285(e), FINRA would require member firms, during a NAC appeal, to establish and implement a mandatory heightened supervision plan for disciplined individuals.[30] Similarly, in the proposed changes to Rule 9522, FINRA seeks to require member firms that seek to continue associating with a disqualified person to include an interim plan of heightened supervision that would remain in effect throughout the entirety of the application review process.[31] Alpine has two primary concerns with these proposed rule changes, in addition to those detailed above.

First, these interim heightened supervisory procedures are unduly costly and burdensome on the member firms. For example, the proposed requirements under Rule 9285(e) would require a member firm to develop and implement heightened supervisory procedures over an associated person, before FINRA has issued a final disciplinary decision against that individual. Moreover, as currently designed, the member firm would be required to develop and implement such procedures before any interim restrictions or conditions are sought, to amend the heightened supervisory procedures to comply with any such conditions or restrictions that are imposed, and then keep them in place until the appeal is resolved. Developing and maintaining such procedures is burdensome and requires resources, both money and employee time, particularly if a firm is required to do so twice. Such burdens are felt acutely at smaller member firms, such as Alpine, who do not have large amounts of excess capital or staff. Given that the disciplinary decision and sanctions could be reversed on appeal, and that FINRA's rules already provide for a sufficient means to guard against future misconduct by obtaining a permanent cease and desist order, these costs to the member firm are wasteful and unnecessary.

Similar issues surround the proposed changes to Rule 9522, although to a lesser extent. The "SD Application" process for seeking approval to associate with a disqualified individual can be lengthy. Requiring firms to devote resources to developing and implementing an interim heightened supervisory plan before the SD Application process is complete would be resources wasted if the application is denied. Again, these concerns are magnified in small firms that have comparatively less resources than larger members. There are more cost-effective options, including streamlining the SD Application process so that decisions can be issued more quickly.

---

[30] *See id.*, at 13-15.

[31] *See id*, at 18-23.

Second, although not directly impacting Alpine, Alpine notes that these proposed rule changes significantly increase the likelihood that individual brokers who have been disciplined will become and remain unemployed. As indicated, developing and implementing heightened supervisory procedures are costly and burdensome. Firms are economically rational entities that are far more likely to simply choose not to associate with the disciplined individual to avoid these costs and burdens, particularly where unstayed "conditions or restrictions" could limit the utility of the individual to the firm and could last 12-18 months.[32] Effectively, FINRA's proposed amendments would transform a nonfinal disciplinary decision into a scarlet letter on an individual broker, which would commonly result in a loss of livelihood that is more punitive than the sanctions actually imposed by Hearing Panel, or which could get reversed. This is neither good policy, in the public interest, nor consistent with principles of due process and fundamental fairness. FINRA has no authority to, and should not, govern a firm's internal hiring decisions in such a manner.

The Proposed Changes to the Membership Application Proceedings Are Overbroad

FINRA seeks to amend the Rule 1000 series to require additional obligations on member firms, such as a mandatory materiality consultations and an increased likelihood of requiring a CMA, when an individual with one or more "final criminal matters" or two or more "specified risk events" within the last five years, seeks to become an owner, control person, principal or registered person of the member.[33] FINRA's proposed definition of a "specified risk event" – a key triggering factor for the proposed enhanced membership application proceedings – is overbroad and would lead to unnecessary costs, burdens and disruptions for member firms.

FINRA proposes to define "specified risk event" to include regulatory disciplinary actions imposing monetary sanctions that exceed $15,000 or a bar, expulsion, revocation or suspension, *and* any "final investment-related, consumer initiated arbitration" that results in an award or a settlement "at or above $15,000."[34] The use of arbitration awards and settlements with customers, of such a low dollar threshold, is over-inclusive and does not appropriately describe a "risk event" that should require a CMA or the proposed mandatory materiality consultation. Stated otherwise, such circumstances to do demonstrate "a significant history of misconduct."[35]

Under current Rule 1014(a)(3), in connection with a CMA, FINRA evaluates whether a member applicant and its associated persons are capable of complying with federal securities laws, including whether persons associated with the applicant are subject to civil actions or arbitrations that "could pose a threat to public investors."[36] Through the proposed definition of "specified risk event," however, FINRA attempts to replace the analysis that would currently be required to

---

[32] To be clear, Alpine does not express an opinion on the actions it would take in response to a disciplinary action against an associated person, under FINRA's current rules or proposed rule changes. Alpine simply notes that this is a logical and likely result of the proposed rule changes.

[33] *See* Notice, SEC Release 23-88600, at 26-33.

[34] *See id.* at 34-35.

[35] *See id.*, Title Description of Purpose of Proposed Rule Change.

[36] *Id.* at 29.

determine whether a person is capable of complying with federal securities laws or is a threat to public investors, in favor of a bright-line rule that any customer arbitration in which the firm pays a relatively low sum of money is defined as creating a risk to investors.

FINRA provides no support for this position, and it is manifestly flawed. The amount of an award provides little insight into whether an associated person can comply with the law or is a threat to an investor. Adverse judgments can, and frequently do, result from isolated acts of negligence or breaches of contract, neither of which involve wrongful intent by the broker. Moreover, an award of $15,000 is not even a significant judgment in today's world and may be buttressed by an award of attorney fees and costs to the customer, and thus not reflective of the amount of "damages" to the customer. A standard which considers any award of such a low threshold to be an automatic risk event for requiring an eligibility review and potentially a CMA is overbroad and nonsensical.

FINRA's inclusion of settlements of such actions is even more indefensible. Defending a lawsuit or arbitration is a nuisance; it is distracting and expensive. As such, there are any number of reasons that a defendant may choose to settle a case that do not reflect on liability, let alone an ability to comply with the federal securities laws. This is especially so where a settlement could be obtained for a relatively low sum, such as $15,000-$25,000, which is likely less than the costs to defend the action.

Allowing FINRA to define "specified risk event" to capture these circumstances would unjustifiably increase the costs and risks to member firms, and place further unreasonable limitations on the business opportunities of individuals who wish to own or associate with a member firm. Preparing a submission to FINRA for a materiality consultation or a CMA costs both money and time and carries a risk of denial that can be very detrimental, including possible disciplinary action. The Commission should therefore reject FINRA's proposed rule change to the Rule 1000 series.

Conclusion

Alpine appreciates the Commission's consideration of this comment letter and its careful review of FINRA's Proposed Rule Change. For the foregoing reasons, Alpine respectfully requests that the Commission not approve one or more of the proposed rule changes to the FINRA Rule 9200 and 9300 Series, the FINRA Rule 9520 Series, and the FINRA Rule 1000 Series.

Respectfully Submitted

PARSONS BEHLE & LATIMER

Aaron D. Lebenta
Attorneys for Alpine Securities Corporation