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Hon. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549
Via email in PDF format
rule-comments@sec.gov

Re: File Number SR-FINRA-2020-027

Dear Ms. Countryman:

I am commenting on the proposed “temporary” rule that the Financial Industry Regulatory Authority, Inc. (FINRA) filed with the Commission on August 31, 2020. *Proposed Rule Change to Temporarily Amend FINRA Rules 1015, 9261, 9524 and 9830 to Permit OHO and NAC Hearings Under Those Rules to Be Conducted by Video Conference*, SR-FINRA-2020-027 (Aug. 31, 2020). The proposed rule would allow FINRA to schedule, over a respondent’s objection, final hearings in disciplinary proceedings through a video conferencing technology. FINRA’s filing provides that the rule will be “operative” from October 1, 2020 through December 31, 2020, but that it may seek an extension after its expiration. Filing, 3, n.3.

My comment deals with FINRA’s assertion that the proposed rule qualifies for immediate effectiveness under Section 19(b)(3)(A) of the Exchange Act, 15 U.S.C. 78s(b)(3)(A) and Exchange Act Rule 19b-4(f)(6), 17 C.F.R. 240.19b-4(f)(6); and FINRA’s failure, in discussing the “public interest”—and, specifically, the fairness of the

procedure—to consider the rule’s negative effect on respondents’ right to a fair hearing.

As discussed herein, it is clear both that the Commission never intended such a rule to be enacted without advance public comment, and that requiring respondents to be deprived of the benefits of a live, in-person hearing is not only controversial but implicates serious “fair process” concerns. I therefore request that, under Exchange Act section 19(b)(3)(C), the Commission “summarily temporarily suspend” the proposed FINRA Rule and “institute proceedings . . . to determine whether the proposed rule should be approved or disapproved.”

Although FINRA attempts to fit this rule change into the “non-controversial” template as if that term had actual currency,¹ it was long ago replaced by Rule 19b-4(f)(6), as amended in Release No. 34-35123 (Dec. 20, 1994), and thus constitutes gloss on the regulatory provision and has no independent regulatory significance. The “new” Rule 19b-4(f)(6) does not use the term “non-controversial,” and, what is more, even if it did, FINRA makes no “designation” of non-controversiality in the body of its August 31, 2020 filing. Moreover, even aside from FINRA’s anachronistic invocation of that

¹ FINRA incorrectly asserts in its filing—in the portion of the filing constituting the draft Notice of Proposed Rule Change (Ex. 1 to the filing)—that “FINRA has designated the proposed rule change as constituting a ‘non-controversial’ rule change under paragraph (f)(6) of Rule 19b-4 under the Securities Exchange Act, which renders the proposal effective upon receipt of this filing by the Commission,” citing Rule 19b-4(f)(6). FINRA makes no such designation, and the Rule contains no reference to “non-controversiality.” This suggests an approach by FINRA that involved less than serious, individualized consideration by FINRA of whether the proposed rule actually qualifies for immediate effectiveness, as opposed to ritualistically invoking an outdated regulatory rubric to make it appear that the rule does.

concept, under the Rule as it exists now (and has existed for 26 years), the proposed FINRA rule does not properly qualify for immediate effectiveness.

In pertinent part, Rule 19b-4(f) provides that “[a] proposed rule change may take effect upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act, 15 U.S.C. 78s(b)(3)(A), if properly designated by the self-regulatory organization as:

(6) Effecting a change that:

- (i) Does not significantly affect the protection of investors or the public interest; [and]
- (ii) Does not impose any significant burden on competition. (emphasis added)²

In SEC Release No. 34-35123, the release by which the Commission amended Rule 19b-4(f)(6), the Commission announced parameters for the availability of immediate effectiveness for SRO rules, and the proposed FINRA rule do not fit within those parameters. The Commission “ma[de] clear that although it intends to expedite the rule filing process, it is doing so only with respect to the universe of proposed rule changes that are not likely to engender adverse comments or otherwise warrant the type of review required by Section 19(b)(2) of the Act.” It added that “[t]he noncontroversial category applies only to those proposed rule changes that are properly designated by the

² Rule 19b-4(f)(6) also requires that the proposed rule

- (iii) By its terms, does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest; provided that the self-regulatory organization has given the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

SRO as not significantly affecting the protection of investors or the public interest and not imposing any significant burden on competition.” Finally, and most significantly for this purpose, the Commission emphasized “that for policy reasons, a proposed rule change that would reduce public representation in the administration of the affairs of an SRO or that would amend the procedures for arbitration or disciplinary proceedings would not be a proper candidate to become effective under Section 19(b)(3)(A). (emphasis added). These limitations were subsumed within the description of the scope of the concept of non-controversiality expressed in the Notice of Proposed Rulemaking, Release No. 34-34140 (June 1, 1994).³

FINRA’s filing makes no attempt to acknowledge the limitations explicitly established by the Commission in amending Rule 19b-4(f)(6) or to explain why, although it “amend[s] the procedures for ... disciplinary proceedings,” it nevertheless qualifies for immediate effectiveness under section 19(b)(3)(A). The proposed rule explicitly “amends the procedures for disciplinary proceedings,” and thus, on its face, does not qualify for immediate effectiveness.

What is more, the proposed rule temporarily eliminates a fundamental right belonging to all respondents in all of the proceedings affected by the proposed rule: the

³ “This new provision only would apply to those proposed rule changes that are properly designated by the SRO as not significantly affecting the protection of investors and not imposing any significant burden on competition. For purposes of meeting this requirement, the impact or burden of a proposed rule change would be significant if, in the view of the Commission staff or industry participants, the change would require more than a cursory analysis to determine whether the impact or burden was necessary or appropriate under the Exchange Act. Proposed rule changes meeting these criteria generally are less likely to engender adverse comments or require the degree of review attendant with more controversial filings.”

right to an in-person hearing in which the adjudicators, who are present in the room with the respondent, have a full and reasonable opportunity, not limited by the inevitable limitations of technology, to assess the respondents' (and other witnesses') credibility. In cases in which intent is a requisite element, this means that what often is the crux of the case is decided in a decidedly imprecise manner. Thus, this rule change not only plainly effects a change in the disciplinary rules, but it does so with a rule that is the opposite of "non-controversial."

In analyzing the costs and benefits of this proposed rule, FINRA gives no consideration whatsoever to this issue and thereby fails to give appropriate consideration to the "public interest" in proposing to permit final hearings by video conference. FINRA looks solely to the effects of the COVID 19 Pandemic on FINRA's efficient disposal of disciplinary and related proceedings. It fails to consider the rights of respondents to an in-person hearing or the effects of a video conference hearing on respondents' ability to obtain a fair hearing, and, in particular, on the adjudicators' ability fairly to assess the credibility of witnesses when their connection with the witness is purely electronic. In fact, FINRA's comments on the subject of fairness are purely conclusory: that it "believes that the proposed rule change is also consistent with Section 15A(b)(8) of the Act, which requires, among other things, that FINRA rules provide a fair procedure for the disciplining of members and persons associated with members and the denial of membership of any person seeking membership," Release at 16; it does not discuss how it asserts the mechanics of the procedure will assure a fair hearing, *id.* at 17.

The "public interest" is not properly measured solely by the need for efficient movement of FINRA's caseload. Yes, there may be a regulatory interest in efficient

processing of disciplinary proceedings in terms of removing “bad” brokers from the industry. But it is also the case that there is a strong public interest in providing respondents fair procedures, including the important and very real question whether video hearings enable the trier of fact to judge witnesses’ credibility. Otherwise, all the language about ensuring fair processes is just so much talk.

Moreover, FINRA does not link the amount of time the proposed rule will be in effect to a determination of the status of the COVID virus as of December 31, 2020, when the effectiveness of the rule will be terminated, absent an extension. Of course, FINRA can come back for an extension, but what if it decides not to? FINRA does not explain why it would be fair for those respondents whose cases will be ready for final hearing in the months of October through December 2020 to be the only ones required to give up the vital protection of in-person hearing. Do these people deserve less protection than others just because their hearings are ready to go now, as opposed to four months from now? This issue goes unaddressed and itself leaves a large hole in its logic.

Nor can FINRA claim that the issue of the right of respondents to an in-person hearing is of little or no significance, or that it is unaware of the issues surrounding the validity of non-in-person hearings. This is September 2020. The effects of video conference hearings on parties’ rights have been widely discussed. See, e.g., United States v. Bethea, 888 F.3d 864, 867 (7th Cir. 2018), where, in the context of a plea hearing under the Federal Rules of Criminal Procedure, the court stated:

The important point is that the form and substantive quality of the hearing is altered when a key participant is absent from the hearing room, even if he is participating by virtue of a cable or satellite link. A face-to-face meeting between the defendant and the judge permits the judge to experience those impressions gleaned through any personal confrontation

in which one attempts to assess the credibility or to evaluate the true moral fiber of another. (quotation marks and citations omitted)

See also United States v. Fagan, No. 2:19-CR-123-DBH, 2020 WL 2850225, at *2 (D. Me. June 2, 2020) (“From thirty years of federal sentencing, I can attest to the importance of seeing the defendant in the same room at sentencing. Physical presence makes unavoidable the recognition that—in sentencing—one human being sits in judgment of another, with a dramatic impact on the future of a living, breathing person, not just a face on a screen.”) (footnotes omitted).

This is not a situation where some relatively unimportant witnesses, whose credibility is not a critical issue, may properly be heard electronically. Cf. Huddleston v. Bowling Green Inn of Pensacola, 333 F.R.D. 581, 586 n. 2 (N.D. Fla. 2019) (“a party’s mere desire to observe a party’s demeanor is insufficient to preclude a telephonic deposition, particularly one involving a witness of lesser importance.”) Instead, a panel’s determination of a respondent’s state of mind at the time of the acts and omissions in question, which will be, at least in part, dependent on their assessment of his credibility, often involves the principal issue in the case, intent. This is the case, for example, in cases deciding whether a respondent’s violations are “willful” and thus qualify for statutory disqualification.

In short, when the ability of a respondent to stay in the securities business may depend on a keen assessment of his or her credibility, it can be fairly stated that, for the respondent and FINRA itself—to preserve or enhance the all-important perception that its authority is wielded fairly—it is vital that that credibility assessment be made on the most valid basis possible basis, and not on the incomplete basis that electronics provides. At

the very least, this is an issue about which reasonable people, including industry professionals, regulators, legislators and members of the public, could reasonably differ. This alone disqualifies this proposed rule for immediate effectiveness, because it means that the issue is up for reasonable debate. FINRA not only gives no consideration to this issue but it provides no guidance to the Office of Hearing Examiners concerning when, if at all, permitting a video conference hearing would not implicate this vital concern.

I close with a quotation from the veteran U.S. District Judge D. Brock Hornby in the context of federal sentencing hearings. His comments are on a subject admittedly not on all fours with this proposed Rule, but nevertheless are beneficial to careful consideration of this issue:

I recognize that the current pandemic, coming after the Seventh Circuit's 2018 statement in *Bethea*, has compelled individuals and businesses to become increasingly accustomed to videoconferencing of various sorts to stay in touch with friends and family and to conduct business. But I am not prepared to conclude that this increased familiarity eliminates the risk that the loss of physical presence will adversely affect the proceeding—for example, making it easier for a judge to impose a harsher sentence on a face on a computer monitor than on an individual in the judge's physical presence.

United States v. Fagan, *supra*, 2020 WL 2850225, at *3. (D. Me. June 2, 2020). In other words, there are worse things than a clogged docket—among them, jeopardizing a respondent's right to a fair trial by allowing him to be in the room with those charged with judging him. At the very least, there should be, but has not been, in this instance, a careful balancing of that right against the public interest in prompt adjudications.

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Thank you for the Commission's careful consideration of my comments.

Sincerely yours,

THE BRODSKY LAW FIRM

A handwritten signature in black ink, appearing to read "Richard E. Brodsky". The signature is written in a cursive, flowing style with a long, sweeping tail on the final letter.

Richard E. Brodsky