

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-75333; File No. SR-FINRA-2015-019)

June 30, 2015

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change to Amend FINRA Rule Series 9100, 9200, 9300, 9550, and 9800 Regarding Temporary and Permanent Cease and Desist Orders

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on June 16, 2015, Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to amend FINRA Rule Series 9100, 9200, 9300, 9550, and 9800 to modify the evidentiary standard that must be met to impose a temporary cease and desist order, to adopt a new expedited proceeding for repeated failures to comply with temporary or permanent cease and desist orders, to ease administrative burdens in temporary cease and desist proceedings, to harmonize the provisions governing how documents are served in temporary cease and desist proceedings and expedited proceedings, to clarify the process for issuing permanent cease and desist orders, and to make conforming changes throughout FINRA’s Code of Procedure.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

The text of the proposed rule change is available on FINRA's website at <http://www.finra.org>, at the principal office of FINRA and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

(i) Background

In 2003, the SEC approved rule amendments that authorized FINRA to seek and impose temporary cease and desist orders.<sup>3</sup> Temporary cease and desist orders are designed to stop serious violative conduct and maintain the status quo while an underlying disciplinary proceeding is being litigated.<sup>4</sup> They can be imposed where the potential harm resulting from

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<sup>3</sup> Securities Exchange Act Release No. 47925 (May 23, 2003), 68 FR 33548 (June 4, 2003) (Order Approving File No. SR-NASD-98-80). In 2009, the SEC approved the adoption of the temporary and permanent cease and desist authority on a permanent basis. Securities Exchange Act Release No. 60306 (July 14, 2009), 74 FR 36292 (July 22, 2009) (Order Approving File No. SR-FINRA-2009-035).

<sup>4</sup> FINRA Rule 9810(a) provides that a temporary cease and desist proceeding may be initiated with respect to alleged violations of Section 10(b) of the Act (15 U.S.C. 78j(b)) and Rule 10b-5 under the Act (17 CFR 240.10b-5); Rules 15g-1 through 15g-9 under the Act (17 CFR 240.15g-1 et seq.); FINRA Rule 2010 (if the alleged violation is unauthorized trading, or misuse or conversion of customer assets, or based on violations

violations to investors is likely and significant. FINRA believes that lowering the evidentiary standard to obtain a temporary cease and desist order would better serve the investor protection purposes of the temporary cease and desist authority and make FINRA's temporary cease and desist authority a more viable investor-protection tool. The change in the evidentiary standard may allow FINRA to initiate and resolve temporary cease and desist proceedings sooner, in which case the potential benefits could be substantial in instances where investors are being significantly harmed. The change would also improve FINRA's capacity to enforce compliance with applicable laws and rules by its members and persons associated with members and FINRA's capability to prevent fraudulent and manipulative acts and practices. At the same time, the proposed rule change maintains all of the meaningful existing restraints on FINRA's temporary cease and desist authority, including rule provisions that restrict who may authorize the initiation of a temporary cease and desist proceeding, narrowly define the violations that a temporary cease and desist order can address, and limit the issuance of temporary cease and desist orders to situations where the alleged violative conduct or continuation thereof is likely to result in significant dissipation or conversion of assets or other significant harm to investors.

The proposed rule change also adopts a new expedited proceeding to address situations involving repeated violations of temporary or permanent cease and desist orders. Finally, the proposed rule change includes a series of rule amendments to the temporary cease and desist order rules (FINRA Rule Series 9800), the expedited proceedings rules (FINRA Rule Series 9550), and FINRA's Code of Procedure (FINRA Rule Series 9000) that harmonize service provisions in temporary cease and desist proceedings and expedited proceedings, ease

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of Section 17(a) of the Securities Act of 1933 (15 U.S.C. 77q(a)); FINRA Rule 2020; or FINRA Rule 4330 (if the alleged violation is misuse or conversion of customer assets).

administrative burdens in temporary cease and desist proceedings, and clarify the process by which permanent cease and desist orders may be imposed.

(ii) Evidentiary Standard for Imposing a Temporary Cease and Desist Order

FINRA Rule 9840(a)(1) provides, in pertinent part, that a temporary cease and desist order shall be imposed if the Hearing Panel finds “by a preponderance of the evidence that the alleged violation specified in the notice has occurred.” FINRA believes that the “preponderance of the evidence” standard sets too high an evidentiary threshold for this critical investor-protection tool. It is the identical standard for proving a violation in the underlying disciplinary proceeding that must be pursued at the same time. Thus, to obtain a temporary cease and desist order—and thereby prevent the likely and significant dissipation or conversion of assets or other significant harm to investors—FINRA’s prosecuting department has to make an evidentiary presentation in the temporary cease and desist proceeding that is similar in extent to its evidentiary presentation in the subsequent underlying disciplinary proceeding, but in an expedited manner. This poses administrative challenges that create a strong disincentive to seeking a temporary cease and desist order.

To increase the viability of the temporary cease and desist authority and improve the capacity of that authority to protect investors facing the likelihood of significant dissipation or conversion of assets, FINRA is proposing rule amendments that modify the evidentiary standard that must be met to obtain a temporary cease and desist order. In this regard, proposed FINRA Rule 9840(a)(1) requires that a FINRA Hearing Panel find that the Department of Enforcement or Department of Market Regulation has made a showing of a likelihood of success on the merits before issuing a temporary cease and desist order. FINRA’s intent is to establish an evidentiary standard in temporary cease and desist proceedings that would require a lesser showing than

what would be required during the subsequent, underlying disciplinary proceeding. Changing the evidentiary standard to require a showing of a likelihood of success on the merits may enable FINRA to initiate and resolve temporary cease and desist proceedings sooner and more efficiently, which would better protect investors' assets and prevent other significant harm until the underlying disciplinary hearing is held.

The proposed rule change makes a corresponding amendment to FINRA Rule 9840(a)(2). Currently, FINRA Rule 9840(a)(2) provides that a temporary cease and desist order shall be imposed if the Hearing Panel finds 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 proceeding. The proposed rule change modifies this requirement to apply to the "alleged" violative conduct or continuation thereof, to be consistent with the proposed change to the evidentiary standard.

FINRA remains mindful that when the Commission approved FINRA's temporary cease and desist authority on a permanent basis in 2009, it noted FINRA's statement that it would use its authority "judiciously."<sup>5</sup> FINRA's actions have been consistent with that statement—FINRA has sought and obtained temporary cease and desist orders on only seven occasions since 2003—and FINRA intends to continue using its authority in a similarly judicious manner. Moreover, the proposed rule change maintains all of the meaningful restraints on FINRA's temporary cease and desist authority, including that a temporary cease and desist proceeding must be authorized by FINRA's Chief Executive Officer or other designated senior officer, and that a temporary cease and desist order can be imposed only if there is a likelihood of significant dissipation or conversion of assets or significant harm to investors.

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<sup>5</sup> Securities Exchange Act Release No. 60306 (July 14, 2009), 74 FR 36292, 36293 (July 22, 2009) (Order Approving File No. SR-FINRA-2009-035).

In sum, FINRA’s purpose in modifying the evidentiary standard for temporary cease and desist proceedings is to increase the effectiveness of this regulatory proceeding and thereby improve investor protection in the most threatening and serious cases until the underlying disciplinary hearing is held.

(iii) Failures to Comply with Temporary Cease and Desist Orders and Permanent Cease and Desist Orders (FINRA Rule 9556)

The proposed rule change includes amendments to FINRA Rule 9556, which sets forth expedited procedures for enforcing violations of FINRA-issued temporary and permanent cease and desist orders. FINRA is concerned that the existing expedited procedures may permit cease and desist orders to be circumvented without any real threat of a sanction. Under current FINRA Rule 9556, if a member or person fails to comply with a temporary or permanent cease and desist order, FINRA staff (with prior authorization from FINRA’s Chief Executive Officer or other designated senior officer) may issue a notice stating that the failure to comply within seven days will result in a suspension or cancellation of membership or a suspension or bar from associating with any member and also stating what the respondent must do to avoid such action. A respondent potentially could abuse the current process by repeatedly violating a cease and desist order and curing that violation before the effective date of any FINRA Rule 9556 notice, without being subject to immediate sanctions or review by the Office of Hearing Officers for a prolonged period. While FINRA could pursue disciplinary action against a respondent that repeatedly “violates and cures” in this manner, an inability to obtain sanctions in an expedited manner could undermine any cease and desist order terms that require immediate compliance to be effective.

Proposed FINRA Rule 9556(h) permits FINRA staff (with prior authorization from FINRA’s Chief Executive Officer or other designated senior officer) to institute a new kind of expedited proceeding if the subject of a temporary or permanent cease and desist order fails to

comply with that order and has previously been served with a notice under FINRA Rule 9556(a) for a failure to comply with any provision of the same temporary or permanent cease and desist order. Proposed FINRA Rule 9556(h)(3) provides that, in contrast to other Rule 9556 proceedings, a respondent's compliance with the temporary or permanent cease and desist order is not a ground for dismissing the FINRA Rule 9556(h) proceeding. Thus, a respondent's compliance with a temporary or permanent cease and desist order after the FINRA Rule 9556(h) proceeding has been initiated would not prevent an adjudicator from reviewing the matter and imposing a fitting sanction for the respondent's violation.

The proposed FINRA Rule 9556(h) proceeding differs from other FINRA Rule 9556 expedited proceedings in other respects that reflect the response that FINRA believes is warranted for situations involving repeated violations of temporary or permanent cease and desist orders. These differences include the following:

- a FINRA Rule 9556(h) proceeding could be initiated only if the respondent has previously been served under FINRA Rule 9556(a) with a notice for failing to comply with any provision of the same temporary or permanent cease and desist order;
- FINRA's prosecuting department would initiate a FINRA Rule 9556(h) proceeding by filing a petition with FINRA's Office of Hearing Officers (and serving the respondent) that seeks the imposition of sanctions for the violation (rather than issuing a notice to the respondent);
- FINRA's prosecuting department would seek the imposition of any fitting sanction at the outset of the FINRA Rule 9556(h) proceeding (in contrast to other FINRA Rule 9556 expedited proceedings, where the recipient of a notice is not subject to the imposition of any fitting sanction unless such recipient opts for a hearing);

- a hearing is required in a FINRA Rule 9556(h) proceeding;
- the hearing for a FINRA Rule 9556(h) proceeding must be held in a condensed time frame (ten business days after a respondent is served the petition, versus other Rule 9556 proceedings which require a respondent to request a hearing within seven business days after service of a notice instituting a proceeding and require hearings to be held within 14 days after a request for a hearing is filed);<sup>6</sup>
- a FINRA Rule 9556(h) proceeding is presided over by a Hearing Officer, rather than a Hearing Panel;<sup>7</sup> and
- the Hearing Officer may issue default decisions in FINRA Rule 9556(h) proceedings.<sup>8</sup>

Under proposed FINRA Rule 9556(h)(4), the FINRA department that filed the petition can withdraw it without prejudice and shall be permitted to refile a petition based on allegations concerning the same facts and circumstances that are set forth in the withdrawn petition. This provision will provide FINRA the flexibility to withdraw the petition where, for instance, the respondent evidences a good faith intent to comply with the temporary or permanent cease and desist order without the need to adjudicate the petition, while preserving FINRA's right to refile the petition if the respondent fails to do so.

Considering that these new FINRA Rule 9556(h) expedited proceedings would be limited to subsequent violations of temporary or permanent cease and desist orders, require appropriate authorization, provide an opportunity for a hearing prior to the imposition of a sanction, be resolved by a Hearing Officer, and be subject to appeal to the SEC, sufficient checks are in place

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<sup>6</sup> See proposed FINRA Rule 9559(f)(2) and (3); FINRA Rule 9556(e).

<sup>7</sup> See proposed FINRA Rule 9559(d)(1) and (2).

<sup>8</sup> See proposed FINRA Rule 9559(m)(2).



to ensure that FINRA continues to use its FINRA Rule 9556 powers in a judicious and fair manner.

(iv) Service Provisions in Temporary Cease and Desist Proceedings and Expedited Proceedings

The proposed rule change makes the FINRA rules that govern service of documents in temporary cease and desist proceedings and the eight different types of expedited proceedings more consistent. Currently, some provisions explicitly address service by facsimile and on counsel, but some do not. FINRA proposes rule amendments that explicitly allow service by facsimile and on counsel across all temporary cease and desist and expedited proceedings because doing so removes unnecessary burdens and inefficiencies.

The proposed rule change also permits service by email in all temporary cease and desist proceedings and expedited proceedings. Email service will allow parties to receive information quickly, which is particularly important in these types of proceedings, considering the short time frames involved. Moreover, where the proposed revisions permit email service, they also require duplicate service through some other means such as overnight courier or personal delivery.

(v) Clarifying FINRA's Authority to Impose Permanent Cease and Desist Orders

When FINRA obtained the authority to impose temporary cease and desist orders, it also obtained the authority to impose permanent cease and desist orders.<sup>9</sup> The proposed rule change contains amendments that clarify the process for imposing permanent cease and desist orders in disciplinary proceedings. These changes are procedural in nature and do not reflect any change

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<sup>9</sup> See Securities Exchange Act Release No. 47925 (May 23, 2003), 68 FR 33548, 33549-50 (June 4, 2003) (Order Approving File No. SR-NASD-98-80).

to FINRA's prior representations concerning the context in which it will seek permanent cease and desist orders.<sup>10</sup>

(vi) Administrative Changes to Temporary Cease and Desist Proceedings

The small pool of persons who currently may serve on hearing panels that preside over temporary cease and desist proceedings, coupled with the short time in which a temporary cease and desist proceeding must be processed, creates administrative burdens for FINRA's Office of Hearing Officers. Currently, FINRA Rule 9820(a) requires that the Hearing Panel appointed to preside over a temporary cease and desist proceeding include two panelists that are "current or former Governors, Directors, or National Adjudicatory Council members, and at least one Panelist shall be an associated person." This is a far more limited pool of potential panelists than is available for other FINRA adjudicatory proceedings, including the underlying disciplinary proceeding that follows a temporary cease and desist proceeding and any FINRA Rule 9556 expedited proceeding to enforce a cease and desist order.<sup>11</sup> While FINRA's Office of Hearing Officers has presided over only a limited number of temporary cease and desist proceedings, those experiences have revealed that the narrowly circumscribed set of potential panelists can impede the recruitment of Hearing Panel members, especially considering that the expedited nature of temporary cease and desist proceedings will already preclude many from being able to

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<sup>10</sup> See Securities Exchange Act Release No. 47925 (May 23, 2003), 68 FR 33548, 33550 & n.18 (June 4, 2003) (Order Approving File No. SR-NASD-98-80).

<sup>11</sup> See FINRA Rule 9231(b) (providing that each panelist shall be associated with a member of FINRA or retired therefrom and that the pool of panelists for disciplinary proceedings includes current or previous members of District Committees, former members of the National Adjudicatory Council, past members of disciplinary subcommittees of the National Adjudicatory Council or the National Business Conduct Committee, past members of the Board of Directors of FINRA Regulation or past members of the Board of Governors of FINRA, and current or previous members of committees appointed or approved by the Board of Governors of FINRA); FINRA Rule 9559(d)(2) (providing for the same pool for FINRA Rule 9556 expedited proceedings).

serve.<sup>12</sup> FINRA also has concerns that the small pool of potential panelists will often make it difficult to recruit hearing panelists who can serve on both the temporary cease and desist proceeding and the subsequent underlying disciplinary proceeding, as well as any related expedited proceeding under FINRA Rule 9556. In such situations, FINRA is unable to realize the corresponding benefits to judicial economy that come from having the same panelists preside over all such proceedings.

To address these issues, the proposed rule change expands the pool of persons eligible to serve on hearing panels to include those who may serve on hearing panels for disciplinary matters. Specifically, under proposed FINRA Rule 9820, the potential panelists for the Hearing Panels that preside over temporary cease and desist proceedings would include persons who currently serve or previously served on a District Committee; previously served on the National Adjudicatory Council; previously served on a disciplinary subcommittee of the National Adjudicatory Council or the National Business Conduct Committee; previously served as a member of the Board of Directors of FINRA Regulation or of the Board of Governors of FINRA; or currently serve or previously served on a committee appointed or approved by the Board of Governors of FINRA, but do not serve currently on the National Adjudicatory Council or as a member of the Board of Directors of FINRA Regulation or of the Board of Governors of FINRA. Likewise, the proposed rule change would require that each panelist be associated with a member of FINRA or retired therefrom.

The proposed rule change also eases other administrative burdens created by the shortened time frame of a temporary cease and desist proceeding. These proposed changes are

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<sup>12</sup> Hearings in temporary cease and desist proceedings are, in general, required to be held not later than 15 days after service of the notice initiating the proceeding. FINRA Rule 9830(a).

aimed at improving Hearing Panels' and parties' ability to prepare for hearings and giving Hearing Officers some needed flexibility. For example, under current FINRA Rule 9830(a), a Hearing Officer is not able to extend a hearing date in a temporary cease and desist proceeding unless all parties consent to the extension. The requirement to obtain the parties' consent can be problematic where the Office of Hearing Officers, rather than one of the parties, has a need for an extension, such as when it encounters difficulty in quickly appointing a Hearing Panel. To address this problem, FINRA is proposing to change FINRA Rule 9830(a) to allow hearing deadlines to be extended by the Chief Hearing Officer or Deputy Chief Hearing Officer for good cause shown.

Likewise, the proposed rule change makes similar amendments to the process by which extensions are obtained to the deadlines for issuing decisions in temporary cease and desist proceedings and responding to requests to modify, set aside, limit or suspend a temporary cease and desist order. Under current FINRA Rule 9840(a), the Hearing Panel's deadline for issuing its written decision cannot be extended, even where there is good cause, without the consent of the parties. Likewise, under current FINRA Rule 9850, a Hearing Panel's deadline for responding to an application to have a temporary cease and desist order modified, set aside, limited, or suspended cannot be extended, even where there is a good cause, without the consent of the Parties. A Hearing Panel should be allowed some flexibility where there is a need for additional time to prepare its decision or respond to a FINRA Rule 9850 request (e.g., when a member of the Hearing Panel becomes ill, where the temporary cease and desist proceeding is highly complex). The proposed change to FINRA Rules 9840(a) and 9850 would permit the deadlines for issuing decisions and responding to FINRA Rule 9850 applications to be extended by the Chief Hearing Officer or Deputy Chief Hearing Officer for good cause shown.

To further address the burdens created by the short time frame of temporary cease and desist proceedings, the proposed rule change also: (i) requires FINRA's prosecuting department to file a memorandum of points and authorities with the notice initiating a temporary cease and desist proceeding; and (ii) permits the Hearing Officer to order a party to furnish to all other parties and the Hearing Panel such information as deemed appropriate, including any or all of the pre-hearing submissions described in FINRA Rule 9242(a).<sup>13</sup> Requiring FINRA's prosecuting department to file a memorandum of points and authorities at the initiation of the proceeding will, at the outset, provide more context to the allegations and set forth legal authorities on which the notice seeking a temporary cease and desist order is premised. This, in turn, will facilitate a more efficient process and improve the quality of the hearing through more thorough preparation, which are the same goals of the pre-hearing processes in FINRA disciplinary proceedings.<sup>14</sup> Requiring the filing of a memorandum of points and authorities at the initiation of a temporary cease and desist proceeding also will enhance disclosure of the prosecuting department's allegations, which will inure to the benefit of the respondents and further increase the fairness of the proceeding. All of these objectives also will be served by authorizing Hearing Officers to order a party to furnish other pre-hearing submissions.

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<sup>13</sup> The pre-hearing submissions described in FINRA Rule 9242(a) include: (1) an outline or narrative summary of a party's case or defense; (2) the legal theories upon which a party shall rely; (3) a list and copies of documents that a party intends to introduce at the hearing; (4) a list of witnesses who shall testify on a party's behalf, including the witnesses' names, occupations, addresses, and a brief summary of their expected testimony; and (5) if a witness shall be called to testify as an expert, a statement of the expert's qualifications, a listing of other proceedings in which the expert has given expert testimony, a list of the expert's publications, and copies of those publications that are not readily available to other parties and the Hearing Panel.

<sup>14</sup> See FINRA Rule 9241(a) (setting forth purposes of pre-hearing conferences in disciplinary proceedings).

Proposed FINRA Rule 9840(e) is a delivery requirement that would require a member firm that is the subject of a temporary cease and desist order to provide a copy of the order to its associated persons, within one business day of receiving it. Considering the significant nature of the harm that a temporary cease and desist order is aimed at stopping, FINRA believes there is a heightened need to ensure that the persons who may act on behalf of the member firm are made aware of the contents of a temporary cease and desist order imposed against the member firm. The delivery requirement will further that goal.<sup>15</sup>

Finally, the proposed rule change clarifies the following additional three issues: (1) how settlements may be approved in temporary cease and desist proceedings; (2) which Hearing Panel has jurisdiction to preside over applications filed under FINRA Rule 9850 to modify, set aside, limit or suspend temporary cease and desist orders that are filed after a Hearing Panel has already been appointed in the underlying disciplinary proceeding; and (3) whether temporary and permanent cease and desist orders imposed against a firm also apply to successors of that firm. With respect to the first issue, proposed FINRA Rule 9810(c) establishes that, if the parties agree to the terms of a proposed temporary cease and desist order, the Hearing Officer shall have the authority to approve and issue the order. On the second issue, proposed FINRA Rule 9850

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<sup>15</sup> Similarly, the proposed rule change makes related amendments to FINRA Rules 9269, 9270, and 9840 to require that the Office of Hearing Officers, the Department of Enforcement, the Department of Market Regulation, or the General Counsel, as appropriate, disseminate default decisions, orders of acceptance of settlement, and temporary cease and desist orders to each member of FINRA with which a respondent is associated. These dissemination requirements are intended to ensure that a respondent's member firm is made aware of the disciplinary history of its associated persons, regardless of the specific disciplinary procedure involved. The proposed amendments are consistent with other FINRA Rules that already require the Office of Hearing Officers, the National Adjudicatory Council, or the Board of Governors of FINRA to provide copies of a decision issued by a Hearing Panel, an Extended Hearing Panel, the National Adjudicatory Council, or the Board of Governors of FINRA to each member firm with which a respondent is associated. See FINRA Rules 9268(d), 9349(c), 9351(e).

provides that the Hearing Panel that presided over the temporary cease and desist order proceeding shall retain jurisdiction to review a FINRA Rule 9850 application unless at the time the application is filed a Hearing Panel has already been appointed in the underlying disciplinary proceeding commenced under FINRA Rule 9211, in which case the Hearing Panel appointed in the disciplinary proceeding has jurisdiction.<sup>16</sup> As to the third issue, proposed FINRA Rules 9840(b) and 9291(a) establish that when a temporary or permanent cease and desist order is imposed against a member firm, it also applies to any successor of the member firm.

(vii) Effective Date

FINRA will announce the effective date of the proposed rule change in a Regulatory Notice to be published no later than 60 days following Commission approval. The effective date will be no later than 30 days following publication of the Regulatory Notice announcing Commission approval.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(2) of the Act,<sup>17</sup> which requires, among other things, that FINRA has the capacity to be able to carry out the purposes of the Act and to comply, and to enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulations thereunder, the rules of the Municipal Securities Rulemaking Board, and FINRA rules; Section 15A(b)(6) of the Act,<sup>18</sup> which requires, among other things, that FINRA rules

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<sup>16</sup> In many instances the same Hearing Panel will preside over both the temporary cease and desist proceeding and the underlying disciplinary proceeding. There may be occasions, however, where that is not possible.

<sup>17</sup> 15 U.S.C. 78o-3(b)(2).

<sup>18</sup> 15 U.S.C. 78o-3(b)(6).

must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest; Section 15A(b)(7) of the Act,<sup>19</sup> which requires, among other things, that FINRA rules provide that FINRA members and persons associated with its members shall be appropriately disciplined for violation of any provision of the Act, the rules of regulations thereunder, the rules of the Municipal Securities Rulemaking Board, or FINRA rules by expulsion, suspension, limitation of activities, functions, and operations, fine, censure, being suspended or barred from being associated with a member, or any other fitting sanction; and Section 15A(b)(8) of the Act,<sup>20</sup> which requires that FINRA rules provide a fair procedure for, among other things, the disciplining of members and persons associated with members.

FINRA believes that the proposed rule change is consistent with, and furthers the objectives of, Sections 15A(b)(2) and 15A(b)(6) of the Act in that the proposed changes to the evidentiary standard required for imposing a temporary cease and desist order and the proposed adoption of a new expedited proceeding for repeated failures to comply with temporary or permanent cease and desist orders will protect investors and the public interest by improving FINRA's capacity to enforce compliance with applicable laws and rules by its members and persons associated with members and improving FINRA's capability to prevent fraudulent and manipulative acts and practices. FINRA believes that the proposed rule change is consistent with Section 15A(b)(7) of the Act because it allows FINRA to take appropriate action against members and their associated persons who are engaged in serious misconduct. Finally, FINRA believes that the proposed rule change is consistent with Section 15A(b)(8) of the Act because

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<sup>19</sup> 15 U.S.C. 78o-3(b)(7).

<sup>20</sup> 15 U.S.C. 78o-3(b)(8).



the rules governing temporary cease and desist orders and expedited proceedings require notice and an opportunity to be heard before a neutral tribunal, in addition to the numerous other procedural safeguards described above and included in the rules.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. FINRA expects that changing the rules that govern obtaining and enforcing temporary and permanent cease and desist orders will result in benefits to investors and the public interest, without imposing significant direct or indirect costs on members or the public. The primary purpose of these amendments is to better ensure that FINRA can protect the assets of brokerage customers in cases where it is demonstrably likely that violative conduct is taking place. These benefits would be achieved through a combination of changing the evidentiary standard for imposing temporary cease and desist orders, removing a potential gap that could allow persons to repeatedly “violate and cure” temporary or permanent cease and desist orders, and other administrative changes. Lowering the evidentiary threshold for obtaining a temporary cease and desist order would provide a more effective and efficient mechanism to combat serious misconduct and lessen the dissipation of customer funds in the presence of misconduct.

Based on FINRA's past history of initiating only a small number of temporary cease and desist actions after gaining temporary cease and desist authority, the proposed rule change is anticipated to result in only a nominal increase in temporary cease and desist actions. Nonetheless, the change in the evidentiary standard may allow FINRA to initiate and resolve temporary cease and desist proceedings sooner, in which case the potential benefits can be substantial in just a single case where investors are being harmed.

Moreover, there are numerous controls to assure that the temporary cease and desist authority is used only in limited and appropriate cases. First, the temporary cease and desist authority is restricted to those instances where the staff can demonstrate that the dissipation or conversion of assets or harm to customers is likely and significant. Second, FINRA's prosecuting departments must still be prepared to prove the underlying disciplinary case at the higher, "preponderance of the evidence" evidentiary standard. Third, to ensure that FINRA applies its temporary cease and desist authority in a manner that is fair, a temporary cease and desist order may be imposed only if the action has been authorized by FINRA's Chief Executive Officer or such other senior officers as the Chief Executive Officer may have designated, the parties have had an opportunity for a hearing prior to the imposition of the temporary cease and desist order, and an independent Hearing Panel has made findings that the standards for imposing a temporary cease and desist order have been met. Fourth, a party subject to a temporary cease and desist order may appeal to the SEC, and thereafter to a federal court of appeals.

The benefits that arise from the remaining portions of the proposed rule change primarily accrue from added efficiency in the application of the temporary cease and desist process and related processes. The proposed service provisions and other administrative changes impose no material costs on firms and permit the staff to expedite the process to preserve customer assets and stop inappropriate activities more quickly.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-FINRA-2015-019 on the subject line.

##### Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-FINRA-2015-019. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>).

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549-1090 on official business days between the hours of 10:00 am and 3:00 pm. Copies of the filing will also be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-FINRA-2015-019 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>21</sup>

Robert W. Errett  
Deputy Secretary

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<sup>21</sup> 17 CFR 200.30-3(a)(12).