UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of: **SOUTHEAST INVESTMENTS, N.C., INC. AND FRANK HARMON BLACK** **For Review of Disciplinary Action Taken by FINRA**	**Admin. Proc. File No. 3-19185**

APPLICANTS' REPLY TO FINRA'S OPPOSITION TO APPLICANTS' MOTION TO ADDUCE ADDITIONAL EVIDENCE

Applicants Southeast Investments, N.C., Inc. ("SEI") and Frank Harmon Black (together the "Applicants") reply to FINRA's Opposition to Applicants' Motion to Adduce Additional Information as follows:

1. Rule 452 permits the Commission to allow the submission of additional evidence at any time prior to the issuance of a decision by the Commission, where the evidence is material to the Commission's review and there are reasonable grounds for failing to adduce such evidence previously.

2. Succinctly, Applicants asked in their Motion to introduce into the evidentiary record an FAQ published by FINRA indicating that certain guidance should not be viewed as a requirement for broker-dealers. This FAQ underscores the accuracy and credibility of testimony from Mr. Black that he did not believe that a FINRA press release the SEC cited to him in a communication constituted a binding rule that required a change in SEI's email review procedures.

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3. FINRA does not appear to contest that there are reasonable grounds for failing to adduce the document at issue (since it did not exist when Applicants' Reply brief was filed in 2019), but does contest the materiality of the information to the outcome of the Appeal.[1]

4. All of FINRA's arguments in the Opposition fail and, therefore, the Commission should grant the Motion and admit the relevant evidence.

5. FINRA first argues that the statements in the FAQ are related to FINOPs and therefore are irrelevant to whether or not SEI's email retention system was adequate because they are not the same "issue."[2] Applicants, however, never argued that the subject matter was the same. Instead, Applicants pointed to the fact that FINRA explicitly articulated in the FAQ that informal guidance, such as a FINRA press release, does not create a standard of conduct by which firms are required to abide. That overarching principle is consistent with Frank Black's testimony that he did not believe that a press release constituted a binding requirement that SEI change its email policy. Therefore, FINRA's FAQ is material, even though the specific subject of the FAQ is, admittedly, unrelated to issues at hand here.

6. FINRA also argues that because the NAC found at least one registered representative did not copy SEI on or forward to SEI emails from his personal account, somehow FINRA's FAQ cease to be material.[3] This is false. Even the best supervision system is imperfect, but like every other BD, SEI was not charged with the obligation to achieve perfection; rather, all SEI needed to implement was a "reasonable" supervisory system. To that end, consider that the NAC found that Applicants failed to retain just 16 emails.[4] Given the size of SEI, that finding

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[1] FINRA's Opposition p. 1.

[2] *Id*. p. 3.

[3] Id. p. 4.

[4] NAC Decision p. 1.

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does not evince an unreasonable email supervision system; to the contrary, it demonstrates the efficacy of SEI's supervision and its requirement that its registered representatives copy SEI on customer emails.

7. Putting all of that to the side, however, what one broker did or failed to do with his emails is irrelevant to the materiality of the FAQ and its articulation of the fact that informal regulatory guidance does not constitute a binding standard of conduct. FINRA's argument about 16 emails is a red herring and, therefore, fails.

8. FINRA next argues that the FAQ does not really say what it clearly says, i.e. that it does not say that certain guidance should not be deemed to be a requirement for broker-dealers. To be clear, the pertinent language at issue in the FAQ is this: "guidance, which includes a provision regarding on-site visits, should not be viewed as requirements…."[5] This language is clear as day and perfectly encapsulates the reasonableness of Mr. Black's belief that SEI was not required to change its email supervision because the informal guidance contained in an SEC press release that FINRA cited was not a requirement. Thus, the meaning of the statement is as indisputable as it is material to the issues at hand. FINRA's argument on this point fails.

9. Finally, FINRA argues that "warnings" issued to SEI in 2012 and 2014 are not "akin to informal guidance contained in a broadly applicable press release"[6] or like that discussed in the FAQ, but, instead, are something different, i.e., something stronger, something that was binding. This is an odd position to take because FINRA concedes that the Commission's 2012 letter to SEI, "may have discussed a FINRA press release." FINRA is, of course, tiptoeing around the fact that the "warning" did not merely "discuss" that press release, rather, it clearly cited that

[5] https://www.finra.org/rules-guidance/key-topics/supervision/faq (last visited July 27, 2021).

[6] FINRA Opposition p. 4.

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press release as binding authority (a concept that is at odds both with the FAQ and Mr. Black's views). Again, FINRA's own FAQ supports Mr. Black's belief that the "guidance" was non-binding and is, thus, material to the appeal.

10. In an implicit recognition of the importance that the citation to the guidance/press release represents, FINRA points out that SEI was issued a similar "warning" in 2014 but this time "without mentioning the press release." This is because FINRA knows the FAQ speaks directly to the FINRA approved treatment of guidance by broker-dealers and that the approved treatment is in lockstep with Mr. Black's testimony. Thus, it is material to Applicants' appeal.

In light of the relevance and importance of the FAQ, and because reasonable grounds exist for not having introduced it previously, Exhibit 1 is properly submitted to the Commission pursuant to Rule 452. Applicants respectfully request that the Commission allow the submission of this evidence into the record on appeal.

Respectfully submitted this 16th day of August, 2021.

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CERTIFICATE OF COMPLIANCE

I, Blaine Doyle, certify that the Motion and this Reply brief comply with the Commission's Rules of Practice by filing a brief that omits or redacts any sensitive personal information described in Rule of Practice (151) (e).

This 16th day of August 2021

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CERTIFICATE OF SERVICE

I hereby certify that this **APPLICANTS' REPLY TO FINRA'S OPPOSITION TO APPLICANTS' MOTION TO ADDUCE ADDITIONAL EVIDENCE** has been filed with the SEC through the SEC's eFAP system and served on the following parties, as follows:

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