HARRIS
ST. LAURENT
WECHSLER

September 1, 2023

By eFAP: www.sec.gov/eFAP
Vanessa Countryman, Secretary
Office of the Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

Re: In the Matter of the Application of William J. Kielczewski
Admin. Proc. File No. 3-20636 For Review of Disciplinary Action Taken by FINRA

Dear Ms. Countryman:

We represent Mr. Kielczewski in the above referenced action. Mr. Kielczewski's appeal from a disciplinary action taken by FINRA is currently pending before the Commission. The most recent action by the Commission was to extend its time to issue a decision to September 24, 2023.

On August 15, 2023, William J. Kielczewski filed a motion requesting that the Commission permit supplemental briefing following the ruling by the D.C. Circuit Court of Appeals in *Alpine Sec. Corp. v. Fin. Indus. Regul. Auth.*, No. 23-5129, 2023 WL 4703307, at *1 (D.C. Cir. July 5, 2023). On August 22, 2023, FINRA filed its opposition. Mr. Kielczewski submits this letter reply in further support of his motion.

In its response, FINRA acknowledges that the Commission has the discretion to consider the issues raised by Mr. Kielczewski but presents three arguments against the Commission doing so. First, FINRA asserts that Mr. Kielczewski's case presents no novel issues and is not worthy of significant consideration by the Commission. Second, FINRA argues that Mr. Kielczewski failed to raise his challenge under the Appointments Clause to the FINRA ALJ and has so failed to exhaust his administrative remedies in FINRA. Third, FINRA argues that the decision by the D.C. Circuit in *Alpine* is an outlier, likely to be soon overruled, and can be safely ignored.

As demonstrated below, none of these arguments has merit. The Commission should grant Mr. Kielczewski's motion for merits briefing on the Appointments Clause and other constitutional issues.

1. **FINRA's argument that Mr. Kielczewski's case is a "routine ground ball" is not supported by the record.**

ANDREW ST. LAURENT ANDREW@HS-LAW.COM DIRECT (646) 248-6010
HS-LAW.COM MAIN (212) 397-3370 | FAX (212) 202-6206 | 40 WALL STREET, 53RD FLOOR, NEW YORK, NY 10005

FINRA asserts that Mr. Kielczewski's appeal is nothing more than a "straightforward disciplinary matter" and should give the Commission no cause for concern. (FINRA Opp. at 2). As argued previously by Mr. Kielczewski, this could not be farther from the case. FINRA's hearing officer allowed Mr. Kielczewski's hostile former employer, Huntington Investment Corporation ("Huntington"), to hand-select the evidentiary record to be used by FINRA against Mr. Kielczewski, in a case in which the fundamental allegation was that Mr. Kielczewski had engaged in private securities transactions without giving notice *in writing* of his intent to do so, a case in which even a single document could have changed the outcome. The FINRA hearing officer did so despite the fact that Huntington blatantly violated FINRA's own rules in so doing.

In sum, and contrary to FINRA's suggestion, the merits of the existing appeal (including the clear legal errors committed by the hearing officer in addressing attorney client privilege) underscore the importance of the issues Mr. Kielczewski seeks supplemental briefing on, including the qualifications of FINRA hearing officers.

2. FINRA's exhaustion arguments rely on precedent that is irrelevant or has been superseded

FINRA argues that Mr. Kielczewski's constitutional arguments are forfeited because they were not exhausted in the FINRA proceedings. The law does not support that result.

First, FINRA argues that exhaustion should be required because the FINRA is the best place to develop the factual record. This argument is irrelevant to structural constitutional challenges as there are no case-specific facts to develop. In this case, it is undisputed that the FINRA hearing officer was not appointed consistent with the Appointments Clause, that the same hearing officer was not subject to removal by the executive, and that no jury was appointed to hear the facts alleged against Mr. Kielczewski.

Next, FINRA cites to a handful of administrative decisions and cases relating to forfeiture, exhaustion, and motions for reconsideration. Only one of those decisions, the Commission's decision in *In the Matter of the Application of Newport Coast Sec., Inc*. Exchange Act Release No. 88548, 2020 WL 1659292 (Apr. 3, 2020) addresses a constitutional challenge. The rest are irrelevant because they address motions for reconsideration after Commission action or arguments raised for the first time on reply or that involve issues squarely within the SRO's ordinary purview. *See, e.g.*, *Blair Edward Olson*, Exchange Act Release No. 93216 (Sept. 30, 2021) (leaving a suspension in place when the associated person failed to provide documents, request a hearing, or file a request for termination of the suspension.)

In *Newport* the Commission determined it had the discretion to consider a constitutional challenge to the Appointments Clause not raised before FINRA. *Newport* at *17. The Commission, however, declined to do so, citing decisions favoring administrative exhaustion. This holding in *Newport*, however, has been superseded by subsequent decisions of the Supreme Court in *Carr v. Saul*, __ U.S. __, 141 S. Ct. 1352, 1362 (2021) and *Axon Enter., Inc. v. Fed. Trade Comm'n*, 598 U.S. 175 (2023).

In *Carr*, the Supreme Court noted that while "[a]dministrative review schemes commonly require parties to give the agency an opportunity to address an issue before seeking judicial review of that question . . . (known as issue exhaustion)", *id.* at 1358, it found that a combination of the non-adversarial qualities of the administrative proceedings, together with the usual exceptions to exhaustion, of structural challenges and futility (described in more detail below) weighed against requiring petitioners to raise their challenges before the agency in order to preserve them for judicial review. *See Carr* at 1362.

In *Axon* the Supreme Court went further and found that administrative review need not precede constitutional challenges to agency action. *Id.* at 195-96. The Supreme Court found that petitioners could skip administrative proceedings altogether in bringing structural constitutional challenges like the ones Mr. Kielczewski seeks to raise now: constitutional challenges "charging that an agency is wielding authority unconstitutionally in all or a broad swath of its work" can be brought directly in district court. *Axon* at 189.[1]

Even before *Carr* and *Axon*, courts, including the Supreme Court, have found Appointments Clause challenges to fall within the category of "structural" constitutional challenges that do not require exhaustion for preservation: "Appointments Clause objections to judicial officers [fall] in the category of nonjurisdictional structural constitutional objections that could be considered on appeal whether or not they were ruled upon below." *Freytag v. Comm'r*, 501 U.S. 868, 878–79 (1991).

This is because of the two well-established exceptions to the doctrine of administrative exhaustion (1) the inadequacy of the regulator's process to determine the issue and (2) futility. *See, e.g.*, *Randolph-Sheppard Vendors of Am. v. Weinberger*, 795 F.2d 90, 104 (D.C. Cir. 1986) ("courts have developed exceptions to the exhaustion requirement in circumstances where 'the reasons supporting the doctrine are found inapplicable.'") Both exceptions are applicable here. FINRA's hearing officers are simply not suited to assess constitutional challenges to their own authority and further have no ability to remediate the problem. *See Hettinga v. United States*, 560 F.3d 498, 506 (D.C. Cir. 2009) ("It would make little sense to require exhaustion where an agency lacks institutional competence to resolve the particular type of issue presented, such as the constitutionality of a statute or where an agency may be competent to adjudicate the issue

[1] The decision in *Axon* was directed at exhaustion of remedies before administrative agencies, specifically the FTC and SEC, before the consideration of those matters by the federal courts, not before SROs, like FINRA, upon review by the Commission. The question of whether Mr. Kielczewski needs to exhaust these claims before the Commission before bringing them in federal court has a clear answer (no) but is not before the Commission. Mr. Kielczewski's arguments concerning the need for exhaustion at the SRO level before consideration by the Commission are framed using Supreme Court and other federal court precedent because the Commission has looked to those sources in *Newport* and other cases in determining whether to consider issues under SEC Rule of Practice 421(b) (and otherwise) on review of SRO final actions.

presented, but still lacks authority to grant the type of relief requested.") (cleaned up): *see also Sidak v. United States Int'l Trade Comm'n*, No. 23-CV-00325 (TNM), 2023 WL 3275635, at *8, 10-11 (D.D.C. May 5, 2023) (*citing Carr v. Saul*, __ U.S. __, 141 S. Ct. 1352, 1362 (2021) (rejecting the agency's argument that petitioners' Appointments Clause challenge was untimely because it was not raised during administrative proceedings)); *Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669, 679 (6th Cir. 2018) (excusing forfeiture of Appointments Clause challenge given "absence of legal authority addressing whether the Commission could entertain the claim" at all.) FINRA's hearing officers (and the NAC) have no expertise in constitutional issues or Appointments Clause jurisprudence in particular, and there is no reason to defer to their legal conclusions on such subjects. Moreover, any application to the FINRA hearing officer (or NAC) concerning the Appointments Clause violation would have been futile because FINRA has no power to grant the remedy Mr. Kielczewski seeks, *viz.*, the conduct of the proceeding before a properly appointed official. This is because, unlike the SEC, which, following the decision in *Lucia v. S.E.C.*, 138 S. Ct. 2044, 2054 (2018), could appoint ALJs consistent with the requirements of the Appointments Clause, FINRA has no authority to appoint officers that would comply with the Constitution.[2]

3. The constitutionality of FINRA's process should be a part of the Commission's review.

As FINRA concedes and *Newport* squarely holds, the SEC's Rules of Practice allow the Commission to consider issues in its review of FINRA orders even in the absence of exhaustion. The constitutionality of the proceeding below is such an issue. In the alternative to the arguments above, we respectfully ask that the Commission permit Mr. Kielczewski to submit supplemental briefing addressing those arguments, even if it finds that exhaustion would ordinarily be required..

SEC Rule of Practice 421(b) and 17 C.F.R. § 201.421(b) permit supplemental arguments, whether or not raised by the parties, if briefing on those matters would significantly aid in the decisional process. The legitimacy of FINRA's process and its hearing officers could not be of greater importance to the Commission, FINRA and the individuals, such as Mr. Kielczewski, whose lives and livelihoods are impacted by FINRA decisions. *See Axon Enter., Inc. v. Fed. Trade Comm'n*, 598 U.S. 175, 191 (2023).

[2] It should be noted that after *Lucia* the Commission directed that all matters proceeding before the Commission or its ALJs to be reassigned to comply with the ruling in *Lucia*, without regard to whether the respondent had raised an Appointments Clause challenge: "With respect to *any such proceeding* currently pending before an ALJ or the Commission, we order that respondents be provided with the opportunity for a new hearing before an ALJ who did not previously participate in the matter. We remand all proceedings currently pending before the Commission to the Office of Administrative Law Judges for this purpose and vacate any prior opinion we have issued in the matter." *In Re: Pending Admin. Proc.*, Release No. 4993 (Aug. 22, 2018) (emphasis added).

FINRA is not an optional private members organization. It exercises enforcement power derived from the government, mandated by the government, and with immunity reserved for the government but it argues that it is free from the constitutional obligations applicable to government actors when it prosecutes individuals and imposes penalties that carry the force of federal law by authority derived entirely from the government. The Circuit Court for the District of Columbia in *Alpine Sec. Corp. v. Fin. Indus. Regul. Auth*., recently issued a ruling indicating that this position is unlikely to succeed. No. 23-5129, 2023 WL 4703307, at *4 (D.C. Cir. July 5, 2023) ("It would be odd if the Constitution prohibits Congress from vesting significant executive power in an unappointed and unremovable government administrator but allows Congress to vest such power in an unappointed and unremovable private hearing officer.") (Walker, C.J. concurring). FINRA's motion for reconsideration *en banc* was denied. *See Alpine Sec. Corp*., No. 23-5129 (D.C. Cir. Aug. 22, 2023). A timely and thorough consideration by the Commission on the merits of this issue would be in the best interests of FINRA, the SEC and the individuals who are regulated by FINRA. This is particularly true in cases, like Mr. Kielczewski's, where the failures of process by the FINRA hearing officers led to an improper result.

Because the SEC Rules of Practice permit supplemental briefings and because of the importance of the issues raised, it is respectfully requested, for the reason above, and in Mr. Kielczewski's original letter motion, that the Commission direct the parties to submit supplemental briefs addressing the constitutionality of the FINRA proceeding.

Sincerely,

Andrew St. Laurent

CERTIFICATE OF SERVICE

I, Andrew St. Laurent, do hereby swear and affirm that on September 1, 2023 I caused the attached September 1, 2023 Reply Brief in Further Support of the Motion for Supplemental Briefing to be sent to the Office of General Counsel, FINRA, 1735 K Street, NW, Washington, DC 20006 by sending it via email to Jennifer Brooks, FINRA's designated agent, at jennifer.brooks@finra.org and nac.casefilings@finra.org.

So sworn,

[redacted]

Andrew St. Laurent
Dated: September 1, 2023