

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-66096; File No. SR-FINRA-2011-044)

January 4, 2012

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving Proposed Rule Change Relating to FINRA's Code of Procedure

I. Introduction

On November 8, 2011, the Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("Commission"), 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> a proposed rule change relating to FINRA's Code of Procedure ("Code"). The proposed rule change was published for comment in the Federal Register on November 23, 2011.<sup>3</sup> The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

FINRA's Code contains detailed provisions for initiating and adjudicating various types of actions, including disciplinary, eligibility, expedited, and cease and desist proceedings. As described further below, FINRA is proposing a number of changes to its Code. According to FINRA, the changes are procedural in nature and will not affect any party's substantive rights.

Service of Complaint

Currently, FINRA Rule 9131(a) requires a complaint to be served on each party by the Department of Enforcement or the Department of Market Regulation. The rule does not explicitly permit FINRA staff to serve the complaint on a party's counsel. The proposed rule

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

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

<sup>3</sup> Securities Exchange Act Release No. 65787 (November 18, 2011), 76 FR 72463 ("Notice").

change would amend FINRA Rule 9131(a) to clarify that only the Department of Enforcement or the Department of Market Regulation can serve a complaint and to allow for service on counsel or another person authorized to represent others when the representative agrees to accept service of the complaint on behalf of the respondent. The proposed rule change also would amend FINRA Rules 9551(b), 9552(b), 9553(b), 9554(b), 9555(b) and 9556(b) to allow for service on counsel or another person authorized to represent others when the representative agrees to accept service of a notice.

FINRA Rule 9131(a) also provides that a party initiating a proceeding shall serve a document initiating a proceeding on the other party. The proposed rule change deletes this provision because, according to FINRA, it has been superseded by other FINRA rules and no longer plays a role in expedited proceedings. Further, the Code no longer allows a party other than FINRA to initiate a proceeding.

#### Filing of Papers with Adjudicator

FINRA Rule 9135(a) prescribes the timing for the filing of papers with an adjudicator. Currently, complaints are deemed timely filed upon mailing or delivery to the Office of Hearing Officers. Other papers required to be filed are deemed timely if, on the day the papers are served, they are also hand-delivered, mailed via U.S. Postal service first class mail or sent by courier to FINRA. In recognition of the increased use of electronic mail, the proposed rule change would allow the use of electronic mail as another delivery method for complaints and other papers required to be filed with an adjudicator.

FINRA Rule 9136 establishes the form for papers filed in connection with a disciplinary proceeding or a review of a disciplinary proceeding. The proposed change to FINRA Rule 9136 would require single-spaced footnotes, as well as decrease the number of copies required to be

filed with the adjudicator from three to one, unless otherwise ordered. The proposed rule change also would amend FINRA Rule 9313 by giving counsel to the National Adjudicatory Council (“NAC”) the authority to set the number of copies of all papers to be filed with the NAC.

#### Motion to Withdraw by Attorney

FINRA Rule 9142 requires an attorney for a party (or person authorized to represent others) who is seeking to withdraw to give notice setting forth good cause for the withdrawal at least 30 days prior to withdrawal, unless circumstances do not permit. According to FINRA, there have been occasions when an attorney, believing that his withdrawal was effective upon filing with FINRA, did not provide any contact information for the party the attorney no longer represents. The proposed rule change would require an attorney (or person authorized to represent others) seeking to withdraw his appearance to file a motion setting forth good cause for the withdrawal, as well as contact information for the party the attorney will no longer represent.

#### Subjects Discussed at Pre-Hearing Conference

FINRA Rule 9241(c) delineates the subjects that the Hearing Officer, in a pre-hearing conference, may consider and act upon. The proposed rule change would amend FINRA Rule 9241 by adding a permissive subject for a pre-hearing conference: designation of relevant portions of transcripts from investigative testimony or other proceedings and the inclusion of an index for the testimony.

#### Fees for Copying Costs during Discovery

FINRA Rule 9251(f) allows a respondent to obtain a photocopy of all documents made available for inspection by the Department of Enforcement or the Department of Market

Regulation at a rate established by the Board of FINRA or FINRA Regulation. The proposed rule change would transfer the authority to establish the rate for copies to FINRA staff.<sup>4</sup>

#### Submission of Evidence

FINRA Rule 9261(a) addresses pre-hearing disclosures and requires each party to submit to all other parties and to the Hearing Officer copies of documentary exhibits the parties intend to introduce and the names of the witnesses each party intends to present at a hearing. Currently, pre-hearing, proposed documentary evidence submitted to the Hearing Officer becomes part of the record. At the hearing, all of the documents that are admitted into evidence also become part of the record.<sup>5</sup> According to FINRA, this results in the record containing a duplicate of nearly every document that was admitted into evidence.

The proposed rule change would amend FINRA Rule 9261(a) to establish that documentary evidence submitted prior to a hearing shall not become part of the record, unless ordered by a Hearing Officer, Hearing Panel, or Extended Hearing Panel. Furthermore, the Hearing Officer may order each party – who will continue to exchange proposed documentary evidence with other parties – to refrain from submitting its proposed documentary evidence to the Hearing Officer.

#### Hearing Panel and NAC Decisions

FINRA Rules 9268(b)(1) and 9349(b)(1) require that a statement describing the investigative or other origin of the disciplinary proceeding be included in the contents of a decision of the Hearing Panel or the NAC, respectively. The proposed rule change would amend this provision to require such a statement only if it is not otherwise contained in the record.

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<sup>4</sup> FINRA stated in its filing that copying costs would be based on rates charged by local copying vendors in the area where FINRA maintains the documents. Id.

<sup>5</sup> See FINRA Rule 9267(a)(3).

## Review Proceedings

FINRA Rule 9312(a)(2) requires that if a default decision issued pursuant to FINRA Rule 9269 is called for review by the General Counsel within 25 days after the date of service of the decision, the decision must be reviewed by the NAC. The proposed rule change would provide that the Review Subcommittee also may review the decision.

## Oral Argument in Review of Proceedings

FINRA Rule 9341(a) establishes the procedure for a party requesting an oral argument before the Subcommittee or, if applicable, the Extended Proceeding Committee. Currently, once oral argument is requested, there is no mechanism to cancel oral argument if a respondent abandons his or her request for oral argument subsequent to filing a brief but prior to the date set for oral argument. The proposed rule change would allow the Subcommittee or, if applicable, the Extended Proceeding Committee, to cancel in writing a previously scheduled oral argument, and decide the matter based on the briefs and the record without oral argument, if the adjudicator finds good cause due to a respondent abandoning his or her prior request, or similar unreasonable lack of availability.<sup>6</sup> If the adjudicator cancels an oral argument but a respondent believes this action was taken in error, a respondent may file a motion seeking to reschedule oral argument.

## Failure to Participate in Disciplinary Proceeding

FINRA Rule 9344(a) gives the NAC or the Review Subcommittee discretion on how to proceed when an appealing party did not participate in the disciplinary proceeding before a Hearing Officer, a Hearing Panel or, if applicable, an Extended Hearing Panel. The proposed rule change would specify that the NAC or the Review Subcommittee will remand the

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<sup>6</sup> According to FINRA, a respondent may be viewed as abandoning a previously scheduled oral argument if the adjudicator has not received a response after attempting to confirm the attendance of the respondent. See Notice supra note 3.

disciplinary proceeding with instructions when a party shows good cause for failing to participate below. If, on the other hand, a party does not show good cause, the Subcommittee or other adjudicator will decide the case based on the briefs and the record and without oral argument.

#### Filing of Papers in Eligibility Proceedings

FINRA Rule 9524(a)(5) gives a Hearing Panel in an eligibility proceeding the ability, after obtaining the consent of all the parties, to extend or shorten any time limits prescribed by the Code for the filing of any papers. The proposed rule change would remove the consent requirement for any extension of the time limits.

#### Procedural Motions in Eligibility or Expedited Proceedings

FINRA Rule 9146(j)(3) requires that in the FINRA Rule 9500 Series, a motion shall be decided by an adjudicator. The proposed rule change would allow Counsel to the NAC to decide a procedural motion made pursuant to an eligibility proceeding or an expedited proceeding. Counsel would not be authorized to rule on dispositive motions.

#### Additional Information

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. Once effective, the proposed rules would apply immediately to all new and pending matters governed by the Code.

### III. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act.<sup>7</sup> Specifically, the Commission finds that the proposal is consistent with Section 15A(b)(6) of the Act,<sup>8</sup> which requires, among other things, that FINRA rules 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, and Section 15A(b)(8) of the Act,<sup>9</sup> which requires, among other things, that FINRA rules provide a fair procedure for the disciplining of members and persons associated with members, as the changes should make for a more efficient process under the Code while still preserving the substantive rights of the parties.

The Commission believes that allowing Hearing Officers to manage the parties' pre-hearing submissions to reduce and eliminate duplicative filings, as well as designating relevant portions of transcripts, should make the process more efficient for all of the parties involved. The proposed rule change should eliminate the unnecessary duplication of pre-hearing exhibits and the introduction of voluminous testimonial transcripts into evidence because the Hearing Officer at the pre-hearing conference may designate the relevant portions of such documents. Further, the proposed rule change should allow for a faster, more efficient review process by allowing the Review Subcommittee, in addition to the NAC, to review certain default decisions; delegating certain procedural and technical decisions to the counsel to the NAC; giving Hearing Panels and the NAC additional flexibility as to required statements in decisions; and allowing a

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<sup>7</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>8</sup> 15 U.S.C. 78o-3(b)(6).

<sup>9</sup> 15 U.S.C. 78o-3(b)(8).

Hearing Panel in an eligibility proceeding to extend time limits for the filing of any papers without the consent of all the parties.

The Commission also believes that it is appropriate to allow the Subcommittee or Extended Proceeding Committee to cancel a previously scheduled oral argument when it can be shown that the party requesting the oral argument has abandoned his prior request or for similar unreasonable lack of availability. The Commission notes that a respondent may file a motion seeking to reschedule an oral argument that he believes was cancelled in error. The Commission believes that this should allow FINRA to avoid unnecessary travel expenses, while still preserving the right of the party to an oral argument in the event the original oral argument was cancelled in error.

The Commission also notes that several of the changes would make it easier for the parties to satisfy the procedural requirements under the Code by allowing them to file papers electronically, authorizing their attorney or representative to accept service of a complaint and notices of certain expedited proceedings, and decreasing the number of copies required to be filed with an adjudicator. Moreover, the Commission believes that FINRA's proposed change requiring an attorney or representative to file a motion to withdraw, along with the contact information of the party no longer being represented, should help to ensure fair procedures by reducing any uncertainty as to whether a party is represented by an attorney and ensuring that FINRA has all necessary information to contact the party.

Further, the Commission believes that the change to require the NAC or Review Subcommittee to remand a disciplinary proceeding, if the respondent has shown good cause for his failure to participate, is appropriate. Finally, the Commission believes that it is appropriate for FINRA staff to set the rate for copies.



IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>10</sup> that the proposed rule change (SR-FINRA-2011-044) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>11</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>10</sup> 15 U.S.C. 78s(b)(2).

<sup>11</sup> 17 CFR 200.30-3(a)(12).