

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-98029; File No. SR-FINRA-2023-008)

July 31, 2023

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving a Proposed Rule Change to Amend FINRA Rules 1015, 9261, 9341, 9524, 9830 and Funding Portal Rule 900 (Code of Procedure) to Permit Hearings Under Those Rules to Be Conducted by Video Conference

I. Introduction

On April 26, 2023, the Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“SEC” or “Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to amend FINRA Rules 1015, 9261, 9341, 9524 and 9830 and Funding Portal Rule 900 to allow for video conference hearings before the Office of Hearing Officers (“OHO”) and the National Adjudicatory Council (“NAC”) under specified conditions. The proposed rule change was published for comment in the Federal Register on May 4, 2023.³ On June 7, 2023, FINRA consented to extend until August 2, 2023, the time period in which the Commission must approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change.⁴ This order approves the proposed rule change.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Exchange Act Release No. 97403 (May 4, 2023), 88 FR 28645 (May 4, 2023) (File No. SR-FINRA-2023-008) (“Notice”). The Commission did not receive any comments in connection with the Notice.

⁴ See Letter from Ilana Reid, Associate General Counsel, FINRA (June 7, 2023) available at <https://www.finra.org/sites/default/files/2023-06/sr-finra-2023-008-extension-no-1.pdf>.

II. Description of the Proposed Rule Change

A. Background

FINRA Rules 1015, 9261, 9341, 9524 and 9830 and Funding Portal Rule 900 pertain to the procedures for various types of proceedings conducted by OHO and the NAC.⁵ As summarized in the Notice, OHO conducts hearings in disciplinary proceedings⁶ and hearings for temporary and permanent cease and desist orders (“TCDOs” and “PCDOs”).⁷ When orders in disciplinary proceedings are appealed, the NAC holds hearings on oral argument.⁸ The NAC also conducts hearings in membership proceedings,⁹ eligibility proceedings,¹⁰ and Funding Portal

⁵ See Notice at 28646.

⁶ See Notice at 28646. FINRA stated that the FINRA Rule 9200 Series sets forth the procedures for disciplinary proceedings initiated by the Department of Enforcement against any FINRA member or associated person for alleged violation of any rule, regulation, or statutory provision that FINRA has jurisdiction to enforce, including the federal securities laws and the regulations thereunder. See Notice at n.8. See also FINRA Rule 9261.

⁷ See Notice at 28646. FINRA stated that the FINRA Rule 9800 Series sets forth the procedures for TCDO and PCDO proceedings. These provide a mechanism for FINRA to take necessary remedial action against a member or associated person where there is a significant risk that the alleged misconduct could cause continuing harm to the investing public, if not addressed expeditiously. See Notice at n.9. See also FINRA Rule 9830.

⁸ See Notice at 28646. FINRA stated that the FINRA Rule 9300 Series sets forth the procedures for review of disciplinary proceedings by the NAC. See Notice at n.10. See also FINRA Rule 9341.

⁹ See Notice at 28646. FINRA stated that the FINRA Rule 1000 Series governs, among other things, the process for: (i) applying for FINRA membership; (ii) FINRA members to seek approval of a change in ownership, control or business operations; and (iii) an applicant to request that the NAC review a FINRA decision rendered under the Rule 1000 Series. See Notice at n.11. See also FINRA Rule 1015.

¹⁰ See Notice at 28646. FINRA stated that the FINRA Rule 9520 Series sets forth the procedures for eligibility proceedings and review of those proceedings by the NAC and FINRA Board. See Notice at n.12. See also FINRA Rule 9524. “Eligibility proceedings,” refer to the process where FINRA may allow a person subject to statutory disqualification to enter or remain in the securities industry. See e.g.,

eligibility proceedings.¹¹ Under these rules (“original rules”), such hearings were generally conducted in person.¹²

Beginning in March of 2020, FINRA administratively postponed these in-person hearings because of the COVID-19 global health crisis.¹³ FINRA later adopted temporary amendments to the original rules (“temporary amendments”)¹⁴ that allowed OHO and the NAC to order, without a motion, hearings to proceed by video conference based on public health risks related to COVID-19.¹⁵

<https://www.finra.org/rules-guidance/guidance/eligibility-requirements> (providing general information about these proceedings).

¹¹ See Notice at 28646. Paragraph (b) of Funding Portal Rule 900 was established as a streamlined version of the FINRA Rule 9520 Series, discussed *supra* note 10, and sets forth the procedures for funding portal eligibility proceedings. See Notice at n.13. See also FINRA Funding Portal Rule 900.

¹² See Notice at 28646. FINRA noted that telephonic testimony and hearings are already explicitly permitted in expedited proceedings. See FINRA Rule 9559(d)(5) (expedited proceedings “shall be held by telephone conference, unless the Hearing Officer orders otherwise for good cause shown”). See Notice at n.14.

¹³ See Notice at 28645.

¹⁴ The temporary amendments were intended to address the expanding backlog of cases from the over six-month long postponement of hearings. See *id.* FINRA did not temporarily amend Paragraph (b) of Funding Portal Rule 900. Instead, FINRA included Paragraph (b) of Funding Portal Rule 900 in the proposed rule change so that the procedures for funding portal eligibility proceedings are aligned with eligibility proceedings under the FINRA Rule 9520 Series. See Notice at 28646. See also *supra* note 11.

¹⁵ See Securities Exchange Act Release No. 88917 (May 20, 2020), 85 FR 31832 (May 27, 2020) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2020-015) and Securities Exchange Act Release No. 89737 (September 2, 2020), 85 FR 55712 (September 9, 2020) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2020-027).

These temporary amendments were extended multiple times due to the continuing public health risks and logistical challenges related to the ongoing COVID-19 pandemic.¹⁶ The temporary amendments expired on April 30, 2023.¹⁷

According to FINRA, as a result of the temporary amendments, OHO and the NAC successfully held numerous hearings by video conference.¹⁸ FINRA conducted the video conference hearings using Zoom, a system which was vetted by FINRA's information

¹⁶ See Securities Exchange Act Release No. 90619 (December 9, 2020), 85 FR 81250 (December 15, 2020) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2020-042); Securities Exchange Act Release No. 91495 (April 7, 2021), 86 FR 19306 (April 13, 2021) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2021-006); Securities Exchange Act Release No. 92685 (August 17, 2021), 86 FR 47169 (August 23, 2021) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2021-019); Securities Exchange Act Release No. 93758 (December 13, 2021), 86 FR 71695 (December 17, 2021) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2021-031); Securities Exchange Act Release No. 94430 (March 16, 2022), 87 FR 16262 (March 22, 2022) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2022-004); Securities Exchange Act Release No. 95281 (July 14, 2022), 87 FR 43335 (July 20, 2022) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2022-018); Securities Exchange Act Release No. 96107 (October 19, 2022), 87 FR 64526 (October 25, 2022) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2022-029); and Securities Exchange Act Release No. 96746 (January 25, 2023), 88 FR 6346 (January 31, 2023) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2023-001).

¹⁷ See Securities Exchange Act Release No. 96746 (January 25, 2023), 88 FR 6346 (January 31, 2023) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2023-001).

¹⁸ According to FINRA, as of March 31, 2023, OHO has conducted 18 disciplinary hearings by video conference (decisions have been issued in all but one of these cases). Also, as of March 31, 2023, the NAC has conducted 19 oral arguments by video conference in connection with appeals of FINRA disciplinary proceedings pursuant to FINRA Rule 9341(d), as temporarily amended. Furthermore, the NAC has conducted via video conference a one-day evidentiary hearing in a membership application proceeding pursuant to FINRA Rule 1015, as temporarily amended. The NAC also has conducted via video conference three evidentiary hearings in eligibility matters pursuant to FINRA Rule 9524, as temporarily amended. See Notice at n.6.

technology staff.¹⁹ FINRA stated that this use of video conference technology has been an effective and efficient alternative to in-person hearings.²⁰

B. Proposed Rule Change

FINRA's proposed rule change would make the temporary amendments regarding video conference hearings permanent, with some modifications, to allow for the use of video conference for reasons beyond COVID-19. The proposed rule change would extend OHO and the NAC's authority to order hearings by video conference to other similar situations in which proceeding in person may endanger the health or safety of the participant or alternatively would be impracticable (i.e., an uncommon situation or extraordinary circumstance such as a natural disaster or terrorist attack that caused travel to be cancelled for an extended period of time).²¹ FINRA stated that this expanded authority is intended to empower OHO and the NAC to act quickly if a future unexpected event impaired their ability to conduct in-person hearings safely.²²

Additionally, FINRA explained that the proposed rule change would differ from the temporary amendments in several other ways.²³ First, according to FINRA, under the proposed rule change, OHO and the NAC would also have authority to order hearings to occur by video conference based on a motion.²⁴ Second, under the proposed rule change, FINRA chose to provide more flexibility for using video conference for oral arguments in appeals from disciplinary proceedings than for evidentiary hearings due to the differences between those types

¹⁹ See Notice at n.7.

²⁰ See Notice at 28646.

²¹ See id.

²² See Notice at 28647.

²³ See Notice at 28646.

²⁴ See id.

of hearings.²⁵ Consequently, according to FINRA, the motion requirements and the standard that the adjudicator would follow when exercising authority under the proposed rule change would differ somewhat depending on the type of hearing involved.²⁶ These differences are described further below.²⁷

As set forth in the Notice, under the proposed rule change, OHO and the NAC would have discretion to determine whether the circumstances for a video hearing were met.²⁸ However, FINRA noted that in-person hearings would remain the default method for conducting hearings.²⁹ FINRA stated it will also use the same protocols for conducting video conference hearings as employed under the temporary amendments, including using a high quality, secure, user-friendly video conferencing service and providing thorough instructions, training, and technical support to all hearing participants.³⁰

Evidentiary Hearings Before OHO and the NAC

As set forth in the Notice, for evidentiary hearings, the proposed rule change would give OHO and the NAC authority to order an evidentiary hearing to occur by video conference, in whole or in part, if OHO or the NAC determines that proceeding in person may endanger the

²⁵ See id. For ease of reference, to be consistent with the language FINRA used in its filing, “evidentiary hearings” refers to hearings conducted before OHO under FINRA Rules 9261 and 9830, and the NAC under FINRA Rules 1015, 9524, and Funding Portal Rule 900. “Oral argument” refers to hearings conducted before the NAC in appeals from disciplinary proceedings under Rule 9341. See Notice at n.17 and see supra notes 6-11 and accompanying text.

²⁶ See Notice at 28646.

²⁷ See infra notes 44-47 and accompanying text.

²⁸ See Notice at 28646.

²⁹ See id.

³⁰ See id.

health or safety of the participants or would be impracticable, as described above.³¹ OHO and the NAC would have such authority to order that the hearing occur by videoconference on their own (i.e., sua sponte).³²

In addition, FINRA explained that under the proposed rule change, parties could file a joint motion requesting the hearing to occur, in whole or in part, by video conference based on a showing of good cause.³³ FINRA stated that due to the nature of evidentiary hearings, which often occur over multiple days and generally include numerous documents in evidence and witness testimony, the proposed rule change would require any motions for a hearing by video conference to be joined by all parties, and even joint motions may be denied if the adjudicator determines that good cause has not been shown.³⁴

According to FINRA, whether acting on their own or based on a joint motion of the parties, OHO and the NAC would have reasonable discretion to exercise their authority to determine whether a hearing should occur by video conference under the proposed rule change.³⁵ FINRA further explained that in deciding whether to schedule a hearing by video conference,

³¹ See id. See also, supra note 21 and accompanying text.

³² See Notice at 28647. FINRA stated that OHO and the NAC would have such authority over the objection of a party, which was also the case under the temporary amendments. See also Notice at n.18. See also SR-FINRA-2020-027, supra note 15.

³³ See Notice at 28647.

³⁴ See id. FINRA noted that its current practice is to allow witnesses in an otherwise in-person hearing to appear by video conference. According to FINRA, in evidentiary hearings, a party may file a motion to offer witness testimony by telephone or video conference. Further, even prior to the COVID-19 pandemic, adjudicators have allowed telephone participation by witnesses who are unable or unwilling to appear in person, such as customers over whom FINRA does not have jurisdiction and therefore cannot compel testimony under FINRA Rule 8210. See Notice at n.19.

³⁵ See Notice at 28647.

OHO and the NAC could consider and balance a variety of factors including, for example and without limitation, a hearing participant’s individual health concerns and access to the connectivity and technology necessary to participate in a video conference hearing.³⁶ Additionally, as noted above, OHO and the NAC may consider whether a situation is uncommon or there are extraordinary circumstances.³⁷

Oral Argument Before the NAC

The proposed rule change would give the NAC authority to order an oral argument hearing to occur by video conference, in whole or in part, if it determines that proceeding in person may endanger the health or safety of the participants or would be impracticable.³⁸ According to FINRA, the NAC would have such authority on its own.³⁹

Further, under the proposed rule change, the NAC would have authority — on its own or on consideration of a motion by any party — to order oral argument to occur by video conference, in whole or in part, for other reasons (i.e. reasons not limited to public health, safety or impracticability).⁴⁰ According to FINRA, under such circumstances, an opposing party would have the opportunity to demonstrate that the hearing should proceed in person because proceeding by video conference would materially disadvantage that party.⁴¹ FINRA explained that whether a party has shown material disadvantage would depend on the facts and

³⁶ See id.

³⁷ See supra note 21 and accompanying text.

³⁸ See Notice at 28647.

³⁹ See id.

⁴⁰ See id.

⁴¹ See id.

circumstances.⁴² According to FINRA, considerations may include, for example and without limitation, case complexity, the issues on appeal, and whether the respondent is pro se and desires to appear in person.⁴³

According to FINRA, under the proposed rule change, the NAC would have greater flexibility to allow oral argument to occur by video conference than the NAC or OHO would have to permit an evidentiary hearing to occur via video conference.⁴⁴ Specifically, FINRA stated that the proposed rule change as to NAC oral argument differs from the proposed rule change for evidentiary hearings in three respects: (1) it would give the NAC sua sponte authority to order oral argument hearings to occur by video conference for reasons other than public health, safety, or impracticability; (2) it would allow for motions by a single party rather than requiring joint motions; and (3) under either of those circumstances, it would permit a party to oppose on grounds that proceeding by video conference would materially disadvantage that party.⁴⁵ As noted above, the third difference serves as an additional safeguard given that the NAC has greater flexibility, compared to evidentiary hearings held by the NAC or OHO, to allow oral argument to occur by video conference.⁴⁶ These proposed differences are, according to FINRA, due to the nature of oral argument hearings, which are typically shorter than evidentiary hearings in duration (generally two hours or less), contain no presentation of new documentary evidence or witness testimony, and are often conducted by counsel.⁴⁷

⁴² See id.

⁴³ See id.

⁴⁴ See id.

⁴⁵ See id.

⁴⁶ See id.

⁴⁷ See id.

According to FINRA, whether acting on its own or based on a motion of a party, the NAC would have reasonable discretion to exercise its authority to determine whether oral argument should occur by video conference under the proposed rule change.⁴⁸ In deciding whether to order an oral argument hearing by video conference, the NAC could consider and balance a variety of factors including, for example and without limitation, a hearing participant's individual health concerns, access to video conference technology, whether a party has delayed or refused to appear in person, and whether proceeding by video conference would materially disadvantage any party.⁴⁹

C. Effective Date

If the Commission approves the proposed rule change, FINRA will announce the effective date of the proposed rule change in a Regulatory Notice to be published by FINRA.

III. Discussion and Commission Findings

After careful review of the proposed rule change, and considering that the Commission did not receive any comments that relate to the proposed rule change,⁵⁰ the Commission finds that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder that are applicable to a national securities association.⁵¹

⁴⁸ See id.

⁴⁹ See id.

⁵⁰ The Commission received two comments related to the initial temporary amendments, as well as an additional comment related to one of the extensions. FINRA responded to these commenters. Comments are available at <https://www.sec.gov/comments/sr-finra-2020-027/srfinra2020027.htm> and <https://www.sec.gov/comments/sr-finra-2021-019/srfinra2021019.htm>. However, none of these comments were submitted in connection with the current proposed rule.

⁵¹ In approving this rule change, the Commission has considered the rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

Specifically, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Exchange Act,⁵² 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.

As discussed in greater detail in the Notice and outlined in Section II above, FINRA Rules 1015, 9261, 9341, 9524 and 9830 and Funding Portal Rule 900 pertain to the procedures for various types of proceedings conducted by OHO and the NAC. The proposed rule change would make the temporary amendments regarding video conference hearings permanent, with some modifications that would allow for the use of video conference for reasons beyond COVID-19, as described above.⁵³ The proposed rule change would allow certain proceedings by video conference if the NAC or OHO determine that proceeding in person may endanger the health or safety of the participants or would be impracticable.⁵⁴ Additionally, the proposed rule change would allow certain proceedings by video conference where both parties prefer doing so and show good cause, or where neither party would be materially disadvantaged.⁵⁵ For approximately two and half years, while the temporary amendments were in effect, OHO and the NAC successfully conducted numerous disciplinary and evidentiary hearings by video conference.⁵⁶

⁵² 15 U.S.C. 78o-3(b)(6).

⁵³ See supra notes 21-49 and accompanying text.

⁵⁴ See supra notes 21-22, 31, 38 and accompanying text.

⁵⁵ See supra notes 33-34, 40-43 and accompanying text.

⁵⁶ See supra note 18 and accompanying text.

The proposed rule change would provide greater flexibility and efficiency for FINRA’s disciplinary and eligibility proceedings and other review processes which serve a critical role in providing investor protection and maintaining fair and orderly markets, while maintaining appropriate safeguards. The proposed rule change would enable OHO and the NAC to respond to unanticipated events such as health emergencies, natural disasters or terrorist attacks more quickly to avoid backlogs or unnecessary delays.⁵⁷ Currently, as set forth in the Notice, FINRA does not have permanent rules that allow for video conference hearings before OHO and the NAC, even when both parties prefer proceeding by video conference, or doing so would not materially disadvantage any party, or when video conference is the only practicable method.⁵⁸ However, the successful implementation of video conference hearings during the COVID-19 global health crisis demonstrated that technology can be an effective and efficient alternative to in-person hearings.⁵⁹ The backlog of cases that arose as a result of the postponement of hearings during the COVID-19 pandemic before the temporary amendments were enacted illustrate the need for greater flexibility to empower OHO and the NAC to react more expeditiously.⁶⁰ The proposed rule change would modernize existing procedures and allow parties who jointly prefer video conference to potentially save travel costs and time.⁶¹

Additionally, the use of video conferences would be limited and controlled. Notably, in-person hearings would still be the default method for conducting hearings.⁶² Furthermore, the

⁵⁷ See Notice at 28647.

⁵⁸ See Notice at 28648.

⁵⁹ See Notice at n.6; see also supra note 18 and accompanying text.

⁶⁰ See Notice at 28647.

⁶¹ See Notice at 28649.

⁶² See supra note 29 and accompanying text.

proposed rule includes procedural safeguards to ensure fairness, such as the requirement for evidentiary hearings that any motions be joined by all parties and show good cause and, for oral argument, the ability of any party to oppose an order or motion to proceed by video conference on grounds that doing so would materially disadvantage that party.⁶³

For these reasons, the Commission finds the proposed rule change is consistent with the protection of investors and in the public interest.

IV. Conclusion

IT IS THEREFORE ORDERED pursuant to Section 19(b)(2) of the Exchange Act⁶⁴ that the proposed rule change (SR-FINRA-2023-008) be, and hereby is, approved.

Sherry R. Haywood
Assistant Secretary

⁶³ See Notice at 28647-28648.

⁶⁴ 15 U.S.C. 78s(b)(2).