

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-99121; File No. SR-NYSEAMER-2023-62)

December 8, 2023

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Change to Harmonize Rules 9261 and 9830

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (“Act”)² and Rule 19b-4 thereunder,³ notice is hereby given that, on November 27, 2023, NYSE American LLC (“NYSE American” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. 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

The Exchange proposes to harmonize Rules 9261 and 9830 with recent changes by the Financial Industry Regulatory Authority, Inc. (“FINRA”) that allow for video conference hearings under specified conditions. The proposed rule change is available on the Exchange’s website at www.nyse.com, at the principal office of the Exchange, 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, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

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

1. Purpose

The Exchange proposes to harmonize Rules 9261 (Evidence and Procedure in Hearing) and 9830 (Hearing) with recent changes by FINRA to its Rules 9261 and 9830 that allow for video conference hearings under specified conditions.

Background

In 2016, NYSE American (then known as NYSE MKT LLC) adopted disciplinary rules modeled the Rule 8000 Series and Rule 9000 Series of FINRA and its affiliate the New York Stock Exchange LLC, and which set forth rules for conducting investigations and enforcement actions.⁴ The NYSE American disciplinary rules were implemented on April 15, 2016.⁵

In adopting disciplinary rules modeled on FINRA’s rules, NYSE American adopted the hearing and evidentiary processes set forth in Rule 9261 and in Rule 9830 for hearings in matters involving temporary and permanent cease and desist orders under the Rule 9800 Series. As adopted, the text of Rule 9261 is identical to the counterpart FINRA rule. Rule 9830 is also identical to FINRA’s counterpart rule, except for conforming and technical amendments.⁶

⁴ See Securities Exchange Act Release Nos. 77241 (February 26, 2016), 81 FR 11311 (March 3, 2016) (SR-NYSEMKT-2016-30) (“2016 Notice”).

⁵ See NYSE MKT Information Memorandum 16-02 (March 14, 2016).

⁶ See 2016 Notice, 81 FR at 11327 & 11332.

In 2020, given the spread of COVID-19 and its effect on FINRA’s adjudicatory functions nationwide, FINRA filed a temporary rule change to grant FINRA’s Office of Hearing Officers (“OHO”) and the National Adjudicatory Council (“NAC”) the authority to conduct certain hearings by video conference if warranted by the current COVID-19-related public health risks posed by in-person hearings. Among the rules FINRA amended were FINRA Rules 9261 and 9830.⁷

In its filing, FINRA represented that its protocol for conducting hearings by video conference would ensure that such hearings maintain a fair process for the parties by, among other things, FINRA’s use of a high quality, secure and user-friendly video conferencing service and provision of thorough instructions, training and technical support to all hearing participants.⁸ According to FINRA, the changes were a reasonable interim solution to allow FINRA’s critical adjudicatory processes to continue to function while protecting the health and safety of hearing participants.⁹

Given that FINRA and OHO administer disciplinary hearings on the Exchange’s behalf pursuant to a regulatory services agreement (“RSA”),¹⁰ and that the public health concerns

⁷ See Securities Exchange Act Release Nos. 83289 (September 2, 2020), 85 FR 55712 (September 9, 2020) (SR-FINRA-2020-027). FINRA also proposed to temporarily amend FINRA Rules 1015 and 9524. FINRA Rule 1015 governs the process by which an applicant for new or continuing membership can appeal a decision rendered by FINRA’s Department of Member Supervision under FINRA Rule 1014 or 1017 and request a hearing which would be conducted by a subcommittee of the NAC. See id. The Exchange has not adopted FINRA Rule 1015. FINRA Rule 9524 governs the process by which a statutorily disqualified member firm or associated person can appeal the Department’s recommendation to deny a firm or sponsoring firm’s application to the NAC. See id. Under the Exchange’s version of Rule 9524, if the Chief Regulatory Officer rejects the application, the member organization or applicant may request a review by the Exchange Board of Directors. This differs from FINRA’s process, which provides for a hearing before the NAC and further consideration by the FINRA Board of Directors.

⁸ See 85 FR at 55713.

⁹ See id.

¹⁰ FINRA’s OHO administers all aspects of Exchange adjudications, including assigning hearing officers to serve as NYSE American hearing officers. A hearing officer from OHO will, among other things, preside over the disciplinary hearing, select and chair the hearing panel, and prepare and issue written decisions. The Chief or Deputy Hearing Officer for all Exchange disciplinary hearings are currently drawn from OHO

addressed by FINRA’s amendments applied equally to the Exchange’s disciplinary hearings, in 2020 the Exchange also temporarily amended its disciplinary rules to allow virtual hearings.¹¹ Both FINRA¹² and the Exchange¹³ extended the temporary relief several times due to the continuing public health risks and logistical challenges related to COVID-19, including whether hearing participants could safely travel and abide by state or local quarantine requirements. The Exchange’s temporary amendments to Rules 9261 and 9830 expired on April 30, 2023.¹⁴

Recently, the Commission approved FINRA’s proposal to make the temporary amendments regarding video conference hearings permanent, with some modifications, to permit the use of video conferences for reasons beyond COVID–19.¹⁵ Specifically, FINRA amended,

and are all FINRA employees. The Exchange believes that OHO will utilize the same video conference protocol and processes for Exchange matters under the RSA as it proposes for FINRA matters.

¹¹ See Securities Exchange Act Release No. 90085 (October 2, 2020), 85 FR 63603 (October 8, 2020) (SR-NYSEAMER-2020-69).

¹² See Securities Exchange Act Release No. 90619 (December 9, 2020), 85 FR 81250 (December 15, 2020) (SR-FINRA-2020-042); Securities Exchange Act Release No. 91495 (April 7, 2021), 86 FR 19306 (April 13, 2021) (SR-FINRA-2021-006); Securities Exchange Act Release No. 92685 (August 17, 2021), 86 FR 47169 (August 23, 2021) (SR-FINRA-2021-019); Securities Exchange Act Release No. 93758 (December 13, 2021), 86 FR 71695 (December 17, 2021) (SR-FINRA-2021-31); Securities Exchange Act Release No. 94430 (March 16, 2022), 87 FR 16262 (March 22, 2022) (SR-FINRA-2022-004); Securities Exchange Act Release No. 95281 (July 14, 2022), 87 FR 43335 (July 20, 2022) (SR-FINRA-2022-018); Securities Exchange Act Release No. 96107 (October 19, 2022), 87 FR 64526 (October 25, 2022) (SR-FINRA-2022-029); and Securities Exchange Act Release No. 96746 (January 25, 2023), 88 FR 6346 (January 31, 2023) (SR-FINRA-2023-001).

¹³ See Securities Exchange Act Release No. 90823 (December 30, 2020), 86 FR 650 (January 6, 2021) (SR-NYSEAMER-2020-88); Securities Exchange Act Release No. 91631 (April 22, 2021), 86 FR 22471 (April 28, 2021) (SR-NYSEAMER-2021-23); Securities Exchange Act Release No. 92910 (September 9, 2021), 86 FR 51418 (September 15, 2021) (SR-NYSEAMER-2021-37); Securities Exchange Act Release No. 93917 (January 6, 2022), 87 FR 1825 (January 12, 2022) (SR-NYSEAMER-2021-49); Securities Exchange Act Release No. 94665 (April 11, 2022), 87 FR 22594 (April 15, 2022) (SR-NYSEAMER-2022-16); Securities Exchange Act Release No. 95474 (August 11, 2022), 87 FR 50665 (August 17, 2022) (SR-NYSEAMER-2022-34); Securities Exchange Act Release No. 96257 (November 8, 2022), 87 FR 68533 (November 15, 2022) (SR-NYSEAMER-2022-50); and Securities Exchange Act Release No. 96870 (February 9, 2023), 88 FR 9934 (February 15, 2023) (SR-NYSEAMER-2023-09).

¹⁴ See Securities Exchange Act Release No. 96870 (February 9, 2023), 88 FR 9934 (February 15, 2023) (SR-NYSEAMER-2023-09) (extending expiration date of temporary rule amendments to, among other rules, FINRA Rules 9261 and 9830 from January 31, 2023 to April 30, 2023).

¹⁵ See Securities Exchange Act Release Nos. 98029 (August 4, 2023), 88 FR 51879 (August 4, 2023) (SR-FINRA-2023-008) (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

among other rules, FINRA Rules 9261 and 9830 to extend OHO’s authority to order hearings by video conference to other similar situations in which proceeding in person could endanger the health or safety of the participant or alternatively would be impracticable (e.g., an uncommon situation or extraordinary circumstances such as a natural disaster or terrorist attack that caused travel to be cancelled for an extended period of time).¹⁶ As approved, OHO has discretion to determine whether the circumstances for a video hearing have been met and can act quickly if a future unexpected event impairs their ability to conduct in-person hearings safely.¹⁷ In addition, OHO also has authority to order hearings to occur by video conference based on a motion, which was not permitted under the previous temporary amendments to FINRA Rules 9261 and 9830.¹⁸

As the FINRA Approval Order noted, FINRA represented that it will utilize the same protocols for conducting video conference hearings as those 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.¹⁹ In addition, the FINRA Approval Order noted that, according to FINRA, the 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. In-person hearings, however, would remain the default method for conducting hearings.²⁰

Be Conducted by Video Conference) (“FINRA Approval Order”).

¹⁶ See FINRA Approval Order, 88 FR at 51880.

¹⁷ See id.

¹⁸ See id.

¹⁹ See id.

²⁰ See id.

Further, as noted in the FINRA Approval Order, given the nature of evidentiary hearings,²¹ which often occur over multiple days and generally include numerous documents in evidence and witness testimony, motions for a hearing by video conference would need to be joined by all parties, and even joint motions could be denied if the adjudicator determines that good cause has not been shown.²² According to FINRA, OHO would have reasonable discretion based on a joint motion of the parties to exercise its authority to determine whether a hearing should occur by video conference under the proposed rule change.²³ Moreover, in deciding whether to schedule a hearing by video conference, OHO 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. Additionally, as noted above, OHO may consider whether a situation is uncommon or there are extraordinary circumstances.²⁴

Finally, the FINRA Approval Order noted that for approximately two and a half years, while the temporary amendments were in effect, OHO successfully conducted numerous hearings by video conference using Zoom, a system which was vetted by FINRA's information technology staff.²⁵ FINRA stated that this use of video conference technology has been an effective and efficient alternative to in-person hearings.²⁶

²¹ As used herein, "evidentiary hearings" refers to hearings conducted before OHO under Rules 9261 and 9830. See id., 88 FR at 51880, n. 25.

²² See id. at 51881.

²³ See id.

²⁴ See text accompanying note 16, supra.

²⁵ See FINRA Approval Order, 88 FR at 51880.

²⁶ See id.

As discussed below, the Exchange proposes to delete the temporary rule text in Rule 9261 and Rule 9830 permitting video conferences that expired earlier this year and replace it with rule text based on FINRA's recently approved amendments to its Rules 9261 and 9830 permitting video conference hearings under specified conditions.

Proposed Rule Change

NYSE American Rule 9261(b) provides that if a disciplinary hearing is held, a party shall be entitled to be heard in-person, by counsel, or by the party's representative. Similarly, NYSE American Rule 9830 outlines the requirements for hearings for temporary and permanent cease and desist orders. NYSE American Rule 9830(a), however, does not specify that a party shall be entitled to be heard in-person, by counsel, or by the party's representative. Consistent with FINRA's temporary amendment to FINRA Rules 9261 and 9830 that expired earlier this year, both NYSE American rules temporarily granted the Chief or Deputy Chief Hearing Officer temporary authority to order, upon consideration of COVID-19-related public health risks presented by an in-person hearing, that a hearing under those rules be conducted by video conference.

The Exchange proposes to delete the temporary amendments to Rules 9261 and 9830 and conform these rules to FINRA Rules 9261 and 9830 as recently amended. The Exchange would add text to the rules permitting the Chief or Deputy Chief Hearing Officer to order the hearing to be conducted in whole or in part by video conference consistent with the FINRA Approval Order either based upon an assessment that proceeding in person may endanger the health or safety of the participants or would be impracticable or upon consideration of a joint motion of the parties for good cause shown. As noted, FINRA has adopted a detailed and thorough protocol to ensure

that hearings conducted by video conference will maintain a fair process for the parties.²⁷

Moreover, the proposed rule change would modernize existing procedures and allow parties who jointly prefer video conference to potentially save travel costs and time. As proposed, the use of video conferences would be limited and controlled, and in-person hearings would continue to be the default method for conducting hearings.²⁸ Furthermore, the 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.²⁹ The Exchange believes that this is a reasonable procedure to follow in hearings under Rules 9261 and 9830 chaired by a FINRA employee.

To effectuate these changes, the Exchange proposes to add the following deletions (bracketed) and additions (underlined) to Rule 9261(b):

If a hearing is held, a Party shall be entitled to be heard in person, by counsel, or by the Party's representative. [Upon consideration of the current public health risks presented by an in-person hearing, the Chief Hearing Officer or Deputy Chief Hearing Officer may, on a temporary basis, determine that the hearing shall be conducted, in whole or in part, by video conference.]Upon a determination that proceeding in person may endanger the health or safety of the participants or would be impracticable, or upon consideration of a joint motion of the Parties for good cause shown, the Chief Hearing Officer or Deputy Chief Hearing Officer may,

²⁷ See text accompanying notes 8 & 19, *supra*.

²⁸ See FINRA Approval Order, 88 FR at 51882.

²⁹ See *id.*

in the exercise of reasonable discretion, order the hearing to be conducted, in whole or in part, by video conference.

The proposed text is identical to the language adopted by FINRA.³⁰

Similarly, the Exchange proposes the following deletions and additions to Rule 9830(a):

The hearing shall be held not later than 15 days after service of the notice and filing initiating the temporary cease and desist proceeding, unless otherwise extended by the Chief Hearing Officer or Deputy Chief Hearing Officer for good cause shown. If a Hearing Officer or Hearing Panelist is recused or disqualified, the hearing shall be held not later than five days after a replacement Hearing Officer or Hearing Panelist is appointed.

[Upon consideration of the current public health risks presented by an in-person hearing, the Chief Hearing Officer or Deputy Chief Hearing Officer may, on a temporary basis, determine that the hearing shall be conducted, in whole or in part, by video conference.]Upon a determination that proceeding in person may endanger the health or safety of the participants or would be impracticable, or upon consideration of a joint motion of the Parties for good cause shown, the Chief Hearing Officer or Deputy Chief Hearing Officer may, in the exercise of reasonable discretion, order the hearing to be conducted, in whole or in part, by video conference.

³⁰ See Exchange Act Release No. 97403 (May 4, 2023), 88 FR 28645 (May 4, 2023) (File No. SR-FINRA-2023-008) (Notice of Filing of 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).

Once again, the proposed language is identical to the language adopted by FINRA.³¹

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,³² in general, and furthers the objectives of Section 6(b)(5),³³ in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to, and perfect the mechanism of, a free and open market and a national market system and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is designed to provide a fair procedure for the disciplining of members and persons associated with members, consistent with Sections 6(b)(7) and 6(d) of the Act.³⁴

The Exchange believes that the proposed rule changes support the objectives of the Act by harmonizing Exchange rules modeled on FINRA's rules, resulting in less burdensome and more efficient regulatory compliance. As previously noted, the additional text proposed for Rule 9261 and Rule 9830 is identical to the text in the counterpart FINRA rules. As such, the proposed rule change would facilitate rule harmonization among self-regulatory organizations with respect to the conduct of video conference hearings, thereby fostering cooperation and coordination with persons engaged in facilitating transactions in securities and will remove impediments to and perfect the mechanism of a free and open market and a national market system.

³¹ See id.

³² 15 U.S.C. 78f(b).

³³ 15 U.S.C. 78f(b)(5).

³⁴ 15 U.S.C. 78f(b)(7) & 78f(d).

The Exchange believes that the proposed rule change protects investors and the public interest by permitting the use of broadly available technology to allow hearings to proceed by video conference under certain circumstances. The Exchange's disciplinary proceedings serve a critical role in providing investor protection and maintaining fair and orderly markets by, for example, sanctioning misconduct and preventing further customer harm by members and associated persons. The proposed rule change would encourage the prompt resolution of these cases while preserving fair process. The Exchange believes that this is especially important in matters where temporary and permanent cease and desist orders are sought because the proposed rule change would enable those hearings to proceed without delay, thereby enabling the Exchange to take immediate action to stop significant, ongoing customer harm, to the benefit of the investing public.

The proposed rule change promotes efficiency by permitting hearings to occur by video conference in situations where the hearings would otherwise be postponed for an uncertain period of time. Moreover, as noted, FINRA will utilize the same protocols for conducting video conference hearings as those 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.³⁵ In addition, the Chief or Deputy Chief Hearing Officer may take into consideration, among other things, a hearing participant's individual health concerns and access to the connectivity and technology necessary to participate in a video conference hearing.³⁶

³⁵ See FINRA Approval Order, 88 FR at 51880.

³⁶ See id. at 51881 & n. 36.

For the same reasons, the Exchange believes that the proposed changes are designed to provide a fair procedure for the disciplining of members and persons associated with members, consistent with Sections 6(b)(7) and 6(d) of the Act.³⁷ The Exchange believes that the proposed rule change provides a fair procedure by allowing hearings to proceed by video conference not only due to public health or safety reasons, but also at a party or the parties' request for reasons particular to them. The Chief or Deputy Chief Hearing Officer could allow a hearing to proceed by video conference in the exercise of reasonable discretion and subject to procedural safeguards that ensure fairness, including the requirement that any motions be joined by all parties and show good cause. Overall, the proposed rule change represents a significant step toward modernizing disciplinary process procedures in a manner that preserves in-person hearings but allows for the use of video conference technology under certain circumstances.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not intended to address competitive issues but is rather intended solely to create permanent rules that would allow video conference hearings if OHO determines that proceeding in person may endanger the health or safety of the participants or would be impracticable, or where both parties prefer doing so and show good cause, thereby providing greater harmonization with approved FINRA rules.

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

No written comments were solicited or received with respect to the proposed rule change.

³⁷ 15 U.S.C. 78f(b)(7) and 78f(d).

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

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act³⁸ and Rule 19b-4(f)(6) thereunder.³⁹ Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6)(iii) thereunder.⁴⁰

A proposed rule change filed under Rule 19b-4(f)(6)⁴¹ normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),⁴² the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)⁴³ of the Act to determine

³⁸ 15 U.S.C. 78s(b)(3)(A)(iii).

³⁹ 17 CFR 240.19b-4(f)(6).

⁴⁰ Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

⁴¹ 17 CFR 240.19b-4(f)(6).

⁴² 17 CFR 240.19b-4(f)(6)(iii).

⁴³ 15 U.S.C. 78s(b)(2)(B).

whether the proposed rule change should be approved or 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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number

SR-NYSEAMER-2023-62 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-NYSEAMER-2023-62. This file number should be included on the subject line if email 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 (<https://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, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office

of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-NYSEAMER-2023-62 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴⁴

Sherry R. Haywood,

Assistant Secretary.

⁴⁴ 17 CFR 200.30-3(a)(12).