

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-70521; File No. SR-FINRA-2013-033)

September 26, 2013

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving a Proposed Rule Change to Amend FINRA Rule 9217 (Violations Appropriate for Disposition Under Plan Pursuant to Securities Exchange Act Rule 19d-1(c)(2))

I. Introduction

On July 24, 2013, 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 (“Exchange Act” or “Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to amend FINRA Rule 9217 (Violations Appropriate for Disposition Under Plan Pursuant to Exchange Act Rule 19d-1(c)(2)). The proposed rule change was published for comment in the Federal Register on August 13, 2013.³ The Commission received two comments on the proposal.⁴ On September 17, 2013, FINRA responded to the comments.⁵ This order approves the proposed rule change.

II. Description of the Proposal

FINRA proposes to amend FINRA Rule 9217 (Violations Appropriate for Disposition Under Plan Pursuant to Exchange Act Rule 19d-1(c)(2)) to include additional rule violations eligible for disposition under FINRA’s Minor Rule Violation Plan (“MRVP”). In its proposal,

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 70131 (Aug. 7, 2013), 78 FR 49313 (“Notice”).

⁴ See Letter to the Commission from David T. Bellaire, Esq., Executive Vice President & General Counsel, Financial Services Institute (“FSI”), dated September 3, 2013. The Commission also received another comment letter which does not address the substance of the proposed rule change. See Letter to the Commission from John Frattellone, dated September 3, 2013.

⁵ See Letter to the Commission from Philip Shaikun, Associate Vice President and Associate General Counsel, FINRA, dated September 17, 2013 (“Response Letter”).

FINRA states that it believes that the purpose of the MRVP is to provide reasonable but meaningful sanctions for minor or technical violations of rules when the conduct at issue does not warrant stronger, reportable disciplinary sanctions.

In the proposal, FINRA states that the inclusion of a rule in FINRA's MRVP does not minimize the importance of compliance with that rule; nor does it preclude FINRA from choosing to pursue violations of eligible rules through an Acceptance, Waiver and Consent ("AWC") or Complaint if the nature of the violations or prior disciplinary history warrants more significant sanctions. Rather, FINRA notes that the option to impose an MRVP sanction gives FINRA additional flexibility to administer its enforcement program in the most effective and efficient manner, while still fully meeting FINRA's remedial objectives in addressing violative conduct. FINRA represents that it will continue to examine and surveil for compliance with eligible rules in a manner consistent with its examination programs and will determine on a case-by-case basis whether disposition pursuant to the MRVP is appropriate.⁶

FINRA has represented that it conducted a comprehensive review of its rules and examination dispositions to determine which rules to propose to add to Rule 9217.⁷ Among other things, FINRA considered (1) rules routinely cited in formal disciplinary actions that are not currently part of the MRVP; (2) rules cited frequently in informal actions; (3) rules comparable to existing rules in the MRVP; and (4) rules included in other self-regulatory organization MRVPs.

The rules FINRA proposes to include in Rule 9217 can, broadly, be grouped into several categories, as described below:

⁶ See Notice, 78 FR at 49313.

⁷ See id.

Filings and Notifications

FINRA proposes to include in Rule 9217 several filing and notification rules because violations of these rules typically involve, FINRA believes, isolated failures to comply with periodic reporting, filing, or notification requirements and are thus appropriate for disposition under the MRVP. These rules include: FINRA Rule 2251(a) (failure to timely forward proxy and other issuer-related materials); FINRA Rule 4524 (failure to timely file or filing of incomplete reports or information); FINRA Rule 5110(b) (failure to timely file or filing of incomplete documents or information); FINRA Rule 5121(b)(2) (failure to give timely notification of termination or settlement of public offering or failure to file net capital computation); FINRA Rule 5122(b)(2) (failure to timely file private placement documents); FINRA Rule 5190 (failure to give timely notification of participation in offerings); and FINRA Rule 6760 (failure to give timely or complete notification concerning offerings of TRACE-Eligible Securities).

FINRA notes, however, that willful, widespread or repeated failures of these rules may be appropriate for disposition through an AWC or the filing of a Complaint.

Late Registrations

FINRA also proposes to include in the Rule 9217 certain rule violations involving isolated or technical failures to timely register. The relevant rules include: NASD Rule 1021(d) (failure to timely register) and MSRB Rules G-2, G-3(b)(ii)(D), and G-3(c)(ii)(D) (failure to timely register).

Untimely Marking, Transaction Reporting and other Market Rules

FINRA proposes to add rules that involve late filing and notification requirements related to market regulation. FINRA notes that the MRVP already includes several such rules. The

rules FINRA proposes to add include: Rule 605(a)(1) and (3) of Regulation NMS⁸ (failure to timely report or provide complete order execution information); Rule 606 of Regulation NMS (failure to timely disclose or provide complete order routing information); FINRA Rule 6181 (failure to timely report transactions in NMS securities); and FINRA Rule 6623 (failure to timely report transactions in over-the-counter (“OTC”) and restricted equity securities).

FINRA also proposes to include marking and reporting rules related to trade and audit data. These rules include: Rule 200(g) of Regulation SHO⁹ (failure to accurately mark sell orders of equity securities); FINRA Rule 6182 and FINRA 6624 (failure to accurately mark short sale transaction in NMS and OTC securities); FINRA Rule 6250 (failure to comply with quote and order access requirements for FINRA’s Alternative Display Facility); FINRA Rule 7330 (failure to timely and accurately input trade reports into the OTC Reporting Facility); and FINRA Rule 7360 (ongoing obligation to input trade reporting requirements in Rule 7330(d) accurately and completely).

In addition, FINRA proposes to add to the MRVP three rules governing the FINRA/NYSE Trade Reporting Facility, because similar rules regarding the FINRA/NASDAQ Trade Reporting Facility are already included in the MRVP. These rules include: FINRA Rule 6380B (transaction Reporting); FINRA Rule 7230B (trade Report Input); and FINRA Rule 7260B (Audit Trail Requirements).

Rules to Achieve Consistency

FINRA proposes to add certain rules to Rule 9217 to achieve consistency with rules that already are part of FINRA’s MRVP. These rules include FINRA Rule 1250 in its entirety, in order to bring both the Regulatory Element and Firm Element of FINRA’s continuing education

⁸ 17 CFR 242.605(a)(1) and (a)(3).

⁹ 17 CFR 242.200.

requirements into the scope of Rule 9217, and MSRB Rule G-3(h), which likewise would bring both the Regulatory Element and Firm Element of the MSRB's equivalent education requirements rule into the scope of Rule 9217. FINRA also proposes to include MSRB Rule G-21 (advertising), because the FINRA's corresponding rules for communication with the public (FINRA Rules 2210, 2212, 2213, 2215, and 2216 and NASD Interpretive Material 2210-2) already are subject to MRVP disposition.

FINRA also proposes to add several rules sanctioning the failure to provide or update contact information. Those rules include: NASD Rule 1150 (failure to review and update executive representative designation and contact information) and NASD Rule 1160 (failure to report or update contact information). Similarly, FINRA has also proposed to add MSRB Rules G-40(a) and (c) (failure to designate and update electronic mail contact information for communications with MSRB) and FINRA Rule 4370(f) (Business Continuity and Emergency Contact Information), which requires a member to designate emergency contact persons and to report emergency contact information to FINRA.

Recordkeeping

FINRA proposes to add specific Commission and MSRB rules that require records to be made and preserved. These rules include: Exchange Act Rule 17a-3(a) (Records to be made by certain exchange members, brokers and dealers); Exchange Act Rule 17a-4 (Records to be preserved by certain exchange members, brokers and dealers); MSRB Rule G-8 (Books and records to be made by brokers, dealers and municipal securities dealers); and MSRB Rule G-9 (Preservation of records). FINRA states in its proposal that it is including these rules because it often charges recordkeeping violations under the applicable FINRA rule, MSRB rule, and Exchange Act rule.

Supervisory Procedures Regarding MRVP Rules

FINRA proposes to expand the MRVP to include any violation of NASD Rule 3010(b) (failure to maintain adequate written supervisory procedures where the underlying conduct is subject to Rule 9217). According to FINRA, the proposal would allow FINRA to resolve under Rule 9217 a failure to maintain adequate written supervisory procedures with respect to a rule that is already subject to the MRVP, whether or not there is a violation of the underlying rule. FINRA's proposal also includes the parallel MSRB rule, MSRB Rule G-27(c) (failure to maintain adequate written supervisory procedures where the underlying conduct is subject to Rule 9217).

Options

FINRA also proposes to include Rule 2360(b)(5) (failure to report options positions), which requires, among other things, that members report each account in which they have an interest and that has established an aggregate position of 200 or more option contracts.

Other Rules

FINRA proposes to include other rules because it asserts that their violation, depending on the circumstances, could appropriately be remediated under the MRVP without compromising investor protection. These rules include: Exchange Act Rule 10b-10 (confirmation of Transactions); FINRA Rule 4360(b) (failure to maintain adequate fidelity bond coverage); MSRB Rule G-6 (failure to maintain adequate fidelity bonding coverage); MSRB Rule G-10(a) (failure to deliver investor brochure to customers promptly); FINRA By-Laws Schedule A, Sec. 1(b) (failure to make accurate payment of Trading Activity Fee); FINRA Rule 2266 (failure to provide written notification of availability of information from the Securities Investor Protection Corporation at account opening or annually thereafter); and FINRA Rules 3160(a)(1),

(3), (4) and (5) (standards of conduct for conducting broker-dealer services on or off the premises of a financial institution pursuant to a networking arrangement, but excluding the networking agreement requirements).

FINRA also proposes to include Rule 4370(a), (b), (c) and (e) (requirements to create, maintain and update a written business continuity plan and disclosure of such to customers).

FINRA notes that, while it recognizes the importance of a business continuity plan, FINRA also has seen minor violations of Rule 4370 that may not implicate the overall effectiveness of a business continuity plan, such as when FINRA members have failed for a short time to timely update their plans or when a member has failed in an isolated circumstance to timely provide disclosure about its business continuity plan after receiving a request from a customer under Rule 4370(d).

FINRA notes, however, that it does not believe that a disposition under FINRA's MRVP would be appropriate where a member has no business continuity plan or procedures required by Rule 4370(a). Also, FINRA does not propose to include Rule 4370(d) in Rule 9217. According to FINRA, it does not foresee any circumstance in which a violation of Rule 4370(d) – which requires members to designate a member of senior management to approve a business continuity plan and to be responsible for the annual review of the plan – would be appropriately addressed under Rule 9217.

FINRA also proposes to include Rule 5121(a) (failure to prominently disclose conflict of interest) and FINRA Rule 7430 (failure to synchronize business clocks used for recording date and time as required by applicable FINRA by-laws and rules). Regarding Rule 5121(a), FINRA states that the disclosure of a conflict of interest in an insufficiently large font may constitute a violation appropriate for disposition under Rule 9217. With respect to Rule 7430, FINRA states

that it believes that isolated violations due to certain business clocks falling out of synch because of software glitches or other technical reasons may be appropriate to resolve as a minor rule violation.

According to FINRA, the inclusion of a rule in the MRVP does not mean that all violations of that rule must be treated pursuant to the MRVP. FINRA states that FINRA staff maintains the discretion to handle any violation through AWCs or Complaints with the full range of applicable sanctions. Similarly, members and associated persons maintain the right to a hearing, with all the same procedural rights accorded in all formal disciplinary proceedings, instead of accepting a Minor Rule Violation.

FINRA proposes that the implementation date for proposed rule change will be the date of Commission approval of this filing.

III. Summary of Comment Letter and the FINRA's Response

The Commission received one comment letter on the proposed rule change. The Financial Services Institute ("FSI") expressed its general support for the appropriateness of imposing a sanction or fine that is appropriate to a rule violation. However, FSI stated that it believes that some minor violations of rule should not be subject to any disciplinary action at all, even under the MRVP. As an example, FSI noted FINRA's example of "isolated violations where certain business clocks fall out of synch due to software glitches or other technical reasons." FSI wrote that "minor violations such as the example given, which are isolated as opposed to systematic and are neither willful nor intentional, should not qualify as rule violations." FSI further stated that, where a rule violation is isolated, FINRA should inform the firm of the violation so the firm may undertake efforts to fix the issue and that FINRA should only consider the issue a rule violation if it is not addressed and therefore becomes "systemic as well as intentional or willful."

In response, FINRA noted that inclusion of a rule in the MRVP does not obligate FINRA to treat any particular violation of that rule pursuant to the MRVP and that the purpose of the proposed rule change is to give FINRA additional flexibility to administer its enforcement program in the most effective and efficient manner. FINRA added that it retains the discretion to resolve minor violations as informal matters or through an AWC or the filing of a complaint, depending on the facts and circumstances. FINRA noted that it does not intend to develop a formula as to when a matter must be handled pursuant to the MRVP as opposed to other alternatives, including informal action. Responding directly to FSI's example of a member violating Rule 7430, which requires FINRA members to synchronize their business clocks, FINRA stated that "while many such violations may appropriately be handled with a Cautionary Action Letter or other informal action, FINRA can envision circumstances where negligence or insufficient vetting or oversight of a software vendor might warrant a disposition pursuant to the MRVP or, in more serious cases, through a reportable disciplinary action." Finally, FINRA noted that a FINRA member or associated person is not obligated to accept an MRV disposition and may always avail itself of the procedural rights under FINRA rules to challenge an allegation in any complaint that may be filed.

IV. Discussion and Commission Findings

After careful review of the proposal, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a Registered Securities Association.¹⁰ In particular, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Act,¹¹ because expanding the

¹⁰ In approving the proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹¹ 15 U.S.C. 78o-3(b)(6).

list of FINRA rules that are subject to the MRVP should afford FINRA increased flexibility in carrying out its enforcement and disciplinary responsibilities and, in doing so, help to meet the aim of protecting investors and the public interest.

The Commission also believes that the proposal is consistent with Section 15A(b)(2) and 15A(b)(7) of the Act,¹² which require that the rules of a Registered Securities Association enforce compliance with, and provide appropriate discipline for, violations of Commission and Association rules. The Commission believes that the proposed changes to Rule 9217 should, by expanding the list of rules subject to the MRVP, strengthen FINRA's ability to carry out its oversight and enforcement responsibilities as a self-regulatory organization in cases where full disciplinary proceedings are unsuitable in view of the minor nature of the particular violation. However, the Commission notes that designating a rule as subject to the MRVP does not signify that violation of the rule will always be deemed a minor violation. In the proposal, FINRA represents that it will remain able to require, on a case-by-case basis, formal disciplinary action for any particular violation. Therefore, the Commission believes that the proposed rule change will not compromise FINRA's ability to seek more stringent sanctions for the more serious violations of rules listed in FINRA Rule 9217.

In addition, because members may contest any fine imposed under Rule 9217 and thus receive a full disciplinary proceeding, the Commission believes that FINRA's rules provide for a fair procedure for the disciplining of members and persons associated with members, consistent with Sections 15A(b)(8) and 15A(h)(1).¹³

The Commission also finds that the proposal is consistent with the public interest, the protection of investors, or is otherwise in furtherance of the purposes of the Act, as required by

¹² 15 U.S.C. 78o-3(b)(2) and 78o-3(b)(7).

¹³ 15 U.S.C. 78o-3(b)(8) and 78o-3(h)(1).

Rule 19d-1(c)(2) under the Act,¹⁴ which governs minor rule violation plans. The Commission believes that the proposed changes to Rule 9217 will strengthen FINRA's ability to carry out its oversight and enforcement responsibilities as a self-regulatory organization, in cases where full disciplinary proceedings are unsuitable in view of the nature of a particular violation.

The Commission notes FSI's views that some minor violations of rules should not be subject to disciplinary action at all and that FINRA should only consider a member's activity a rule violation if the violation becomes systemic as well as intentional or willful. The Commission believes that it is appropriate and consistent with the Act to permit FINRA to exercise its discretion, based on the facts and circumstances of each situation, to assess whether or not to address the alleged violation of a FINRA rule through more informal means, such as a Cautionary Action Letter, or through progressively more formal actions up to and including action under the MRVP, an AWC, or a formal complaint against a member. The Commission notes that, as FINRA stated in its Response Letter, a FINRA member or associated person can always avail itself of the procedural rights under FINRA rules to challenge any allegation of a rule violation.

In approving this proposed rule change, the Commission emphasizes that in no way should the amendment of the rule be seen as minimizing the importance of compliance with FINRA's rules and all the other rules subject to imposition of fines under Rule 9217. The Commission believes that the violation of any self-regulatory organization's rules, as well as Commission rules, is a serious matter. However, Rule 9216 provides a reasonable means of addressing rule violations that do not rise to the level of requiring formal disciplinary proceedings, while providing greater flexibility in handling certain violations. The Commission

¹⁴ 17 CFR 240.19d-1(c)(2).

expects that FINRA will continue to conduct surveillance with due diligence and make a determination based on its findings, on a case-by-case basis, of whether a violation requires formal disciplinary action under FINRA Rule 9000 et seq. The Commission also notes that Exchange Act Rule 19d-1(c)(2)¹⁵ and FINRA 9216(b)¹⁶ require that FINRA, on a quarterly basis, report to the Commission all disciplinary actions taken under its MRVP.

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁷ that the proposed rule change (SR-FINRA-2013-033) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁸

Kevin M. O'Neill
Deputy Secretary

¹⁵ 17 CFR 240.19d-1(c)(2).

¹⁶ See Securities Exchange Act Release No. 32076 (March 3, 1993), 58 FR 18291 (April 3, 1993).

¹⁷ 15 U.S.C. 78s(b)(2).

¹⁸ 17 CFR 200.30-3(a)(12).