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October 9, 2020

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: File No. SR-FINRA-2020-027 – Response to Comments

Dear Ms. Countryman:

This letter is being submitted by the Financial Industry Regulatory Authority, Inc. ("FINRA") in response to comments submitted to the Securities and Exchange Commission ("SEC" or "Commission") regarding the above-referenced rule filing, a proposed rule change to temporarily amend FINRA Rules 1015, 9261, 9524 and 9830 to permit hearings under those rules to be conducted by video conference.[1]

The Commission published the temporary proposed rule change for comment in the Federal Register on September 9, 2020. The Commission received two comment letters to the temporary proposed rule change.[2] The commenters argue that the temporary proposed rule change does not qualify for immediate effectiveness primarily because it implicates fair process concerns. For the reasons set forth below, FINRA disagrees.

In evaluating whether the proposed rule change is appropriate for immediate effectiveness, it is critical to note the core purpose of the proposed change – to provide, on a temporary basis only, emergency relief in response to the unprecedented exigent circumstances presented by the COVID-19 global health crisis and the corresponding health and safety risks of conducting traditional, in-person hearings. FINRA sought this relief after careful consideration of the costs and benefits of postponing FINRA's critical adjudicatory functions indefinitely while COVID-19 continues to present serious safety and health risks for in-person hearings and determining that doing so is not a viable option.

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1 See 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).

2 Mr. Richard Brodsky's comment letter dated September 6, 2020 (the "Brodsky Letter") and Messrs. Richard Ensor and Evan Strassberg's letter dated September 30, 2020 (the "Ensor Letter").

FINRA must be able to perform its critical adjudicatory functions in order to fulfill its statutory obligations to protect investors and maintain fair and orderly markets.

Seeking this temporary relief through the process set forth under Section 19(b)(2) of the Exchange Act, a process that typically takes many months, would significantly impact the efficacy of the relief. As noted below, at the time of filing for this relief, FINRA had already postponed in-person hearings for several months in hopes that the COVID-19 crisis would resolve, which has contributed to an increasing backlog of cases. Further, the guidance on the scope of filings eligible for immediate effectiveness, set forth in the SEC's 1994 release amending Exchange Act Rule 19b-4,[3] did not contemplate the unprecedented scenario we are currently faced with – a global pandemic that has caused widespread disruption to the ability of adjudicatory systems nationwide to safely conduct in-person hearings. In addition, FINRA notes that the SEC provided the same 21-day comment period that occurs with respect to a filing under Section 19(b)(2) and that the comment period expired before the proposed temporary amendments became operative, since FINRA did not seek a waiver of the 30-day operative delay required of immediate effectiveness filings pursuant to Rule 19b-4(f)(6). In these extraordinary circumstances, and with the delayed operative date, FINRA believes filing for immediate effectiveness for this temporary relief is appropriate.[4]

The two commenters argue that FINRA, in seeking this temporary, emergency relief, is prioritizing efficiency above fair process.[5] This argument is without basis. While FINRA has an interest in its proceedings being conducted in a timely manner, the suggestion that FINRA is motivated exclusively[6] or primarily by metrics of efficiency fails to acknowledge several critical facts pertaining to the timing and purpose of FINRA's proposed rule change. As an initial matter, at the time FINRA filed this temporary

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3 Exchange Act Release No. 35123 (December 20, 1994), 59 FR 66692 (December 28, 1994).

4 FINRA notes that, in response to the conditions presented by the COVID-19 crisis, it previously filed a proposed rule change for immediate effectiveness to provide emergency relief temporarily amending certain procedural and other requirements in FINRA's Code of Procedure applicable to, among other things, disciplinary proceedings and proceedings before the National Adjudicatory Council ("NAC"). See Securities Exchange Act Release No. 88917 (May 20, 2020), 85 FR 31832 (May 27, 2020) (Notice of Filing and Immediate Effectiveness File No. SR-FINRA-2020-015).

5 Brodsky Letter at p. 5; Ensor Letter at p. 2.

6 Mr. Brodsky contends that FINRA sought this relief because it is focused "solely" on the "efficient disposal of disciplinary and related proceedings." Brodsky Letter at p. 5.

proposed rule change, it had already postponed in-person hearings for over four months, since March 16, 2020, in response to the serious COVID-19-related health and safety risks of conducting in-person hearings.[7] Unfortunately, most of those risks have not yet abated, and many health experts have suggested it could be well into 2021 before they significantly lessen. Even so, as discussed in its proposed rule change, FINRA's goal is to resume in-person hearings and is proactively pursuing a protocol for doing so in a safe manner. However, as with adjudicatory systems nationwide, FINRA is grappling with the unique challenges of safely resuming such hearings, which cannot be done hastily. It requires consideration of numerous health and safety factors and data points that are in a constant state of flux, as well as complex logistical considerations, creating uncertainties around the timeline for safely resuming in-person hearings. Further, as noted above, FINRA filed this proposed rule change seeking temporary relief after carefully assessing the consequences of postponing its critical adjudicatory functions indefinitely and the corresponding impact on its ability to fulfill its statutory obligations to protect investors and maintain fair and orderly markets.

Moreover, FINRA properly considered fair process concerns in developing this temporary proposed rule change. This is reflected in FINRA's rule filing, which directly addresses fair process considerations, including how FINRA will provide, among other things, training, guidance, technical assistance and, as needed, hardware to hearing participants who take part in a video conference hearing and will use high quality, secure video conferencing technology with features that will allow the parties to reasonably approximate tasks that are typically performed at an in-person hearing.[8] Also, as noted in FINRA's filing, this temporary proposed rule change grants discretion to, but does not require, FINRA's Office of Hearing Officer's ("OHO") Chief or Deputy Chief Hearing Officer, or the NAC or relevant Subcommittee, to order a video conference hearing.

In deciding whether to schedule a hearing by video conference, OHO and the NAC may consider a variety of other factors in addition to COVID-19 virus trends. In its filing, FINRA provided a non-exhaustive list of other factors OHO and the NAC may take into consideration, including a hearing participant's individual health concerns and access to the connectivity and technology necessary to participate in a video conference hearing.[9] The rule text of the temporary proposed rule change and the accompanying description in FINRA's filing explicitly address public health risks and the COVID-19 data and criteria

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[7] As of the date of this response, in-person hearings will have been postponed for over six months in order to cope with the continued COVID-19-related health and safety risks.

[8] 85 FR 55712, 55715-17 & nn. 28-29 & 31.

[9] See id. at n. 28. FINRA notes that OHO and the NAC will have several means of addressing a hearing participant's access issues.

that will be assessed because the COVID-19 outbreak necessitated this emergency relief and to provide guidance to the parties, but does not alter OHO or the NAC's existing discretion to consider case-related or other relevant factors when scheduling a hearing. Accordingly, OHO and the NAC are not limited to considering COVID-19-related public health risks when scheduling a hearing by video conference.

The Ensor Letter asserts that video conference hearings will be unfair because they will be "unworkable."[10] This argument does not take into account the guidelines and procedural guard rails FINRA has implemented for video conference hearings or FINRA's experience to date with conducting video conference hearings. As noted in its filing, the parties will be provided with, among other things, the opportunity to participate in a mock hearing to learn how to use the features of the video conferencing platform, including how to share exhibits. The parties will also be provided with thorough guidelines for the hearing, including how objections will be handled. In addition, a case administrator will participate in the full duration of every hearing to provide technical assistance, trouble shoot and generally facilitate the hearing. For example, the case administrator will have back up contact information for each hearing participant in case they are disconnected and will have the ability to place the parties into break out rooms while a participant reconnects. While no hearing is without some logistical challenges, these guidelines and procedures should mitigate logistical concerns specific to video conference hearings.[11]

Similarly, the Ensor Letter calls into question whether a video conference hearing will develop a reliable appellate record.[12] This concern is unfounded. As with in-person hearings, the transcript will serve as the official record for video conference hearings and applicable FINRA rules provide the parties and any witnesses an opportunity to request correction of the transcript following a hearing.[13] In addition, practical issues such as hearing participants talking over one another or other similar disruptions are not unique to video conference hearings. OHO and the NAC are adept at handling these and related issues as they arise and addressing any impact on the record. Also, there will be multiple

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10 Ensor Letter at pp. 3-4.

11 The Ensor Letter raises specific concerns about conducting hearings that involve a large number of witnesses or exhibits by video conference. Id. These concerns are misplaced. A matter involving numerous witnesses and exhibits may necessitate more hearing days and similar accommodations, but these are practical considerations that must be taken into account when scheduling a hearing regardless of whether the hearing is in person or conducted by video conference. Nevertheless, these concerns will be further mitigated by the guidelines and procedural guard rails for video conference hearings discussed above.

12 Ensor Letter at pp. 3-4.

13 See FINRA Rules 1015(f)(4), 9265(c), 9524(a)(6) and 9830(f).

participants that will be observing the proceeding for any such issues, including the court reporter, the case administrator and independent panelists or subcommittee members, depending on the proceeding. These hearing participants such as the court reporter are authorized to, and routinely do, speak up if they are unable to hear a witness or need to raise a similar issue.

Further, as indicated in its filing, FINRA has experience conducting disciplinary hearings by video conference. To date, OHO has conducted two disciplinary proceedings by video conference for a total of nine hearing days. This should mitigate any such concerns about the workability of, or ability to develop a record for, video conference hearings. FINRA also notes that, as of the date of this comment letter, the parties in at least six disciplinary and other cases that would otherwise be impacted by the proposed rule change, including in connection with a 10-day disciplinary hearing, have jointly agreed to conduct hearings by video conference. This fact reflects that relevant stakeholders agree that conducting hearings by video conference is a fair, workable and reasonable interim solution while FINRA navigates the impact and exceptional challenges of a global pandemic on its adjudicatory processes.

The commenters also contend that the use of video conferencing technology may not allow for fair hearings, in part because adjudicators may not be able to assess the credibility of respondents or other witnesses.[14] This argument is unpersuasive. Foremost, they cite inapposite federal criminal cases while failing to acknowledge applicable case law that recognizes FINRA adjudicatory proceedings are less formal[15] and not held to

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[14] Brodsky Letter at pp. 4-7; Ensor Letter at pp. 5-6.

[15] As noted in FINRA's filing, in interpreting the fair procedure requirement under Section 15A(b)(8) of the Exchange Act, the Commission has emphasized that FINRA proceedings are less formal than federal court proceedings. See, e.g., Sumner B. Cotzin, 45 S.E.C. 575, 579-80 (1974). See also David A. Gingras, 50 S.E.C. 1286, 1293 n.20 (1992).

constitutional or federal criminal law standards.[16] Therefore, these cases are of little relevance to the issue of fair process in FINRA proceedings.[17]

Furthermore, their arguments do not address the cases establishing that, in FINRA proceedings, even telephonic testimony is consistent with fair process and can be relied upon for credibility determinations. See, e.g., Gerald E. Donnelly, 52 S.E.C. 600, 603 n.16 (1996); Daniel Joseph Alderman, 52 S.E.C. 366, 368 n.6 (1995); Curtis I. Wilson, 49 S.E.C. 1020, 1024-25 (1989). Moreover, their arguments overlook the fact that telephonic testimony and hearings are already explicitly permitted and regularly used in contested FINRA proceedings, including in the context of FINRA's expedited proceedings, and are used in matters where credibility determinations are made. This temporary proposed rule change, which will allow for the use of video conferencing technology, is arguably an enhancement to telephonic testimony and hearings, as it provides the parties and adjudicators with simultaneous visual and oral communication. Accordingly, conducting hearings by video conference will provide adjudicators with the opportunity to assess the credibility of the respondent and any witnesses consistent with the applicable fair process standards.

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16 It is well established that the fairness standards from federal criminal proceedings are inapplicable in FINRA proceedings. See, e.g., Santos-Buch v. FINRA, 591 F. App'x 32, 34 (2d Cir. 2015) ("FINRA is not a state actor that can be held to constitutional standards."). See also Epstein v. SEC, 416 Fed. Appx. 142, 148 (3d Cir. 2010); Michael Earl McCune, Exchange Act Release No. 77375, 2016 SEC LEXIS 1026, *37 n. 52 (Mar. 15, 2016); Gregory Evan Goldstein, Exchange Act Release No. 71970, 2014 SEC LEXIS 4625, at *23-29 (Apr. 17, 2014). Mr. Brodsky in fact acknowledges that such federal criminal cases are not directly applicable. Brodsky Letter at p. 8 (noting that the quoted language from a case addressing federal sentencing hearings is "admittedly not on all fours with this proposed Rule . . .").

17 If anything, certain of these cases support the use of video conferencing technology as a reasonable alternative to live testimony. For example, the Ensor Letter cites United States v. Yida, 498 F.3d 945, 950 (9th Cir. 2007), to argue that "in person testimony cannot be replaced by other means." See Ensor Letter at pp. 4-5. To the contrary, in Yida, the Ninth Circuit affirmed the denial of the government's motion to admit a transcript of a criminal coconspirator's prior trial testimony in a defendant's retrial because the government failed to establish the coconspirator's unavailability in part due to its failure to pursue a video-recorded deposition of the coconspirator. In analyzing the reasonableness of the government's actions, the Ninth Circuit explained that such a video deposition would have been "***almost as good as if [the coconspirator] had testified live*** at the second trial . . ." and would have allowed, among other things, the jury "to observe [the coconspirator's] demeanor." Yida, 498 F.3d at 959-960 (emphasis added).

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FINRA believes that the foregoing responds to the material issues raised by the commenters concerning this rule filing. If you have any questions, please contact me at (202) 728-8235; email: emily.goebel@finra.org.

Very truly yours,

/s/ Emily Goebel

Emily Goebel
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