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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-89737; File No. SR-FINRA-2020-027]

### **Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of 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**

September 2, 2020.

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> notice is hereby given that on August 31, 2020, the Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. FINRA files the proposed rule change as a “non-controversial” proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>3</sup> and Rule 19b-4(f)(6) thereunder.<sup>4</sup> 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

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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> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>4</sup> 17 CFR 240.19b-4. The Exchange provided the Commission with 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 the proposed rule change as required by Rule 19b-4(f)(6)(iii). 17 CFR 240.19b-4(f)(6)(iii).

FINRA is proposing to temporarily amend FINRA Rules 1015, 9261, 9524 and 9830 to grant FINRA’s Office of Hearing Officers (“OHO”) and the National Adjudicatory Council (“NAC”) authority<sup>5</sup> to conduct hearings in connection with appeals of Membership Application Program decisions, disciplinary actions, eligibility proceedings and temporary and permanent cease and desist orders by video conference, if warranted by the current COVID-19-related public health risks posed by an in-person hearing. As proposed, these temporary amendments would be in effect through December 31, 2020.<sup>6</sup>

The text of the proposed rule change is available on FINRA’s website at <http://www.finra.org>, at the principal office of FINRA 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, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

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<sup>5</sup> For OHO hearings under FINRA Rules 9261 and 9830, the proposed rule change temporarily grants authority to the Chief or Deputy Chief Hearing Officer to order that a hearing be conducted by video conference. For NAC hearings under FINRA Rules 1015 and 9524, this temporary authority is granted to the NAC or relevant Subcommittee.

<sup>6</sup> If FINRA requires temporary relief from the rule requirements identified in this proposal beyond December 31, 2020, FINRA may submit a separate rule filing to extend the expiration date of the temporary amendments under these rules. The amended FINRA rules will revert back to their current state at the conclusion of the temporary relief period and any extension thereof.

## 1. Purpose

The outbreak of COVID-19 has disrupted critical adjudicatory functions nationwide due to the serious public health risks it poses in connection with conducting traditional, in-person hearings. In order to comply with the guidance of public health authorities and to ensure the safety and well-being of parties, counsel, adjudicators and FINRA personnel, FINRA has administratively postponed in-person OHO and NAC hearings for over four months now – starting on March 16, 2020, with in-person hearings currently postponed through October 2, 2020. The result is an expanding backlog of cases, which if left unchecked, will compromise FINRA’s ability to provide timely adjudicatory processes and fulfill its statutory obligations to protect investors and maintain fair and orderly markets.

In order to proactively address this backlog of cases, and mitigate the consequences of a stalled adjudicatory system, FINRA is proposing this temporary rule change to grant OHO and the NAC the authority to conduct hearings by video conference, if warranted by the current COVID-19-related public health risks posed by an in-person hearing. This proposed rule change would allow OHO and the NAC to order that a hearing proceed by video conference over the objection of a party.<sup>7</sup> As discussed in further detail below, FINRA will evaluate whether current COVID-19-related public health risks warrant a hearing by video conference based on an assessment of critical data and criteria and guidance from its outside health and security consultant.<sup>8</sup>

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<sup>7</sup> Currently, if the parties jointly agree, OHO and the NAC will proceed with a hearing by video conference. As of August 21, 2020, OHO has conducted three days of video conference hearings in connection with a disciplinary matter and scheduled hearings in 5 other disciplinary matters to proceed by video conference, per joint agreement of the parties.

<sup>8</sup> See infra Assessment of Public Health Risks – Data and Criteria Used.

FINRA's protocol for conducting hearings by video conference will ensure that such hearings maintain fair process for the parties. FINRA will, among other things, use a high quality, secure and user-friendly video conferencing service and provide thorough instructions, training and technical support to all hearing participants.<sup>9</sup> In addition, FINRA has experience conducting numerous hearings and oral arguments utilizing video conferencing technology in similar contexts.<sup>10</sup>

While FINRA's ultimate goal is to resume in-person hearings, doing so in a manner that is compliant with the current guidance of public health authorities is a complex, challenging and time-consuming process that presents numerous logistical challenges. Among other things, FINRA will need detailed procedures and related participant training on physical distancing and otherwise minimizing physical contact during in-person hearings, preparing spaces and providing protective equipment to protect the safety of hearing participants (including parties, counsel, adjudicators and FINRA personnel) and to address numerous other aspects of in-person hearings that pose a risk of COVID-19 transmission.<sup>11</sup> Even with the ability to put those

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<sup>9</sup> FINRA plans to conduct video conference hearings using Zoom, a program that has been vetted by FINRA's information technology staff. FINRA may consider alternate video conferencing services, if those services have features and capabilities analogous to those available through Zoom.

<sup>10</sup> From the postponement of in-person hearings starting on March 16, 2020, through August 21, 2020, 43 FINRA arbitration cases have proceeded with one or more video conference hearings conducted via Zoom. Of those 43 cases, 23 conducted one or more video conference hearings pursuant to the parties' joint motion. As of August 21, 2020, the NAC, through the relevant Subcommittee, has conducted 3 oral arguments by video conference using Zoom in connection with appeals of FINRA disciplinary proceedings pursuant to FINRA Rule 9341(d), as temporarily amended. See infra note 22.

<sup>11</sup> See, e.g., Conducting Jury Trials and Convening Grand Juries During the Pandemic (June 4, 2020) (Outlining the "multitude of issues" courts need to consider before resuming jury selection and jury trials during the pandemic, including, among other things, reconfiguring courtrooms, the presentation and handling of evidence to reduce transmission risks, restricting access to physical spaces such as common areas and deciding when jurors will be permitted to leave the premises) available at

protections in place, FINRA cannot conduct an in-person hearing where the hearing participants cannot safely travel to the hearing location. Furthermore, even if hearing participants are able to travel to a hearing location, state and local quarantining requirements may pose significant impediments to their ability to participate in person.

With the assistance of its outside health and security consultant, FINRA is actively working to develop such a protocol for in-person hearings that takes into consideration the various health and safety considerations at play. Settling on a protocol for in-person hearings, however, continues to be a moving target, with public health guidance being continually updated and local and state transmission rates, government public health orders and other localized considerations in a constant state of flux. FINRA believes that permitting the Chief or Deputy Chief Hearing Officer or the NAC or relevant Subcommittee to exercise their judgment to conduct OHO and NAC hearings, respectively, by video conference<sup>12</sup> on a temporary basis is a reasonable interim solution to allow FINRA's critical adjudicatory processes to continue to function in these extraordinary times – enabling FINRA to fulfill its statutory obligations to protect investors and maintain fair and orderly markets – while protecting the health and safety of hearing participants.<sup>13</sup>

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[https://www.uscourts.gov/sites/default/files/combined\\_jury\\_trial\\_post\\_covid\\_doc\\_6.10.20.pdf](https://www.uscourts.gov/sites/default/files/combined_jury_trial_post_covid_doc_6.10.20.pdf).

<sup>12</sup> FINRA currently conducts certain hearing and pre-hearing conferences by remote means. Pursuant to FINRA Rule 9241(b) (Pre-hearing Conference; Procedure), pre-hearing conferences conducted in connection with FINRA disciplinary proceedings can be conducted with one or more persons participating by telephone or “other remote means.” Pursuant to FINRA Rule 9559(d)(5) (Hearing Procedures for Expedited Proceedings Under the Rule 9550 Series), hearings in connection with expedited proceedings under the Rule 9550 Series are held by telephone conference, unless the Hearing Officer orders otherwise for good cause shown.

<sup>13</sup> FINRA notes that, in response to COVID-related risks, federal agencies such as the United States Patent and Trademark Office (USPTO) are also conducting a variety of meetings and hearings remotely, including trademark examining attorney interviews and

a) Background

FINRA’s adjudicatory functions performed by OHO and the NAC are essential to investor protection and market integrity. This proposed rule change would provide OHO and the NAC with temporary authority to order that OHO hearings for disciplinary matters and temporary and permanent cease and desist orders and NAC hearings for appeals of Membership Application Program (“MAP”) decisions and eligibility proceedings, take place by video conference, if warranted by the current COVID-19-related public health risks posed by an in-person hearing. As proposed, this temporary rule change would be in effect through December 31, 2020.

(1) OHO Hearings

OHO conducts disciplinary hearings in-person at venues across the country before three-person hearing panels composed of one hearing officer and two industry members.<sup>14</sup> Depending on the size and complexity of the case, OHO schedules the hearing for four to ten months after the filing of the complaint. OHO, on average, conducts 19 disciplinary cases a year.<sup>15</sup> FINRA Rule 9261(b)<sup>16</sup> states that if a disciplinary hearing is held, a party shall be entitled to be heard in-

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oral hearings, until further notice. See USPTO Update on In-Person Meetings (March 13, 2020) available at <https://www.uspto.gov/about-us/news-updates/uspto-update-person-meetings>.

<sup>14</sup> In limited circumstances, a hearing may proceed with a Hearing Officer and one panelist, which is permitted under FINRA rules.

<sup>15</sup> This number is based on an average of the hearings from the three-year period from January 2017 to December 2019.

<sup>16</sup> FINRA Rule 9261(b) (Disciplinary Proceedings; Hearing and Decision; Evidence and Procedure in Hearing; Party’s Right to be Heard).

person, by counsel, or by the party's representative. Absent an agreement by all parties to proceed in another manner, OHO conducts disciplinary hearings in-person.

OHO also conducts hearings for temporary and permanent cease and desist orders ("TCDOs" and "PCDOs"). Pursuant to FINRA Rule 9810,<sup>17</sup> FINRA's Department of Enforcement ("Enforcement") initiates a TCDO or PCDO proceeding by filing a written notice with OHO and must simultaneously file a disciplinary complaint with the initiation of a TCDO or PCDO proceeding. These proceedings provide a mechanism 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.<sup>18</sup>

After OHO receives a notice initiating a TCDO or PCDO, it must hold a full evidentiary hearing before a three-person hearing panel within 15 days.<sup>19</sup> As with standard disciplinary matters, OHO typically conducts these proceedings in person, absent consent by all parties to proceed otherwise, at various venues across the country. FINRA Rule 9830 outlines the

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<sup>17</sup> FINRA Rule 9810 (Code of Procedure; Temporary and Permanent Cease and Desist Orders; Initiation of Proceeding).

<sup>18</sup> Pursuant to FINRA Rule 9810(a), Enforcement may initiate a TCDO proceeding based on alleged violations of (i) Section 10(b) of the Exchange Act and SEA Rule 10b-5 thereunder; (ii) SEA Rules 15g-1 through 15g-9; (iii) FINRA Rule 2010 (Standards of Commercial Honor and Principles of Trade), if the alleged violation is unauthorized trading, or misuse or conversion of customer assets, or based on violations of Section 17(a) of the Securities Act; (iv) FINRA Rule 2020 (Use of Manipulative, Deceptive or Other Fraudulent Devices); or (v) FINRA Rule 4330 (Customer Protection – Permissible Use of Customers' Securities), if the alleged violation is misuse or conversion of customer assets. Enforcement may initiate a PCDO proceeding pursuant to 9810(a) based on alleged violations of Supplemental Material .03 to FINRA Rule 5210 (Disruptive Quoting and Trading Activity Prohibited) for certain types of quoting and trading activity that are deemed to be disruptive and need to be resolved on an expedited basis.

<sup>19</sup> FINRA Rule 9830(a) (Code of Procedure; Temporary and Permanent Cease and Desist Orders; Hearing; When Held).

requirements for a TCDO or PCDO hearing, however, it does not specify that a party shall be entitled to be heard in-person, by counsel, or by the party's representative.<sup>20</sup>

The proposed rule change would temporarily amend FINRA Rules 9261 and 9830 to grant OHO's Chief or Deputy Chief Hearing Officer temporary authority to order, upon consideration of the current COVID-19-related public health risks presented by an in-person hearing, that a hearing under those rules be conducted by video conference. This will allow OHO to make an assessment, based on critical COVID-19 data and criteria and the guidance of its outside health and security consultant, as to whether an in-person hearing would compromise the health and safety of the hearing participants such that the hearing should proceed by video conference.<sup>21</sup>

## (2) NAC Hearings

The NAC is FINRA's appellate body, which reviews initial decisions issued by OHO and – through Subcommittees – holds evidentiary hearings for MAP decision appeals and eligibility proceedings.<sup>22</sup> The proposed rule change would grant the NAC or relevant Subcommittee

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<sup>20</sup> See supra note 19.

<sup>21</sup> The SEC's Rules of Practice pertaining to temporary cease-and-desist orders provide that parties and witnesses may participate by telephone or, in the Commission's discretion, through the use of alternative technologies that allow remote access, such as a video link. See SEC Rule of Practice 511(d)(3); Comment (d).

<sup>22</sup> FINRA Rule 9341(d) (Oral Argument; Attendance Required) provides that oral arguments made in connection with the review of a FINRA disciplinary proceeding take place before a Subcommittee of the NAC and requires all members of the relevant Subcommittee to be present for the oral argument. FINRA has temporarily amended FINRA Rule 9341(d) such that oral arguments made in connection with the review of FINRA disciplinary proceedings can be conducted by video conference. 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); Securities Exchange Act Release No. 89423 (July 29, 2020), 85 FR 47278 (August 4, 2020) (Notice of Filing and Immediate Effectiveness File No. SR-FINRA-2020-022) (Further extending the expiration date of the temporary amendments in SR-FINRA-2020-15 from July 31, 2020, to a date to be specified in a public notice issued by FINRA, which date will be at

temporary authority to order, upon consideration of the current COVID-19-related public health risks presented by an in-person hearing, that a hearing in connection with a MAP decision or eligibility proceeding under Rule 1015 or 9524 be conducted by video conference.

(a) Membership Proceedings

When a firm applies to become a FINRA member or seeks to make certain changes to its ownership, control or business operations, the firm files a membership application – a New Member Application (“Form NMA”) or Continuing Membership Application (“CMA”) – with FINRA’s Department of Member Supervision (“Department”). The Department evaluates the application pursuant to FINRA Rule 1014 or 1017, depending on the type of application. FINRA Rule 1015 governs the process by which an applicant for new or continuing membership can appeal a decision rendered by the Department under FINRA Rule 1014 or 1017 and request a hearing.<sup>23</sup> If a hearing is requested, a Subcommittee of the NAC conducts the hearing. Rule 1015(f) does not require an in-person hearing, however, hearings are typically conducted in-person.<sup>24</sup>

(b) Eligibility Proceedings

Pursuant to FINRA’s By-Laws, a member firm subject to a statutory disqualification that wishes to retain their membership must file a Form MC-400A (“MC-400A”) application. If an associated person is subject to a statutory disqualification, a firm can sponsor the association of the disqualified person by filing a Form MC-400 application (“MC-400”). The Department is

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least two weeks from the date of the notice, and no later than December 31, 2020).

<sup>23</sup> See FINRA Rule 1015(a) (Review by National Adjudicatory Council; Initiation of Review by Applicant).

<sup>24</sup> See FINRA Rule 1015(f) (Review by National Adjudicatory Council; Hearing).

responsible for evaluating MC-400A and MC-400 applications and making recommendations either to approve or deny the application to the NAC.<sup>25</sup>

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 MC-400A or MC-400 application to the NAC.<sup>26</sup> If the Department recommends denial of an application, the applicant can request an evidentiary hearing before a hearing panel, which routinely consists of two members of the NAC Statutory Disqualification Committee.<sup>27</sup> FINRA Rule 9524(a)(4) states that the parties are entitled to be heard in-person and represented by an attorney.

The proposed rule change would temporarily amend FINRA Rules 1015(f) and 9524(a)(4) to grant the NAC or Subcommittee (or Review Subcommittee) temporary authority to order, upon consideration of the current COVID-19-related public health risks presented by an in-person hearing, that a hearing under those rules be conducted by video conference. As with the OHO hearings discussed above, this temporary proposed rule change will allow the NAC or relevant Subcommittee to make an assessment, based on critical COVID-19 data and criteria and the guidance of its outside health and security consultant, as to whether an in-person hearing would compromise the health and safety of the hearing participants such that the hearing should proceed by video conference.

### (3) Assessment of Public Health Risks – Data and Criteria Used

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<sup>25</sup> See FINRA Rule 9522 (Initiation of Eligibility Proceeding; Member Regulation Consideration).

<sup>26</sup> See FINRA Rule 9524 (National Adjudicatory Council Consideration).

<sup>27</sup> See FINRA Rules 9522(e)(3) and 9524.

In light of the COVID-19 outbreak, determining the health and safety risks of a given in-person activity requires a complex facts and circumstances analysis and is a moving target. Public health guidance on how to minimize the risk of transmission is continually updated and localized considerations evolve rapidly. In order to assist FINRA through this challenging process, FINRA has engaged a health and security consultant to provide guidance on the multitude of issues that will need to be addressed in order to safely resume in-person activities.

For purposes of this proposed temporary rule change, FINRA plans to rely on the guidance of its health and safety consultant, in conjunction with COVID-19 data and guidance issued by public health authorities, to determine whether the current public health risks presented by an in-person hearing may warrant a hearing by video conference. The following criteria, among others, will be considered in order to make this determination: (i) state and county virus trends and hospitalization rates at or around the hearing location; (ii) national, state and local orders addressing COVID-19; (iii) risks posed by requiring hearing participants to travel by air, use public transportation and stay in hotels; and (iv) the increased risk of exposure based on the length of the hearing or number of hearing participants. FINRA will also take into consideration any other relevant health, safety or similar concerns raised by the hearing participants.<sup>28</sup>

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<sup>28</sup> In addition to an assessment of the public health risks, OHO's Chief or Deputy Chief Hearing Officer, or the NAC or relevant Subcommittee, may consider other factors in determining whether to schedule a video conference hearing. A non-exhaustive list of these factors includes a hearing participant's individual health concerns and access to the connectivity and technology necessary to participate in a video conference hearing. Moreover, as discussed *infra*, OHO and the NAC will have several means of addressing a hearing participant's access issues, including providing a hearing participant with the technology or hardware necessary to participate in a video conference or permitting a witness, for example, to participate by telephone to address connectivity issues. A FINRA case administrator will also participate in each video conference hearing to ensure participants have adequate technical support.

#### (4) Platform and Procedures for Conducting Video Conference Hearings

FINRA has adopted a detailed and thorough protocol to ensure that hearings conducted by video conference will maintain fair process for the parties.<sup>29</sup> As an initial matter, FINRA will use a high quality, secure and user-friendly video conferencing service.<sup>30</sup> FINRA has provided a step-by-step breakdown of the enhanced security features that will be provided for video conference hearings.<sup>31</sup> In addition, FINRA will use available video conferencing features to parallel an in-person hearing experience such as waiting rooms to ensure that no party has time alone with the hearing panel and breakout rooms to allow for confidential communications. FINRA has also developed comprehensive guidelines for how video conference hearings will be conducted, including how objections and the introduction of new documents will be handled.<sup>32</sup>

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<sup>29</sup> The temporary proposed rule change will not alter the Chief or Deputy Chief Hearing Officer's, or the NAC or relevant Subcommittee's, existing discretion to allow a party or witness to participate by telephone, if necessary to address, among other things, impediments to a hearing participant's use of video conferencing technology such as connectivity issues. FINRA also notes that, to the extent feasible, it may, among other things, lend hearing participants the hardware necessary to participate in a video conference hearing (e.g., a video camera).

<sup>30</sup> As indicated above, FINRA has used video conferencing technology in other contexts to conduct hearings and oral arguments and take testimony. See supra notes 7 and 10.

<sup>31</sup> See Zoom Process for Disciplinary Hearings with the Office of Hearing Officers, available at <https://www.finra.org/rules-guidance/key-topics/covid-19/hearings/zoom-office-hearing-officers>. The enhanced securities features include randomly-generated meeting IDs and passwords for admittance, the use of a "waiting room" for all participants who join the hearing, the ability to "lock" the "hearing room" so that no one else can enter, even if they have a password, and FINRA's Zoom process is restricted to Zoom's US data centers only.

<sup>32</sup> See supra note 31.

These guidelines ensure that participants know what to expect during a video conference hearing and can prepare accordingly.

FINRA will also provide assistance to participants to ensure that they are adequately prepared to use the video conferencing software by conducting a mock hearing for the parties in advance of the hearing date. During the mock hearing, hearing participants will learn how to share documents and use other software features that allow participants to perform tasks typically done during in-person hearings, such as a highlighting feature that the parties can use to focus a witness on particular portions of a document during witness questioning. Further, FINRA will have a case administrator participate in each video conference hearing to ensure participants have adequate technical support during the hearing. These procedures and resources, among others, will provide fair process for all hearing participants.

FINRA has filed the temporary proposed rule change for immediate effectiveness. The implementation date will be 30 days after the date of filing.

## 2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>33</sup> which requires, among other things, that FINRA rules must 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. FINRA believes that the proposed rule change is also consistent with Section 15A(b)(8) of the Act,<sup>34</sup> which requires, among other things, that FINRA rules provide a fair procedure for the disciplining of

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<sup>33</sup> 15 U.S.C. 78o-3(b)(6).

<sup>34</sup> 15 U.S.C. 78o-3(b)(8).

members and persons associated with members and the denial of membership of any person seeking membership.

The underpinning of FINRA's regulatory purpose is to protect investors and safeguard the integrity of the securities markets. FINRA cannot accomplish these objectives in an effective manner without the ability to timely conduct hearings in connection with its core adjudicatory functions. The temporary proposed rule change will allow FINRA's core adjudicatory functions to operate effectively without protracted delays. For example, the temporary proposed rule change allowing TCDO hearings to be conducted by video conference is vitally important, as it will enable FINRA to take immediate action to stop significant, ongoing customer harm.

With respect to eligibility proceedings, members and disqualified individuals who file an MC-400A or MC-400 application are permitted, in certain circumstances, to continue operations as a FINRA member and continue to work in the industry, respectively, while their application remains pending. Allowing hearings on these applications to proceed by video conference will prevent extended delays and allow members and disqualified individuals to receive an approval or denial of their applications. Accordingly, the proposed rule change, which would grant OHO and the NAC temporary authority to conduct hearings by video conference, is in the public interest and consistent with the Act's purpose.

Further, the proposed rule change will continue to provide fair process in connection with OHO and NAC hearings.<sup>35</sup> Conducting hearings via video conference will give the parties and

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<sup>35</sup> FINRA notes that, in interpreting the fair procedure requirement under Section 15A(b)(8) of the Act, the Commission has emphasized that FINRA and its predecessor organization (NASD) have proceedings that are less formal than federal court proceedings. See, e.g., Sumner B. Cotzin, 45 S.E.C. 575, 579-80 (1974) ("When Congress provided for self-regulatory associations of securities dealers such as the NASD, it clearly did not intend to create formalistic tribunals akin to the courts or even to this Commission. Self-regulation or cooperative regulation necessarily calls for informality."). See also David A. Gingras,

adjudicators simultaneous visual and oral communication,<sup>36</sup> but without the risks of individuals being physically close to one another. FINRA will use high quality, secure video conferencing technology with features that will allow the parties to reasonably approximate those tasks that are typically performed at an in-person hearing, such as sharing documents, marking documents, and utilizing breakout rooms. FINRA will also provide training for participants on how to use the video conferencing platform and detailed guidance on the procedures that will govern such hearings. Moreover, as noted above, the Chief or Deputy Chief Hearing Officer, or the NAC or relevant Subcommittee, may take into consideration, among other things, a hearing participant's access to connectivity and technology in scheduling a video conference hearing and can also, at their discretion, allow a party or witness to participate by telephone, if necessary, to address such access issues.

In addition, temporarily permitting the OHO and NAC hearings for FINRA disciplinary matters to proceed by video conference maintains fair process by providing respondents a timely opportunity to address and potentially resolve any allegations of misconduct. With respect to applicants who receive an adverse MAP decision, they will have a timely opportunity to challenge the denial of their application. The temporary proposed rule change strikes an appropriate balance, providing fair process and enabling FINRA to fulfill its statutory obligations to protect investors and maintain fair and orderly markets while taking into consideration the significant health and safety risks of in-person hearings stemming from the outbreak of COVID-19.

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50 S.E.C. 1286, 1293 n.20 (1992) (“NASD’s proceedings are informal and do not resemble those of law courts.”).

<sup>36</sup> See Jeremy Graboyes, Admin. Conf. of U.S., Legal Considerations for Remote Hearings in Agency Adjudications at 12 (June 16, 2020), available at <https://www.acus.gov/report/legal-considerations-remote-hearings-agency-adjudications>.

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

FINRA does not believe that the temporary proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is intended solely to provide temporary relief given the impacts of the COVID-19 outbreak. As a result of the temporary nature of the proposed relief, an abbreviated economic impact assessment is appropriate.

1. Economic Impact Assessment

a) Regulatory Objective

FINRA is proposing this temporary relief to address the public health risks and corresponding challenges of in-person hearings during the COVID-19 crisis. Social distancing, quarantining and other similar requirements to promote the health and safety of citizens make it exceedingly difficult to conduct in-person hearings. In recognition of these extraordinary times, the proposed rule change would temporarily grant OHO's Chief or Deputy Chief Hearing Officer, or the NAC or relevant Subcommittee, discretion to conduct OHO and NAC hearings, respectively, by video conference, if warranted by the current COVID-19-related public health risks posed by an in-person hearing.

b) Economic Baseline

The obligations under FINRA Rules 1015, 9261, 9524 and 9830 are described above. OHO conducts approximately 19 regular disciplinary hearings per year.<sup>37</sup> Since January 1, 2017, the NAC has held nine hearings. One hearing was conducted in connection with an appeal of a Membership Application Program decision and eight hearings related to eligibility proceedings.

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<sup>37</sup> OHO also conducts hearings for TCDO and PCDO proceedings. OHO has not conducted a TCDO or PCDO hearing in the last three calendar years.

Under current FINRA rules, hearings conducted in connection with appeals of Membership Application Program decisions, disciplinary actions, eligibility proceedings and temporary and permanent cease and desist orders are typically conducted in person. In order to comply with the guidance of public health authorities relating to the COVID-19 pandemic and to ensure the safety of all participants and stakeholders, FINRA has administratively postponed in-person OHO and NAC hearings since March 16, 2020. To date, at least eight hearings have been delayed as a result of the pandemic.

c) Economic Impact

The proposed rule change is intended solely to provide a temporary mechanism for FINRA to allow its critical adjudicatory functions to proceed while COVID-19 continues to pose health and safety risks for traditional, in-person hearings. The proposed rule change is necessary to temporarily rebalance the attendant benefits and costs of the obligations under FINRA Rules 1015, 9261, 9524 and 9830 in response to the impacts of the COVID-19 pandemic.

(1) Anticipated Benefits

The benefits of the temporary proposed rule change will accrue to participants and stakeholders of hearings that are conducted by video conference rather than delayed until in-person hearings can be conducted safely. A benefit of the temporary proposed rule change will be reducing the potential costs associated with delayed proceedings resulting from the COVID-19 pandemic, as discussed in Item 3(b) above. The flexibility provided by this temporary proposed rule change—to conduct hearings by video conference as warranted by COVID-related public health risks—will also benefit hearing participants and other stakeholders by allowing them to avoid the health and safety risks associated with in-person hearings. In addition, hearing participants will benefit from the elimination of travel time and travel costs.

## (2) Anticipated Costs

As previously stated, the public health risks stemming from the COVID-19 outbreak have increased the costs associated with in-person hearings. Conducting hearings by video conference, however, presents some potential drawbacks. These may include technological challenges such as bandwidth or connectivity issues for participants, cybersecurity concerns or concerns related to the ability of hearing participants to represent themselves in a manner equivalent to an in-person hearing.

FINRA's approach to video conference hearings, however, which includes, among other things, the use of high quality, secure technology that allows hearing participants to perform tasks typically done during in-person hearings should mitigate the potential costs. As noted above, FINRA is currently conducting hearings using video conferencing technology in similar contexts. Moreover, the temporary proposed rule change permits, but does not mandate that hearings be conducted by video conference. Therefore, OHO and the NAC will use the discretion permitted under the temporary proposed rule change to balance the costs of delaying a hearing with the public health risks of requiring an in-person hearing, and the costs associated with conducting hearings by video conference. Furthermore, the temporary proposed rule change will not alter the Chief or Deputy Chief Hearing Officer's, or the NAC or relevant Subcommittee's, discretion to consider other factors affecting an individual's ability to participate or allow a party or witness to participate by telephone, if necessary to address, among other things, impediments to a hearing participant's ability to use video conferencing technology such as connectivity issues, reducing the potential costs. Additionally, the proposed rule change is limited in time, providing temporary relief through December 31, 2020, or until the conclusion of any extension thereof.

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

Written comments were neither solicited nor received.

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

Because the foregoing 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 for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>38</sup> and Rule 19b-4(f)(6) thereunder.<sup>39</sup>

At any time within 60 days of the filing of the 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 to determine whether the proposed rule 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 (<http://www.sec.gov/rules/sro.shtml>); or

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<sup>38</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>39</sup> 17 CFR 240.19b-4(f)(6).

- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-FINRA-2020-027 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-FINRA-2020-027. This file number should be included on the subject line if e-mail 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 (<http://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, on business days between the hours of 10:00 a.m. and 3:00 p.m., located at 100 F Street, NE, Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change.

Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR-FINRA-2020-027 and should be submitted on or before **[INSERT DATE 21 DAYS FROM PUBLICATION IN THE *FEDERAL REGISTER*]**.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>40</sup>

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

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<sup>40</sup> 17 CFR 200.30-3(a)(12).