No. 23-2297

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FRANK HARMON BLACK; and
SOUTHEAST INVESTMENTS, N.C., INC.,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent,

and

FINANCIAL INDUSTRY REGULATORY AUTHORITY,

Intervenor.

On Petition for Review of the Decision and Order of the Securities and Exchange Commission under 15 U.S.C. § 78y(a)(1)

PETITIONERS' OPENING BRIEF

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 23-2297 Caption: Frank Harmon Black, et al. v. Financial Industry Reg. Auth, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Southeast Investments, N.C., Inc.
(name of party/amicus)

who is petitioner, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Aditya Dynar Date: 12/22/23

Counsel for: Petitioners

Print to PDF for Filing

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

CASES

CONSTITUTIONS

STATUTES

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

Petitioners Frank Harmon Black and Southeast Investments, N.C., Inc. (Southeast) petition for review of the opinion and final order of the Securities and Exchange Commission (SEC) under 15 U.S.C. § 78y(a)(1). Black and Southeast are aggrieved by the SEC's final order because the order imposes civil monetary fines against them by sustaining in part the disciplinary action taken by the Financial Industry Regulatory Authority (FINRA). *Id.*; [JA431]. The Fourth Circuit has jurisdiction under 15 U.S.C. § 78y(a)(1) because Black resides in South Carolina and Southeast is incorporated in and has its principal place of business in North Carolina.

INTRODUCTION

Liberty and accountability go hand in hand. The separation of powers secures both—the liberty of the individual and government accountability to the people. FINRA/SEC's in-house adjudication disregards both.

This case illustrates the consequences of breaching the Constitution's separation of powers. FINRA/SEC's actions against Black/Southeast are unconstitutional for three reasons:

- FINRA's hearing officers exercise significant government power, which makes them Officers of the United States, but they are not properly appointed in accord with the Appointments Clause.

- FINRA exercises significant government power. It makes rules, prosecutes statutory violations, and adjudicates disputes arising thereunder. This structure commingles and deposits the government's legislative, executive, and judicial powers inside a single private entity, which violates the separation of powers and the private nondelegation doctrines.
- FINRA adjudicates Black/Southeast's liberty and property, seeking civil monetary penalties without trial by jury, which violates Article III, the Seventh Amendment, and the Due Process of Law Clause. Before a person can be deprived of life, liberty, or property, the Constitution presumes that adjudication must occur in Article III courts with a Seventh Amendment jury trial. Congress cannot assign an adjudication that could lead to a lifetime bar and civil monetary penalties to a private entity such as FINRA. FINRA's adjudication deprives private parties (Black/Southeast) of their private rights. FINRA/SEC's enforcement and adjudication are therefore unconstitutional and void.

FINRA/SEC's actions also flunk under the operative statutory scheme for two reasons:

- FINRA should not get yet another chance to prove Black/Southeast provided false testimony and documents. FINRA destroyed evidence that would have exonerated Black/Southeast, which is not harmless error according to SEC.

- Black/Southeast maintained reasonable supervisory systems for their electronic communications. Indeed, Southeast's supervisory system was recommended to it by FINRA. FINRA cannot recommend a supervisory system and then entrap them in liability for the very system they recommended.

Consequently, SEC's relitigation remand to FINRA should be vacated, and SEC's affirmance of FINRA's decision should be reversed.

Frank Black entered the securities industry in 1971. He founded Southeast Investments, N.C., Inc. in 1997. Black/Southeast have been in the teeth of FINRA/SEC enforcement and adjudication for over ten years.

Based on surmise drawn from an office inspection, FINRA/SEC went after Black and his company without ever alleging, much less proving, any consumer harm whatsoever. FINRA investigated and prosecuted Black/Southeast, and then adjudicated that enforcement action in FINRA's in-house tribunal. FINRA examined only ex-Southeast employees, credited their testimony over Black's, and disregarded documentary evidence, all while destroying contemporaneous notes of witness interviews that contained evidence exculpatory to Black/Southeast. Then FINRA found Black/Southeast guilty anyway and banned Black from the securities industry—a ban that lasted more than four-and-a-half years until SEC lifted it.

Black/Southeast appealed FINRA's decision to SEC. After sitting on the appeal for four-and-a-half years, SEC finally issued an appealable

order in December 2023. The SEC upheld in part FINRA's decision, imposed a $73,500 fine against Black/Southeast, and set aside and remanded the case back to FINRA for reconsideration of FINRA's claims for false testimony and fabricated documents. Black/Southeast now stand before this Court with FINRA in-house relitigation hanging over their head on remand.

ISSUES PRESENTED

1. Are FINRA's hearing officers unconstitutionally appointed?

2. Is FINRA's exercise of the government's powers a violation of the private nondelegation doctrine?

3. Does the FINRA/SEC in-house adjudication violate Article III, the Seventh Amendment and the Fifth Amendment's Due Process Clause?

4. Did SEC err (a) in remanding for FINRA relitigation FINRA's allegation of false testimony and documents, and (b) in concluding that Black/Southeast had an ineffective system for retaining business-related emails and thereby wrongfully imposing monetary fines on them?

STATEMENT OF THE CASE

I. Statutory Framework

The Securities Exchange Act of 1934 (Exchange Act) vests SEC with broad authority over the securities industry. Congress has authorized private "self-regulatory" organizations to "enforce compliance" with the "provisions" of the Exchange Act and the "rules and regulations thereunder." 15 U.S.C. § 78s(g)(1).

FINRA is that self-regulatory organization. *Id.* § 78c(a)(26). FINRA is the only national securities association registered with SEC under 15 U.S.C. § 78o-3.[1] Together, SEC and FINRA exercise significant control over the securities industry. Brokers and dealers, like Black/Southeast, who want to buy and sell securities, must register with SEC and become members of FINRA. *Id.* § 78o(a)(1), (b)(1).

Two sets of FINRA rules are relevant here.

- FINRA's rules require office inspections. Under FINRA's predecessor, the National Association of Securities Dealers (NASD), each FINRA member was required to inspect branch offices at least once every three years. NASD Rule 3010(c)(1)(B) (setting inspection schedule), (g)(2) (defining "branch office"). FINRA

[1] *See Turbeville v. FINRA*, 874 F.3d 1268, 1270 n.2 (11th Cir. 2017) (FINRA is the only registered national securities association); *UBS Fin. Servs., Inc. v. Carilion Clinic*, 706 F.3d 319, 326 (4th Cir. 2013) (FINRA is the "sole self-regulatory organization chartered under the Exchange Act.").

Rule 3110, which superseded NASD Rule 3010, contains essentially the same requirement. *See* [JA424].

- FINRA members must maintain written supervisory procedures that ensure compliance with securities laws, regulations, and FINRA rules. FINRA Rules 3110(a)(1) & (b).

FINRA also has extensive enforcement powers, subject to limited SEC oversight. FINRA's Department of Enforcement (FINRA Enforcement) can compel compliance with federal securities laws, SEC rules and regulations, and FINRA's own rules and regulations through administrative enforcement actions, which are conducted entirely in-house. *See* FINRA Rule 9211. FINRA Enforcement initiates these actions by issuing a complaint. *Id.* It then prosecutes the case before its own Office of Hearing Officers, which conducts the adjudication and issues a written decision. FINRA Rules 9212, 9213, 9268.

The Office of Hearing Officers' decision can be appealed to FINRA's National Adjudicatory Council. FINRA Rule 9311. The Council "may affirm, dismiss, modify, or reverse with respect to each finding, or remand the disciplinary proceeding with instructions" and "may affirm, modify, reverse, increase, or reduce any sanction … or impose any other fitting sanction." FINRA Rules 9348, 9349. The FINRA board of governors may review the Council's decision, absent which Council's decision becomes final. FINRA Rule 9349(c). A decision may include a "bar or an expulsion" from FINRA (and thus from the securities industry), which becomes

"effective immediately." FINRA Rule 9268(f)(2). And when FINRA imposes civil penalties, it keeps the money. FINRA Rule 8320(a).[2]

The accused may then appeal FINRA's final decision to SEC, where review is limited. FINRA Rule 9370; 15 U.S.C. § 78s(d)-(h). SEC does not conduct de novo review and does not find facts. Instead, the agency reviews FINRA's conclusions only to determine whether the respondents engaged in the conduct that FINRA found, whether such conduct violates the rules FINRA specified, and whether FINRA's rules were applied in a manner consistent with the purposes of the Exchange Act. 15 U.S.C. § 78s(e)(1); *see also In re Eric J. Weiss*, Release No. 34-69177, 2013 WL 1122496 (SEC Mar. 19, 2013). The agency reviews FINRA's sanctions only to determine whether it "impose[d] any burden on competition not necessary or appropriate to further the purposes of this chapter or" if the sanction was "excessive or oppressive." 15 U.S.C. § 78s(e)(2). SEC does not have to find facts in its review. *See* 17 C.F.R. § 201.452 (SEC *may* allow submission of additional evidence). Where, as here, SEC does not find facts, SEC defers to FINRA's "credibility determination[s] … absent substantial evidence to the contrary." *In re Wilfredo Felix*, No. 2018058286901, 2021 WL 2288014, at *11 (SEC May 26, 2021).

[2] "In 2021, FINRA reported that it collected $103 million in fines, which became part of its operating budget." *See* 2021 FINRA Financial Annual Report at 1-2, 3, 9, https://www.finra.org/sites/default/files/2022-06/2021-FINRA-Financial-Annual-Report.pdf ("2021 FINRA Annual Report").

Ultimately, SEC may modify, affirm, or set aside FINRA's decision. 15 U.S.C. § 78s(e)(1).

Only after this in-house process is complete may an aggrieved party petition a federal appellate court for review of SEC's final decision. 15 U.S.C. § 78y. But the appellate court does not find facts and may find itself shackled with some deference doctrine as to conclusions of law that prevents the court from conducting true de novo review. "[F]actual findings are upheld if supported by substantial evidence." *Wiley v. SEC*, 663 F. App'x 353, 358 (5th Cir. 2016). "[A]gency actions and conclusions of law may be set aside only if they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Id.* And "SEC's interpretations of FINRA Rules are entitled to deference so long as they are not unreasonable." *Id.*; *see also Birkelbach v. SEC*, 751 F.3d 472, 478 (7th Cir. 2014).

II. Background

Frank Harmon Black is a registered representative who entered the securities industry in 1971. He opened his own firm, Southeast Investments, N.C., Inc., in 1997 and managed it thereafter. [JA424]. He has approximately 48 years of experience in the securities industry. *Id.* He owned between 95% and 100% of the firm during the relevant years. Southeast has been a member of FINRA since 1997. *Id.*

During the time period relevant to this case (2010-2015), Southeast engaged in a general retail securities business, helping clients manage

their financial investments, with a home office in Charlotte, North Carolina. *See id.*; *see generally* Southeast Investments, N.C., Inc. (2024), https://www.southeastinvestmentsnc.com/. Southeast had between 114 and 133 registered financial professionals, known as registered representatives, located throughout the United States. *See* [JA424]. The registered representatives often worked from their residences and were supervised by Black from Southeast's Charlotte office in accordance with FINRA rules. *Id.*

A. FINRA Inspection and Investigation

The events leading to this case go back 13 years. [JA424] (noting events beginning in 2011). During its routine 2012 examination cycle, FINRA investigated the performance of Southeast's branch-office inspections. *Id.* Rather than conduct a random sampling of branches, FINRA contacted only former Southeast brokers—as Black/Southeast would find out much later. *Cf.* [JA144]. Of these former brokers, four allegedly reported that Black failed to inspect their offices. [JA425].

FINRA then asked Black for records documenting Southeast's inspections. [JA424-425]. Black produced an inspections calendar, a three-page document listing 43 inspections he conducted between March 2010 and August 2012. *Id.* at 425. The calendar provided the date by which each inspection was to be completed and the date Black performed each branch inspection. *Id.*

In April 2013, FINRA staff asked for additional evidence of the 43 office inspections. *Id.* Black produced Southeast's "Internal Review Files and Forms Checklist," which listed tasks to be conducted as part of each inspection. Those tasks included "review[ing] broker annual certification of representative's declaration to Supervisory Office" and "Review with Operations Manager any operational issues." *Id.* Next to each task was a handwritten checkmark, signifying that Black completed all tasks during each inspection. *Id.* Black also produced reports with the title "Office Compliance Inspection," which indicated that Black inspected the offices of the four former brokers on the dates shown on the inspections calendar (between May 2010 and January 2011), and 29 expense vouchers, which reflected amounts that the firm reimbursed Black for mileage and meals during travel from March 2010 through June 2012. *Id.*

B. FINRA Prosecution

Two years later, on September 15, 2015, FINRA filed an administrative complaint—with its hearing office—against Black/Southeast. *Id.* at 080. The Complaint alleged that Black/Southeast committed perjury by submitting false documents and providing false testimony (counts one[3] and two[4]); they were deficient in conducting branch inspections (count three[5]); and they failed to preserve emails and maintained

[3] FINRA Rules 8210, 2010, 4511.

[4] FINRA Rules 8210, 2010.

[5] NASD Rule 3010.

deficient supervision over how emails were retained (counts four[6] and five[7]). [JA080-088].

C. FINRA Hearing Panel's Hearing and Decision

In September 2016, FINRA's hearing panel held a hearing on the charges. [JA090]. Four former Southeast brokers testified that Black never inspected their offices. [JA144-150]. Black testified to the contrary, affirming that he had completed the inspections. [JA427]. He also testified that FINRA's witnesses had a motive to lie because they either did not part on good terms with him or harbored ill feelings against him. *Id.*

At the hearing, FINRA examiner Pamela Arnold testified that she had taken notes of her first calls with the four representatives. [*Id.* at 428]. FINRA had never disclosed the existence of these notes, prompting Black/Southeast to request copies. *Id.* But FINRA's hearing panel refused to order FINRA to produce the notes. *Id.* Thus, in a case that turned almost entirely on witness credibility. [JA233], Black/Southeast were denied evidence and effective cross-examination of FINRA's witnesses based on those documents. They were limited to presenting an affirmative case—documentary evidence of inspections and Black's truthful testimony.

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[6] 15 U.S.C. § 78q(a) (i.e., Exchange Act § 17(a)), 17 C.F.R. § 240.17a-4 (SEC Rule 17a-4), NASD Rule 3110; FINRA Rules 4511 and 2010.

[7] NASD Rule 3010; FINRA Rules 3110, 2010.

FINRA's hearing panel found FINRA's witnesses to be credible and decided in favor of the prosecution on all five counts. *See* [JA178]. FINRA's hearing panel imposed fines totaling $243,000 against Black/Southeast. *Id.* FINRA's hearing panel also permanently barred Black from registering with FINRA in the future—the so-called corporate death penalty. *Id.*; *Saad v. SEC*, 718 F.3d 904, 906 (D.C. Cir. 2013) (describing the lifetime bar as "the securities industry equivalent of capital punishment").

D. FINRA Adjudicatory Council's Interim Order

Black/Southeast appealed to FINRA's adjudicatory council. *See* [JA428]. In an interim order, the adjudicatory council ordered FINRA to produce the notes created by FINRA examiner Pamela Arnold. [JA183-186]. The council's order also directed FINRA's hearing office to determine whether Arnold's investigatory notes constituted "written statements" that should have been made available to Black/Southeast during or before the 2016 hearing and, if so, whether FINRA Enforcement's failure to produce the notes was harmless error. *Id.* (citing FINRA Rule 9253).

E. FINRA Hearing Office's Interim Order

On remand from the adjudicatory council's interim order, FINRA's hearing office concluded that FINRA properly withheld Arnold's notes and, in the alternative, that the failure to disclose was harmless. [JA214].

F. FINRA Adjudicatory Council's Final, Appealable Decision

The matter returned to the adjudicatory council both as to the interim order and the merits decision. The adjudicatory council affirmed in part and reversed in part. The council affirmed that Black/Southeast presented false documents and testimony (counts one and two); reversed the hearing panel's decision that Black/Southeast maintained a deficient supervisory system concerning office inspections (count three); reversed in part the finding that Black/Southeast failed to maintain electronic records, affirmed in part the finding as to 16 business-related emails of a Southeast representative, but reversed the finding that Southeast's failure to maintain those 16 emails was willful (count 4); affirmed the finding that Black/Southeast maintained a deficient supervisory system for retaining and reviewing emails (count five). *See* [JA259-260]. The adjudicatory council reduced the fine to $146,500 but upheld the lifetime bar against Black. *Id.* Black was barred from practicing his profession beginning on May 23, 2019. *See* FINRA Rule 9268(f)(2).

G. SEC Appeal

Black/Southeast appealed the adjudicatory council's decision to SEC. *See* [JA266]. SEC did not issue any final, appealable decision for over four-and-a-half years, granting itself 19 extensions. [JA019-020]. And all the while, Black was barred from his profession.

SEC finally issued its decision on December 7, 2023, [JA423-444]—but only after Black/Southeast, having waited more than four-and-a-half

years, filed suit in federal district court and sought a preliminary injunction against FINRA/SEC's unconstitutional actions. That district court action is currently stayed by agreement of the parties.

SEC's decision affirmed in part, and set aside and remanded in part, FINRA's decision. SEC set aside and remanded FINRA's holding with respect to false testimony and documents (counts one and two). *Id.* at 423-424, 438. SEC affirmed FINRA's holding regarding deficient supervisory procedures for electronic communications and failure to preserve 16 emails (counts four and five). *Id.* at 424.

SEC remanded counts one and two because FINRA spoliated exculpatory evidence. SEC concluded that FINRA's failure to produce Arnold's notes was not harmless error. *Id.* at 435-438. Indeed, those notes went to the credibility of FINRA's witnesses, whose testimony formed the basis of FINRA's findings that Black provided false testimony and documents. FINRA Enforcement had previously admitted that it lost the interview notes that it should have retained. *Id.* at 437. In lieu of the notes, FINRA produced emails created after the fact, which showed FINRA's witnesses and enforcement officer gave altered testimony against Black/Southeast. [JA187-202]. Because FINRA failed to maintain records containing evidence exculpatory as to Black/Southeast, it was not harmless error for FINRA to deprive Black/Southeast of evidence that would have shown their innocence. [JA437-438]. SEC stated FINRA's spoliation may justify an adverse inference against FINRA Enforcement. *Id.* at 438. However,

SEC took no punitive action against FINRA for spoliation of exculpatory evidence even while acknowledging FINRA's spoliation harmed Black/Southeast.[8] *See* [JA435-438].

SEC affirmed FINRA's decision on counts four and five. SEC held that Black/Southeast were deficient in maintaining adequate supervision which led to 16 missing emails.

Consequently, SEC reduced the monetary fine to $73,500. [JA424]. And SEC set aside the lifetime bar FINRA imposed on Black. [JA444]. The industry bar lasted more than four-and-a-half years, starting May 23, 2019, and ending in January 2024, about two months after the SEC decision, at which time FINRA restored Black's registration as it existed before the bar went into effect only after being repeatedly prompted to do so by Black/Southeast. FINRA did not appeal the SEC set aside of the lifetime bar. And FINRA proceedings on remand are currently stayed by agreement of the parties.

[8] This is not the first time FINRA has engaged in this kind of misbehavior. At least three times in eight years, SEC has adjudged FINRA officials of providing altered or misleading documents to the Commission in violation of Section 17(a) of the Exchange Act and SEC Rule 17a-4. *See In re FINRA, Release No. 65643*, 2011 WL 5097714 (SEC Oct. 27, 2011). FINRA violated Section 17(a)(1) and SEC Rule 17a-4 in this case by failing to maintain exculpatory evidence of Black/Southeast's innocence as required by law.

H. Appeal to This Court

Black/Southeast appeal SEC's decision to this Court under 15 U.S.C. § 78y(a)(1). They seek a declaration that FINRA/SEC's actions are unconstitutional and thereby an injunction stopping FINRA/SEC from taking any further action against Black/Southeast based on the events leading to this suit. They also seek vacatur of the SEC remand and reversal of SEC's affirmance as to the email retention matter.

LEGAL STANDARD

"Constitutional challenges and questions of statutory construction are reviewed de novo." *United States v. Claybrooks*, 90 F.4th 248, 255 (4th Cir. 2024); *United States v. Malloy*, 568 F.3d 166, 171 (4th Cir. 2009). "This court reviews pure questions of law de novo and pure questions of fact for clear error." *United States v. Han*, 74 F.3d 537, 540 (4th Cir. 1996).

SUMMARY OF THE ARGUMENT

FINRA's private and administrative adjudication is unconstitutional in at least three ways. First, FINRA exercises significant government authority without proper appointment under the Appointments Clause. FINRA's hearing officers are near "carbon copies" of SEC Administrative Law Judges (ALJs), whose acts were invalidated under the Appointments Clause in *Lucia v. SEC*, 585 U.S. 237 (2018). *See Alpine Sec. Corp.*, No. 23-5129, 2023 WL 4703307, at *2 (D.C. Cir. July 5, 2023)

(Walker, J., concurring). Just as the SEC ALJ's adjudication was unconstitutional and void in *Lucia*, so too is FINRA's adjudication.

Second, FINRA's exercise of governmental powers violates the private nondelegation doctrine as established by *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), and confirmed by this Court in *Kerpen v. Metro. Washington Airports Auth.*, 907 F.3d 152 (4th Cir. 2018).

Third, FINRA/SEC's in-house adjudication violates Article III, the Seventh Amendment, and the Fifth Amendment's Due Process of Law Clause. As here, suits alleging perjury and forgery and seeking civil monetary penalties that FINRA gets to pocket are suits at common law to determine private rights that Congress cannot assign for adjudication to FINRA or SEC. Such assignment deprives Black/Southeast of the right to judicial process, the right to a fair trial in a fair tribunal free from biased adjudication and an impermissible profit motive, and the right to an appropriate fact-finder and meaningful judicial review thereof.

Finally, vacatur of SEC's relitigation remand to FINRA of its false documents and testimony allegations is appropriate because FINRA failed to prove those allegations against Black/Southeast due to FINRA's evidentiary gamesmanship. Remand in such situations will only turn litigation into an unfair game requiring Black/Southeast to bounce between FINRA's hearing office, FINRA's adjudicatory council, SEC, this Court,

and back and forward again.[9] Also, SEC's affirmance of FINRA's decision relating to email retention should be reversed because Black/Southeast's email supervision system was reasonable.

The Court should vacate the SEC decision if the Court concludes that there is a constitutional violation here. In the alternative, the Court should vacate SEC's remand to FINRA for relitigation of the false documents and testimony issue, and the Court should reverse SEC's affirmance of FINRA's decision relating to supervision over email retention. Consequently, the Court should enjoin SEC and FINRA from taking further adverse action against Black/Southeast.

ARGUMENT

I. Tasking FINRA officials to perform governmental functions violates the Appointments Clause

The Constitution's Appointments Clause requires the President to appoint principal officers of the United States with the advice and consent of the Senate. U.S. Const. art. II, § 2, cl. 2. Congress may vest the appointment of "inferior" officers in the President alone, the courts of law, or in the heads of departments. *Lucia*, 585 U.S. at 253. Anyone who wields "significant" executive power is an Officer of the United States and

[9] FINRA's claims against Black/Southeast for perjury and forgery are not before this Court on the merits because FINRA did not appeal SEC's reversal and set-aside of the adjudicatory council's decision as to those counts to this Court. [JA044]. However, because Black/Southeast face these claims on remand in front of FINRA's hearing officers, the constitutionality of the adjudication on remand is at issue.

must "be appointed in the manner prescribed by [the Appointments Clause]." *Buckley v. Valeo*, 424 U.S. 1, 126 (1976). At the time of the framing, federal officers encompassed all officials "with responsibility for an ongoing statutory duty." *Lucia*, 585 U.S. at 253 (Thomas, J., concurring); *NLRB v. SW General, Inc.,* 580 U.S. 288 (2017) (Thomas, J., concurring); Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 Stan. L. Rev. 443, 564 (2018).

"The principle of separation of powers is embedded in the Appointments Clause." *Freytag v. Comm'r*, 501 U.S. 868, 882 (1991). "[T]he Appointments Clause of Article II is more than a matter of 'etiquette or protocol'; it is among the significant structural safeguards of the constitutional scheme." *Edmond v. United States*, 520 U.S. 651, 659 (1997). The Clause creates a chain of command in the Executive Branch ensuring legitimacy and accountability in tying all power back to the People through their elected representatives in the President and Congress. *United States v. Arthrex, Inc.*, 594 U.S. 1, 13 (2021). It also improves the quality of appointments by guaranteeing "public accountability for both the making of a bad appointment and the rejection of a good one." *Edmond*, 520 U.S. at 660.

A. FINRA officials are executive officers of the United States but are not properly appointed

FINRA's hearing officers exercise significant governmental powers—which the Supreme Court has held in *Lucia*, *Freytag*, and *Arthrex*, make them executive Officers of the United States subject to the Appointments Clause.

Lucia held that SEC's ALJs are "Officers of the United States," and their appointments violated the structural protections of the Appointments Clause. 585 U.S. at 254. In *Lucia*, SEC launched an administrative proceeding against Raymond Lucia and his investment company. *Id.* at 241. SEC assigned an ALJ to adjudicate the case. *Id.* at 241-242. The ALJ held Lucia violated the act and imposed civil penalties of $300,000 and a lifetime bar from the investment industry. *Id.* at 242.

Lucia challenged the ALJ as improperly appointed under the Appointments Clause. The Supreme Court agreed. The Court held SEC ALJs were "Officers of the United States" because they "exercis[ed] significant authority pursuant to the laws of the United States." *Id.* at 245 (citation omitted). However, the ALJs were not appointed consistent with the Appointments Clause and therefore the ALJ's adjudication and decision were void. *Id.* at 251-52.

Lucia's holding built on prior Supreme Court precedent—*Freytag*, 501 U.S. 868. In *Freytag*, the Supreme Court held the United States Tax Court's special trial judges (STJs) exercised significant executive power

and their appointment violated the Appointments Clause. *Lucia* noted SEC's ALJs were "near-carbon copies" of the *Freytag* STJs. *Lucia*, 585 U.S. at 246.

The Fourth Circuit has construed *Lucia*'s holding about SEC ALJs "to apply broadly" and declined to confine it to SEC ALJs. *See Brooks v. Kijakazi*, 60 F.4th 735, 740 (4th Cir. 2023). This Court applied *Lucia* to Social Security Administration's ALJ. So too should it apply *Lucia* to FINRA hearing officers.

Adjudicatory officers like *Lucia*'s ALJs and *Freytag*'s STJs are officers in the executive branch. *Arthrex* explained that, even if the "duties" of hearing officers "partake of a Judiciary quality," these officers "exercis[e] executive power." 594 U.S. at 17 (simplified). "[I]ndeed, under our constitutional structure, they *must be* exercises of … the 'executive Power,' for which the President is ultimately responsible." *Id.* (quoting *City of Arlington v. FCC*, 569 U.S. 290, 305 n.4 (2013)).

FINRA's hearing officers exercise identical powers to *Lucia*'s ALJs and *Freytag*'s STJs. Indeed, D.C. Circuit Judge Justin Walker, echoing *Lucia*'s invocation of *Freytag*, noted, "FINRA's hearing officers are near carbon copies of [SEC] ALJs." *Alpine Securities*, 2023 WL 4703307, at *2 (Walker, J., concurring).

In fact, "point for point—straight from *Freytag*'s [and *Lucia*'s] list—the [FINRA officers] have equivalent duties and powers as STJs [and

ALJs] in conducting adversarial inquiries." *Lucia*, 585 U.S. at 248. The following chart illustrates the powers point for point:

Freytag STJ	Lucia ALJ	FINRA Hearing Officer
"take testimony," *Freytag*, 501 U.S. at 881-82.	"take testimony," *Lucia*, 585 U.S. at 248.	"require a member ... to testify" and "provide information or testimony," and have the power to compel testimony, FINRA Rules 8210 and 9252.
"conduct trials," *id.*	"conduct trials," *id.*	"regulat[e] the course of a hearing," order parties to present oral arguments, and rule on motions, FINRA Rule 9235.
"rule on the admissibility of evidence," *id.*	"rule on the admissibility of evidence" to "shape the administrative record," *id.*	decide the admissibility of evidence to shape the record, FINRA Rules 9235 and 9263.

"have the power to enforce compliance with discovery orders," *id.*	"enforce compliance with discovery orders," *id.*	enforce compliance with discovery orders by punishing contempt, FINRA Rule 9280.
Tax Court STJs prepare proposed findings and an opinion, *id.* at 880-81.	SEC ALJs issue decisions "containing factual findings, legal conclusions, and appropriate remedies," *id.* at 249.	FINRA hearing officers issue a final written decision addressing factual findings, legal conclusions, and remedial sanctions, FINRA Rule 9268

In short, FINRA's officers have the same nebula of powers as SEC ALJs. SEC ALJs have "authority to do all things necessary and appropriate to discharge his or her duties." 17 C.F.R. § 201.111. Likewise, FINRA's hearing officers have "authority to do all things necessary and appropriate to discharge his or her duties." FINRA Rule 9235(a). In *Lucia*, the SEC was granted "statutory authority to enforce the nation's securities laws" and "delegate[d] that task to an ALJ." 585 U.S. at 241. Likewise, FINRA's hearing officers are tasked by statute with enforcing the nation's securities laws. 15 U.S.C. § 78s(g)(1). And FINRA can "levy sanctions that carry the force of federal law." *Turbeville v. FINRA*, 874 F.3d 1268, 1270 (11th Cir. 2017) (citing 15 U.S.C. § 78o-3(b)(7)).

In sum, FINRA's hearing officers are officers of the United States because they have "responsibility for an ongoing statutory duty" under 15 U.S.C. § 78s(g)(1). *Lucia*, 585 U.S. at 253 (Thomas, J., concurring) (quoting *NLRB v. SW General,* 580 U.S. at 314 (Thomas, J., concurring)). Yet when FINRA's officers perform this duty in adjudicating cases, "the President can neither oversee [them] himself nor attribute [their] failings to those whom he *can* oversee." *Arthrex*, 594 U.S. at 17. They perform their statutory duty and exercise governmental power without appointment while operating outside the executive branch's chain of command. That violates the Appointments Clause. FINRA's decision against Black/Southeast is therefore void and should be vacated.

B. SEC review of FINRA decisions does not cure the unconstitutional appointment because such SEC review is irrelevant to the analysis

Eventual SEC review of FINRA's decision does not change this conclusion. FINRA's hearing officers serve the same role as the SEC's ALJs and Tax Court's STJs. They exercise power that belongs to executive officers of the United States, so they must be properly appointed. After FINRA's hearing officers (private actors) render a decision, the appeal goes to FINRA's adjudicatory council (also made up of FINRA private actors). FINRA Rule 9348. The adjudicatory council provides a decision to the FINRA Board—more private actors—and if no Board member calls for review, the adjudicatory council's decision is final, and the decision

can be appealed to SEC. FINRA Rules 9349(c), 9370; 15 U.S.C. § 78s(d)-(e).

In *Lucia*, the final decision of the ALJ could likewise be appealed to the SEC for review but that "ma[d]e no difference" to the Court—the SEC ALJs still unlawfully wielded significant executive power. *Lucia*, 585 U.S. at 249. And in *Freytag*, the final decision of the STJ could be reviewed by the Tax Court but the result was the same—the STJs exercised significant government power and were officers but were not properly appointed. 585 U.S. at 249; 501 U.S. at 873.

If SEC ALJs and Tax Court STJs are executive officers of the United States, per *Lucia*, *Freytag*, and *Arthrex*, then FINRA's Board, and its hearing officers are, too. But FINRA's officials are not appointed by the President, SEC commissioners (department heads), or courts of law. So, they cannot exercise significant government authority absent proper appointment under the Appointments Clause. FINRA's decision against Black/Southeast should therefore be vacated. *Lucia*, 585 U.S. at 251-52.[10]

[10] FINRA's ostensible status as a "private" entity does not change this analysis. SEC cannot outsource its constitutional violations to a private entity to avoid constitutional liability. The police could not hire private enforcers to investigate crimes outside the strictures of the Fourth Amendment. So too, SEC cannot hire private adjudicators outside the strictures of the Appointments Clause. SEC cannot circumvent *Lucia* by outsourcing governmental power to FINRA.

II. FINRA's exercise of governmental powers violates the private non-delegation doctrine

Government's powers should be exercised by the government. But FINRA is a "private" entity that exercises significant governmental power over the securities market. Such delegation of the government's powers to a private entity is impermissible under the private nondelegation doctrine.

To safeguard the people from arbitrary government, the Constitution forbids the delegation of government power to a private party. This "nondelegation principle serves both to separate powers as specified in the Constitution, and to retain power in the governmental Departments so that delegation does not frustrate the constitutional design." *Pittston Co. v. United States*, 368 F.3d 385, 394 (4th Cir. 2004) (simplified). The delegation of government power to a private party such as FINRA is "delegation in its most obnoxious form." *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936).

When Congress delegates authority to an agency, that delegation must include an "intelligible principle" to direct the agency's discretion. *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 472 (2001) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). But the intelligible-principle standard is not so relaxed when Congress delegates government power to a private entity, particularly the power to regulate other private parties. Such private delegation is particularly

problematic because it is "not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business." *Id.*

Carter Coal controls. There, the Court voided a law that gave private coal producers and miners the power to set minimum wages and maximum hours in their industry. The Court explained the core of the private nondelegation doctrine: "[I]n the very nature of things, one person may not be intrusted with the power to regulate the business of another … [a]nd a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property." *Id.*; *see also A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935) (deeming it "obvious" that a delegation of government power "to trade or industrial associations or groups so as to empower them to enact the laws … for … their trade or industries … is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress").

The Fourth Circuit has confirmed that "Congress … may not give [private] entities governmental power over others." *Pittston*, 368 F.3d at 395. That is so because "the Constitution recognizes no governmental powers vested in private entities." *Kerpen*, 907 F.3d at 161.

FINRA impermissibly exercises three types of governmental powers; it exercised all three of these powers against Black/Southeast. Each standing alone flunks the private nondelegation doctrine.

First, FINRA's power to regulate, license, and discipline Black/Southeast is "'necessarily a government function' that must constitutionally remain with a public body." *See Kerpen*, 907 F.3d at 162. FINRA's disciplinary action against Black "involve[s] coercive exercises of sovereign power," *Suss v. Am. Soc. for Prevention of Cruelty to Animals*, 823 F. Supp. 181, 189 (S.D.N.Y. 1993), which is typically undertaken "by governmental authorities," *Peel v. Att'y Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 103 (1990), not private parties. Indeed, the ability to impose lifetime industry bars (like the one FINRA imposed on Black) is "so intrinsically governmental in nature that [it] may not be entrusted to a non-governmental entity." *Melcher v. Fed. Open Mkt. Comm.*, 644 F. Supp. 510, 523 (D.D.C. 1986), *aff'd*, 836 F.2d 561 (D.C. Cir. 1987). *See also, e.g.*, *Lynch v. Donnelly*, 465 U.S. 668, 683 (1984) (calling "a licensing veto authority" an "important governmental power").

Second, FINRA exercises prosecutorial discretion—a "quintessentially executive power." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2200 (2020). FINRA can investigate, choose to prosecute, and then punish alleged violations of securities laws, regulations, and rules with no pre-approval or action by SEC. FINRA Rules 8210, 8310, 8313, 9120(a), (b), (e),

(o), (q), 9211, 9235(a), 9268(f). For example, FINRA alone makes all discretionary executive decisions including which brokers and firms to burden with investigative demands for documents and testimony, how burdensome those demands will be, which brokers and firms will be charged with wrongdoing, what statutory and rule violations will be charged against them, whether to accept a settlement offer and on what terms, and what fines and other sanctions will be imposed.[11] As the Supreme Court recognized in *Buckley*, "enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress." 424 U.S. at 138. The power to bring suit for violation of federal law "is the ultimate remedy for a breach of the law, and it is to the President … that the Constitution entrusts th[at] responsibility." *Id.*

Third, FINRA engages in private adjudication that the Supreme Court has not blessed. The Court has approved adjudications outside Article III only because they occur within Article II. But FINRA is a private entity adjudicating claims while remaining outside Articles II and III. Precedent allows Congress to "delegate [adjudicatory] power to executive

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[11] *See generally* Jessica Hopper, *Working on the Front Lines of Investor Protection—How an Enforcement Action Becomes an Enforcement Action*, FINRA Newsblog (June 4, 2020), https://www.finra.org/media-center/blog/working-on-the-front-lines-of-investor-protection-how-an-enforcement-action-becomes-an-enforcement-action (describing FINRA's enforcement process).

officers," "reserve" the power to itself, "or … commit it to judicial tribunals," but each of those is a branch of the government accountable to the People. *See Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929). Article III forbids "Congress [from] completely oust[ing] the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the executive department," and, as a corollary, also bars Congress and SEC from evading even meaningful administrative review by delegating adjudication to a private entity. *See Crowell v. Benson*, 285 U.S. 22, 56-57 (1932).

Accordingly, the delegation of governmental powers to FINRA is as unprecedented as it is unconstitutional. The Court should so hold and vacate SEC's decision.

III. FINRA/SEC's in-house adjudication violates Article III, the Seventh Amendment, and the Fifth Amendment

Before depriving any person of life, liberty, or property, the Constitution "presum[es]" that adjudication must occur in Article III courts with a trial by jury. *Stern v. Marshall*, 564 U.S. 462, 499 (2011); U.S. Const. amend. VII. There is one narrow exception to this presumption. Congress can assign adjudication of public-rights cases to non-Article III government entities such as bankruptcy courts or SEC; Congress cannot assign such adjudication to private entities like FINRA. When Congress assigns adjudication to a private entity such as FINRA, followed by eventual and deferential appellate-style review by SEC, followed by eventual

and deferential circuit-court review of SEC decisions, that statutory scheme deprives private parties like Black/Southeast their right to judicial process, right to a jury trial, and right to the due process of law.

Here, FINRA, a private entity, adjudicated Black/Southeast's private rights (ability to practice a profession and monetary fines), then SEC, a non-Article III entity, performed appellate-style review. This scheme is unconstitutional and void. The Court should therefore reverse and vacate the SEC decision against Black/Southeast.

A. FINRA/SEC's in-house adjudication violates Article III

The Constitution's "presumption" for litigating lawsuits "is in favor of Article III courts." *Stern*, 564 U.S. at 499. The Constitution "enunciates a fundamental principle" that the "judicial Power of the United States" must be reposed in the Judiciary. *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 60 (1982).

Article III's structure secures, as Justice William Brennan noted, the right of all individuals "to have claims decided by judges who are free from potential domination by other branches of government." *Id.* at 58 (quoting *United States v. Will*, 449 U.S. 200, 217-18 (1980)). Article III secures individual rights by ensuring judicial independence through the "good Behaviour" Clause, which guarantees "judges shall enjoy life tenure, subject only to removal by impeachment," *id.* at 59 (citing *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955)), and the Compensation Clause, which provides "judges a fixed and irreducible

compensation for their services," *id.* (citing *Will*, 449 U.S. at 217-18). This structure secures the right to judicial process by forcing all three branches to cooperate before any individual can be deprived of life, liberty, or property—the *executive* branch must file suit in *court* to prosecute conduct that it alleges violates the law as enacted by the *legislature*.

Stern, 564 U.S. at 469, concluded that the bankruptcy court (which is not an Article III court) violated Article III when it "exercised the judicial power of the United States by entering final judgment" on a matter reserved for decision to Article III courts. So too here. FINRA entered a final and binding order against Black/Southeast on matters (as described below) that cannot be assigned for decisionmaking outside Article III.

i. Congress cannot assign suits at common law for adjudication to FINRA or SEC

The Supreme Court has "long recognized that … Congress may not 'withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.'" *Stern*, 564 U.S. at 484. Common-law suits include suits involving private rights, which cannot be "withdrawn from judicial cognizance." *Id.* at 488-89. "When a suit is made of the stuff of the traditional actions at common law tried by the courts at Westminster in 1789 and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts." *Id.* at 484 (simplified).

1. Suits alleging perjury and forgery are suits at common law

Perjury and forgery—as alleged by FINRA in counts one and two—are traditional common-law claims. SEC's remand primes FINRA to adjudicate these allegations. *See* [JA444]. But those allegations must be litigated in the first instance in Article III courts. Thus, FINRA/SEC adjudication of those claims would violate Article III.

At common law, perjury occurs "when a lawful oath is administered, in some judicial proceeding, to a person who swears willfully, absolutely and falsely, in a matter material to the issue or point in question." 4 William Blackstone, *Commentaries on the Laws of England* *136-37; *United States v. Bailey*, 34 U.S. 238, 256-57 (1835) (perjury, false swearing, and false affirmation is a common-law offense); *United States v. Dunnigan*, 507 U.S. 87, 94-95 (1993) (tracing perjury back to the common law).

And forgery is "defined (at common law) to be, 'the fraudulent making or alteration of a writing to the prejudice of another man's right.'" 4 Blackstone, *Commentaries* *245-46; *Gilbert v. United States*, 370 U.S. 650, 655-59 (1962) (explaining the common-law offense of forgery); *People v. Warner*, 62 N.W. 405, 406 (Mich. 1895) (at common law, forgery was "a false making, or a making malo animo of any written instrument with intent to defraud").

These common-law claims are the types of claims that Article III courts, not agencies or private entities, are the experts in resolving. *Stern*, 564 U.S. at 493. FINRA's common-law claims against Black/Southeast are not "limited to a[n] [agency's or private entity's] 'particularized area of the law.'" *Id.* Lying under oath, and producing false documents are not "matter[s] that could be pursued only by the grace of the other branches" nor claims uniquely created by securities regulations. *Id.* These are run-of-the-mill common-law claims that prosecutors can pursue in any court of law from Westminster in 1789 to the present. So, FINRA's counts one and two against Black/Southeast must be adjudicated in an Article III court—but they weren't.

2. Suits seeking civil monetary penalties are suits at common law

Suits at common law include those created by statute. *Tull v. United States*, 481 U.S. 412, 417 (1987). Suits "to recover civil penalties under statutory provisions therefore historically have been viewed as one type of action in debt." *Id.* at 418-19; *see also Gonzalez v. Sessions*, 894 F.3d 131, 139 (4th Cir. 2018) ("[R]emedies intended to punish culpable individuals … were issued by courts of law[.]" (quoting *Tull*, 481 U.S. at 422)). Accordingly, a civil penalty suit is a suit at common law.

In *Tull*, "the Government sought penalties of over $22 million for violation of the Clean Water Act and obtained a judgment in the sum of $325,000." 481 U.S. at 420. Such "[a] civil penalty was a type of remedy

at common law that could only be enforced in courts of law." *Id.* at 422. Early American caselaw also confirms suits for civil monetary penalties are suits at common law.[12]

For the false testimony and documents allegations as well as for the deficient supervisory system for email retention allegations, FINRA seeks (and obtained an order for) civil monetary penalties against Black/Southeast. [JA424] ($73,500). FINRA/SEC enforced various federal laws, regulations, and rules as authorized by 15 U.S.C. §§ 78s(g)(1) and 78o-3(b)(7). This is therefore a suit at common law for "an action in debt" that must be brought in an Article III court—but wasn't. *Tull*, 481 U.S. at 418-19.

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[12] *Stearns v. United States*, 22 F. Cas. 1188, 1192 (C.C.D. Vt. 1835) (No. 13,341) ("Actions for penalties are civil actions, both in form and in substance, according to Blackstone."); *United States v. Gates*, 25 F. Cas. 1263, 1266 (S.D.N.Y. 1845) (No. 15,191) ("Ordinarily mere statutory penalties are to be sued for and recovered by action of debt."); *United States v. Chouteau*, 102 U.S. 603, 611 (1880) ("Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still as a punishment for the infraction of the law."); *Lees v. United States*, 150 U.S. 476, 478 (1893) ("From the earliest history of the government, the jurisdiction over actions to recover penalties and forfeitures has been placed in the district court."); *Hepner v. United States*, 213 U.S. 103, 108 (1909) ("It must be taken as settled law that a certain sum, or a sum which can readily be reduced to a certainty, prescribed in a statute as a penalty for the violation of law, may be recovered by civil action, even if it may also be recovered in a proceeding which is technically criminal.").

ii. Congress cannot assign private-rights cases for adjudication to FINRA or SEC

Private-rights cases are those involving "liability of one individual to another under the law as defined." *Crowell v. Benson*, 285 U.S. 22, 51 (1932). FINRA, a private entity, seeks to collect monies from Black/Southeast "under the law as defined." *Id.* That makes this a private-rights case.

Private-rights cases include those where the government seeks to deprive a person of liberty—such as the lifetime practice restriction (that lasted four-and-a-half years) that FINRA imposed on Black. *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 198 (2023) (Thomas, J., concurring) ("Private rights encompass the three absolute rights, life, liberty, and property"; "full Article III adjudication" is "required" where "private rights are at stake.") (simplified).

Private-rights cases belong in an actual court. *Crowell*, 285 U.S. at 51. The "determinations of fact" and entering of conclusions of law in such cases are "the essential attributes of the judicial power" that Congress cannot assign elsewhere. *Id.* That Congress made that assignment to FINRA/SEC, therefore, violates Article III.

In sum, suits at common law and suits determining the private rights of private parties belong, and must be initiated, in Article III courts. It violates Article III to shunt such suits for adjudication

elsewhere. Accordingly, the FINRA/SEC adjudication is unconstitutional and void. This Court should therefore vacate SEC's decision.

B. FINRA/SEC's in-house adjudication violates the Seventh Amendment

i. Private-rights cases and suits at common law require trial by jury

Where property (money) and liberty (industry bar) are at stake, there is a right to trial by jury. The Seventh Amendment guarantees the right to trial by jury for "Suits at common law, where the value in controversy shall exceed twenty dollars." U.S. Const. amend. VII. Suits at common law, as here, can be creatures of statute. *Tull*, 481 U.S. at 417. And suits seeking civil monetary penalties are an "action in debt requiring trial by jury." *Id.* at 418-19; *see also Gonzalez*, 894 F.3d at 139 ("[R]emedies intended to punish culpable individuals … were issued by courts of law[.]" (quoting *Tull*, 481 U.S. at 422)). Accordingly, a civil penalty suit is a "suit at common law" requiring trial by jury.

The jury protections affirmed in *Tull* have firm historical pedigree.[13] And the connection between property and trial by jury is not

[13] Blackstone stated that the king's bench, the "supreme court of common law in the kingdom," had jurisdiction over actions "brought for a civil remedy; and for which the defendant ought in strictness to pay a fine to the king." 3 William Blackstone, *Commentaries* at *41-42. Common law courts held that imposing a penalty "is as much a civil action, as an action for money had and received." *Atcheson v. Everitt*, 98 Eng. Rep. 1142, 1147 (K.B. 1775); *see also Calcraft v. Gibbs*, 101 Eng. Rep. 11, 11 (K.B.

new.[14] One reason for our law's longstanding recognition of the right to trial by jury is its guarantee that judges and prosecutors remain accountable to the people, who exercise a check on adversarial adjudication when they sit on juries.[15] The need for jury trials is heightened where, as here, the adjudication commenced against private parties has the purpose of protecting the public at large. The Seventh Amendment ensures such

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1792) (jury trial on action for "penalties on the game laws"); *Cox v. Mundy*, 96 Eng. Rep. 267, 267 (K.B. 1764) (jury trial for action "for a penalty incurred by having foreign lace in her house").

[14] The Magna Carta recognized "[n]o free man shall be … stripped of his rights or possessions … except by the lawful judgment of his equals or by law of the land." Magna Carta cl. 39 (1215). Founding-era state constitutions linked property and the right to trial by jury too. Va. Decl. of Rights § 11 (1776) ("[I]n controversies respecting property … the ancient trial by jury is preferable to any other, and ought to be held sacred."); Penn. Const. art. XI (1776) ("That in controversies respecting property, and in suits between man and man, the parties have a right to trial by jury, which ought to be held sacred."); N.C. Const. art. XIV (1776) ("That in all controversies at law, respecting property, the ancient mode of trial, by jury, is one of the best securities of the rights of the people, and ought to remain sacred and inviolable."); N.H. Bill of Rights art. XX ("In all controversies concerning property ... the parties have a right to a trial by jury.").

[15] Sheldon Whitehouse, *Restoring the Civil Jury's Role in the Structure of Our Government*, 55 Wm. & Mary L. Rev. 1241, 1245-46 (2014); Jennifer Walker Elrod, *W(h)ither the Jury? The Diminishing Role of the Jury Trial in Our Legal System*, 68 Wash. & Lee L. Rev. 3, 23 (2011) ("[T]he institution of the jury raises the people itself, or at least a class of citizens, to the bench of judicial authority [and] invests the people, or that class of citizens, with the direction of society." (quoting 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 334 (1st ed., 1961)).

adjudication remains democratically accountable by requiring a fact-finding jury of peers before a private party can be deprived of liberty or property.

ii. The public-rights exception does not apply

There is one narrow exception to the Seventh Amendment—the public-rights doctrine. In limited circumstances, Congress can assign adjudication to an agency where trial by jury is not available. But the Constitution continues to presume that Article III courts will adjudicate cases, "even with respect to matters that arguably fall within the scope of the 'public rights' doctrine." *Stern*, 564 U.S. at 499-500. So, the burden on FINRA/SEC to overcome that presumption is heavy. That limited public-rights exception, however, is simply inapplicable here.

"[W]hen Congress properly assigns a matter to adjudication in a non-Article III tribunal, the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder." *Oil States Energy Servs., LLC v. Greene's Energy Group, LLC*, 584 U.S. 325, 345 (2018) (simplified). Congress can only assign adjudication to an agency if the action concerns "public rights." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51 (1989) (citing *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442, 455 (1977)).

As explained above, FINRA's action against Black/Southeast concerns private rights because it presents traditional common-law allegations seeking traditional common-law remedies (civil monetary penalties

and industry bar). It is not sufficient to say that the securities laws Congress enacted serve the public interest and the U.S. economy overall. "Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity." *Granfinanciera*, 492 U.S. at 61. Congress cannot convert any sort of action into a "public right" simply by finding a public purpose for it and codifying it in federal statutory law. *Id.* In short, *Tull* requires jury trials in suits seeking monetary penalties. And *Granfinanciera* instructs that Congress cannot avoid the Seventh Amendment by moving such cases out of Article III courts.

The Court's most expansive interpretation of adjudication by agencies, *Atlas Roofing*, 430 U.S. 442, is consistent with *Granfinanciera*. *Granfinanciera* confirms that the Constitution forbids Congress from "conjur[ing] away the Seventh Amendment by mandating that traditional legal claims be brought … to an administrative tribunal." 492 U.S. at 52. *Atlas Roofing*, however, does not extend to blessing adjudication occurring outside of federal agencies. *Atlas Roofing* simply does not apply to private adjudication, which is at issue here; when it applies it only applies (as confirmed by *Granfinanciera*) to *agency* adjudication.

In sum, FINRA's in-house suit for monetary penalties against Black/Southeast must be brought in an Article III court with a civil jury trial—but it wasn't. FINRA's private, juryless adjudication is therefore

void. This Court should therefore vacate and set aside SEC's decision and order.

C. FINRA/SEC's in-house adjudication violates the Fifth Amendment's Due Process of Law Clause

The Due Process Clause of the Fifth Amendment guarantees that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law." The Clause is central to our Constitution's security "against arbitrary deprivation[s] of property," *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972), and "was intended to give Americans" the same protection "that they had enjoyed as Englishmen against the power of the Crown." *Ingraham v. Wright*, 430 U.S. 651, 672-73 (1977).

i. The Due Process Clause requires judicial process in Article III courts

Alongside Article III, the Fifth Amendment's Due Process Clause also guarantees the right to judicial process with Article III officers presiding over an adversarial trial. That is, before a person can be deprived of life, liberty, or property, suit must be filed in an actual court, *Stern*, 564 U.S. at 483-84, which must decide such controversies under "settled principles and precedents of law." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 534 (1991).

FINRA/SEC's adjudication of Black/Southeast's liberty and property violates due process of law. Before the government can ban Black from his profession (i.e., deprive him of liberty) and fine Black/Southeast

hundreds of thousands of dollars (i.e., deprive them of property), Black/Southeast must receive judicial process. Instead, they received a quasi-private, quasi-administrative process. Because such adjudication outside Article III deprived Black/Southeast of judicial process, FINRA/SEC adjudication violates the Due Process Clause. The Court should therefore vacate the SEC decision.

ii. The Due Process Clause requires a fair trial in a fair tribunal.

The Supreme Court has identified another due process consideration that is at play here. Black/Southeast have the right to "a fair process of decisionmaking" before they can be "deprive[d] … of [their] possessions." *Fuentes*, 407 U.S. at 80. FINRA/SEC's inherent bias and FINRA's impermissible profit motive deprive Black/Southeast of fair process and thereby violate the Due Process Clause.

1. FINRA/SEC's biased adjudication deprives Black/Southeast of the due process of law

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). Fairness prohibits actual bias in adjudication but also seeks to eliminate the appearance or chance of unfairness. *See id.* Hence the ancient maxim—*nemo iudex in causa sua*—"no man can be a judge in his own cause." *Id.*; *The Federalist No. 10* ("No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.");

Tumey v. Ohio, 273 U.S. 510, 532 (1927) ("Every procedure which would offer a possible temptation to the average man as a judge ... not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law."). In other words, "justice must satisfy the *appearance* of justice." *Murchison*, 349 U.S. at 136 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)) (emphasis added). This rule applies to administrative adjudications as well as to courts. *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973).

FINRA's adjudicatory process is infused with bias. FINRA Enforcement acts as prosecutor. [JA076-88]. Then FINRA hearing officers act as judge, and jury. [JA136-179]; [JA216-265]. Neither can be neutral or unbiased. This combination of functions in a single entity rebuffs any claims to fairness and impartiality.[16]

Consider an analogy to Article III diversity jurisdiction. The Constitution does not trust state-court judges in diversity cases to be "impartial" because they could not be "expected to be unbiased" in interpreting laws; the Constitution considers them predisposed to favor their home state or citizens. *The Federalist No. 80*. It is "natural" that FINRA

[16] According to FINRA and SEC, "the requirements of constitutional due process do not apply to FINRA." [JA401-402]. Consequently, FINRA maintained that it "was not required to correct inconsistent witness testimony, *id.*—an assertion SEC has now rejected when it concluded that FINRA's destruction and withholding of documents was not harmless error. [JA438].

operatives, like state-court judges, tasked with interpreting the laws "should feel a strong predilection to" FINRA's "claims." *Id.*

The logic of that argument applies with equal force to FINRA and SEC whose officials interpret the statutes which they administer. Both FINRA and SEC officials can be presumed to have a strong predilection to interpreting laws in "their own" favor. *Id.* Ordinarily, "even the appearance of partiality" or "impropriety" "requires recusal" of the adjudicator—that is to say, such adjudication cannot take place to begin with. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872, 888 (2009); *see also Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 584 U.S. 617, 643 (2018) (Kagan, J., concurring) (disapproving administrative adjudication that can be "infected by … hostility or bias").

Black/Southeast's experience underscores FINRA's inherent bias and the resulting due process debacle. FINRA's investigation of Black/Southeast involved contacting only former Southeast brokers, all of whom had past disputes with Black. FINRA did not include interviews with any other current or former Southeast brokers, prejudicially keeping out any favorable testimony.[17] Nor did FINRA interview anyone to attempt to confirm Black's calendar record of inspections. FINRA's hearing officers, acting as factfinders without a jury, then credited these

[17] For example, FINRA interviewed ex-Southeast broker, Gregg Kucher, but FINRA failed to produce the memo from that interview that confirmed Black inspected Kucher's office and met him approximately 20 times. [JA054].

witnesses over the testimony of Black and his documentary evidence of completed inspections. [JA427-428]. FINRA then ignored Black's evidence that contradicted the witness testimony, [JA144]. More galling, FINRA did not produce exculpatory evidence that demonstrated FINRA's witnesses were biased and unreliable until after the evidentiary hearing and oral argument took place. Even SEC agrees this error was not harmless. [JA435-438].

Moreover, FINRA destroyed the original contemporaneous notes from the interviews with the witnesses, leaving only email summaries created after-the-fact. Even the after-the-fact memorialized recollections that FINRA did end up producing after resisting their production and disclosure for some time show FINRA attorneys may have suborned perjury from FINRA's witnesses against Black/Southeast. [JA187-201]. Such exculpatory evidence for each of FINRA's witnesses abounds. [JA319-330]. And FINRA attorney Sean Firley repeatedly used evidence he knew or should have known to be false.[18]

Indeed, FINRA banned Black from the securities industry for false testimony and fabricated documents by prosecuting him with false testimony and fabricated documents. FINRA's stacked-deck antics denied

[18] Firley emphasized that Ravella testified "that he had never seen Mr. Black before. Didn't even know what he looked like until he walked into the hearing to testify," [JA182], but the late-disclosed evidence demonstrated that Ravella told Arnold that he "met Black once a year." [JA324-325].

Black/Southeast their right to a fair hearing in a neutral tribunal with full confrontation and cross-examination.

Then it took SEC four-and-a-half years to finally issue a decision on Black/Southeast's appeal from FINRA's decision. And during those four-and-a-half years, Black was banned from the securities industry. These errors are not bugs but features of a biased and unfair adjudication system that violates basic due process of law.

2. FINRA's impermissible profit motive deprives Black/Southeast of the due process of law

The Due Process Clause prohibits the government from establishing a system where the adjudicating entity has a financial incentive to raise revenue through its decisions. *See, e.g.*, *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Tumey*, 273 U.S. 510. In *Ward*, for instance, a citizen charged with traffic offenses claimed that trial before the village's mayor violated due process, since "[a] major part of village income is derived from the fines, forfeitures, costs, and fees imposed by [the mayor] in his mayor's court." 409 U.S. at 58. The Court agreed, reasoning that even though no money went directly into the mayor's pocket, he would face institutional pressure "to maintain the high level of contribution." *Id.* at 60. This was true even if the citizen could not show actual bias, as due process protects against a financial incentive that would offer "a possible temptation to the average man." *Tumey*, 273 U.S. at 532.

Ample—and impermissible—temptation is present here. FINRA touts the size of revenue raised through fines that it uses to fund its "multi-year $30 million investor education initiative." *See* 2021 FINRA Annual Report at 1-3, 9; FINRA Rule 8320(a) ("All fines and other monetary sanctions shall be paid to the Treasurer of FINRA and shall be used for the general corporate purposes."). In 2021, FINRA reported that it collected $103 million in fines, which became part of its operating budget. *See* 2021 FINRA Annual Report at 1, 3, 9.

This makes the bias problem worse because it involves the exercise of monopolistic government power over a private industry by a financially self-interested private entity. The D.C. Circuit has found a due-process violation when "an economically self-interested entity" "exercise[s] regulatory authority over" that industry's participants. *Ass'n of Am. R.R.s v. Dep't of Transp.*, 821 F.3d 19, 27 (D.C. Cir. 2016). FINRA's financial self-interest in prosecuting, adjudicating, and then collecting and keeping the fines it levies contravenes basic fairness and impartiality that the Due Process Clause requires.

Because FINRA's biased enforcement and adjudication violated due process, the Court should vacate SEC's decision.

iii. Eventual and deferential judicial review is insufficient under the Due Process Clause

Not only does FINRA, a private entity, adjudicate Black/Southeast's rights, but Congress has also limited SEC's and the federal courts' involvement in that adjudication, guaranteeing only eventual and deferential—and, therefore, meaningless—review of FINRA's decisions. Such deferential review also violates the Due Process Clause.

Courts review agency decisions through a deferential lens, asking if the decision is "unsupported by substantial evidence." 5 U.S.C. § 706(2)(E); *see also Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) ("[T]he threshold for such evidentiary sufficiency is not high."). And the review is based on a closed record—facts determined by the agency. *See, e.g.*, *Duckworth v. United States ex rel. Locke*, 705 F. Supp. 2d 30, 40 (D.D.C. 2010). Worse here, those facts are determined by a private self-interested entity rather than an agency. And SEC's review of facts found by FINRA is also deferential. 15 U.S.C. § 78y(a)(4).

Eventual deferential judicial review in federal circuit courts only stacks deference on deference—all while private parties like Black/Southeast, who stand to be deprived of hundreds of thousands of dollars of their property, never obtained Article III courts' first view to begin with. *See also* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 Colum. L. Rev. 939 (2011) (exposing the shaky historical and

doctrinal footing of eventual and cursory judicial review of administratively adjudicated cases).

This scheme is problematic because it compounds a central error with FINRA adjudication—the jury should be the factfinder in a case for monetary fines, not a self-interested private entity. *Tull*, 481 U.S. at 418-20. In a case that turns heavily on credibility determinations, [JA438], a FINRA private employee finds facts usurping "the exclusive province of the jury … to [be the] judge of the credibility of the witnesses," *Ewing's Lessee v. Burnet*, 36 U.S. 41, 50-51 (1837), followed by deference given to that impermissible credibility determination by both SEC and this Court.

In other words, courts appropriately give "substantial evidence" deference to facts found by an actual jury. *See* U.S. Const. amend. VII ("[N]o fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."). But facts found by FINRA hearing officers acting as the jury is an altogether different creature.

In striking down bankruptcy courts' adjudication of common-law claims, *Stern* found it noteworthy that the district-court judge's review of the bankruptcy judge's decision "requires marked deference to, among other things, the bankruptcy judges' findings of fact." 564 U.S. at 487. *Stern* pointed to this impermissible statutory scheme to declare unconstitutional the bankruptcy courts' adjudication of common-law claims. So

too here. On appeal, FINRA's factual findings receive marked deference from SEC and then from the federal circuit courts.

In short, FINRA fact-finding violates the Due Process Clause. And the attendant deferential review of that fact-finding by SEC and this Court also violates the Due Process Clause. Consequently, the Court should vacate the SEC decision.

IV. This Court should vacate SEC's relitigation remand and reverse SEC's affirmance

A. Vacatur of SEC's relitigation remand to FINRA is appropriate

SEC's relitigation remand (on counts one and two relating to false testimony and documents), [JA178-179]; [JA444], is erroneous because Black/Southeast would again face FINRA's unconstitutional private adjudication. FINRA could even reimpose the lifetime bar on Black that would take months if not years of further appeals before it could be lifted.

Enough is enough. After nearly a decade in FINRA/SEC's adjudicatory process, SEC's remand gives FINRA another bite at the apple to prove claims FINRA only proved the first time based on surmise and conjecture, spoliated evidence, and deceitful legal argumentation. It is unfair to "convert judicial review of agency action into a ping-pong game." *PDK Lab'ys Inc. v. U.S. D.E.A.*, 362 F.3d 786, 809 (D.C. Cir. 2004) (Roberts, J., concurring). FINRA's errors are fatal. FINRA is in no position to take yet another swing at Black/Southeast without the documentary evidence

FINRA admits it lost. This is the fourth known example where FINRA has engaged in such deceptive litigation practice and has been publicly rebuked by SEC. Given SEC's steadfast refusal to sanction FINRA for its misdeeds (and even if this Court does not draw an adverse inference against FINRA), giving FINRA another chance at relitigation almost a full decade after allegedly wrongful events transpired is unfair, unwarranted, and leaves the due process of law by the wayside. In such situations, vacating the relitigation remand is appropriate.

Relitigation remands are appropriate where the lower adjudicating body applies the wrong legal standard; remands are appropriate in such situations so "a determination under the appropriate standard" announced by the appellate court can be made by the lower-level adjudicator. *D.B. v. Cardall*, 826 F.3d 721, 743 (4th Cir. 2016) (simplified). Misapplication of a legal standard is not at issue here. At issue is something else: FINRA's spoliation leading to FINRA Enforcement giving altered and misleading testimony at the hearing, in turn leading FINRA to adjudge Black/Southeast to have provided false testimony and documents.

The "exclusion of relevant evidence"—indeed now non-existent evidence—"affects [Black/Southeast's] rights," which deprives them "of a fair hearing." *International Union, United Mine Workers of Am. v. Marrowbone Development Co.*, 232 F.3d 383, 389 (4th Cir. 2000) (simplified). "Vacatur" in such situations "is appropriate." *Id.* (simplified). Now, there is simply no evidence in the record controverting Black/Southeast's

documentary evidence and truthful testimony that Black indeed conducted office inspections. That should be the end of the matter; this Court should thereby vacate SEC's relitigation remand.

B. SEC's affirmance should be reversed because Black/Southeast's email supervision system was reasonable

The only statutory claims before this Court on the merits relate to FINRA/SEC's findings of violations and sanctions for (1) an ineffective system for the retention of business-related emails and (2) failure to preserve 16 emails in the firm's records. [JA444]. SEC fined Black/Southeast $73,000 for the supervisory violation and $500 for failure to preserve the 16 emails. *Id.* The Court should reverse SEC on this issue because Black/Southeast's system was reasonable for their business model.[19]

A broker-dealer's duty to supervise is governed by a "reasonableness" standard. *In re Arthur James Huff*, 50 S.E.C. 524 (Mar. 28, 1991). FINRA Rule 3110 requires, and NASD Rule 3010 required, FINRA members to establish and maintain a supervision system that is reasonably designed to achieve compliance with applicable securities laws and regulations including FINRA's rules. Broker-dealers are responsible for creating their own supervisory system. Whether a broker-dealer's supervision of its employees is reasonable "is determined based on the particular

[19] Black/Southeast do not dispute that a Southeast employee lost 16 emails.

circumstances of each case" and "[t]he burden is on [FINRA] to show that the respondent's procedures and conduct were not reasonable." *Dist. Bus. Conduct. Committee for District No. 7 v. William A. Lobb*, No. C07960105, 2000 WL 1299576, at *5 (NAC Apr. 6, 2000); *see also Hecht v. Harris, Upham & Co.*, 430 F.2d 1202, 1210 (9th Cir. 1970) (finding that the control person is only required to maintain an adequate system of internal control, and to maintain such system in a diligent manner). "It is not enough to demonstrate that an individual is less than a model supervisor or that supervision could have been better." *Lobb*, 2000 WL 1299576, at *5.

Likewise, the mere fact that a principal "could have taken stronger action" against the registered representative is not sufficient to find supervisory liability. *Dep't of Enforcement, Complainant v. Respondent Respondent*, No. C9B040020, 2005 WL 3831352, at *8-9 (Apr. 6, 2005); *see also In re Trujillo*, Exch. Act Rel. No. 26635, 49 S.E.C. 1106, 1109-10 (1989) (finding no supervisory liability where a principal's supervisory record "was less than exemplary"). A hindsight analysis cannot establish a failure to supervise. *Lobb*, 2000 WL 1299576, at *7 n.9 (citing *In re James H. Thornton*, Exch. Act Rel. No. 41007 (Feb. 1, 1999) (Comm'r Unger, concurring) ("Commission's decisions [are] careful not to substitute the knowledge gleaned with hindsight, of actual wrongdoing by someone under a supervisor's control, for an assessment of whether the supervisor's conduct was proper under the circumstances." (simplified)).

SEC's conclusion that Black/Southeast's supervision of electronic communications was unreasonable is wrong factually and as a matter of law. Southeast utilized an honor system to supervise emails—a system recommended *by FINRA* to Black/Southeast. Southeast required associated persons who utilized email for communication with customers to copy Black on all such correspondence. The communications were then kept in printed or electronic form.

Southeast implemented this system at FINRA's suggestion. During the 2008 exam, FINRA Examiner DePorres Cormier recommended this system to Southeast, [JA128-130],[20] due to the composition of the company and its business model.[21] It was in response to Cormier's suggestions that Southeast instituted the requirement that representatives copy Southeast on their emails so that Southeast can then retain the emails in either paper or electronic form. [JA129].

The FINRA-recommended supervisory system is not now somehow illegal. Indeed, FINRA Regulatory Notice 07-59 permits flexibility in designing supervisory systems that fit the company's business model.

[20] Southeast employee Jeanette Roberts testified similarly [JA118-119], as did FINRA employee Matt Dale, who testified that he remembered Cormier making these recommendations to Southeast. [JA108].

[21] Cormier supplied the language to use for Southeast's written supervisory procedures ("WSPs"). [JA129, 131]. The updated WSP language was reflected in Southeast's December 27, 2008, response letter to the 2008 cycle exam. [JA022, 032]; NASD Rule 3010(c) Exception.

FINRA Regulatory Notice 07-59 at 5.[22] FINRA also expressly allows employees to "communicate via email through means other than their member-issued email addresses" and requires the employer "to supervise and retain those communications." *Id.* at 8. Accordingly, Black allowed employees to use private email for business communications so long as they forwarded those emails to him at Southeast's main office where he kept a record of them.

FINRA cannot recommend a supervisory system to Black/Southeast then turn around and entrap them with liability claiming the very supervisory system FINRA recommended is unreasonable. Southeast brokers who used their personal email addresses were required to forward all customer correspondence to Black, where the correspondence was reviewed and retained. Thus, in formulating their procedures, Black/Southeast followed FINRA's own recommendations (Regulatory Notice 07-59).

Southeast's experience with the honor system also shows it was reasonable. Southeast required each employee to certify in writing, on at least an annual basis, that they were complying with Southeast's procedure to copy the home office on all electronic communications. And Southeast's email use was minimal. Only 28 of 126 Southeast brokers used email to communicate with clients at all and the number using personal

[22] https://www.finra.org/rules-guidance/notices/07-59.

email was even lower. [JA051]. Given the small number of brokers using email, it was reasonable for Southeast to use the FINRA-recommended honor system to supervise email usage.

The honor system was consistent and reasonable across Southeast. A majority of Southeast's brokers communicate by telephone or written letter. The only means of retaining those communications is the honor system and FINRA had never suggested that system was unreasonable before it pressed charges. As a result, Southeast's supervision system for emails was consistent with FINRA recommendations and reasonable in light of Southeast's business model.

FINRA's 2011 cycle examination resulted in a 2012 letter stating that Southeast's email retention system needed to be improved. [JA033]. The letter cited only a FINRA Press Release. [JA038]. But a press release is not a regulatory requirement.[23] Every time Southeast was informed that it *must* change something through a regulation or otherwise, Southeast has promptly made that change.

Indeed, Black implemented the recommendation given in the 2012 letter, believing it was part of an iterative process. SEC's letter invited Black to "respond in writing to each of the matters described in the Examination Findings within thirty days ... describing the steps you have

[23] A FINRA employee admitted the press release cited in the warning was not a regulation. [JA110]. And Black corroborated his belief that the press release was not a binding regulation. [JA131].

taken or intend to take with respect to each of these matters." [JA033]. Black understood this cycle-examination process to be collaborative, not adversarial. In other words, if FINRA had so much as recommended during examination or as a result of its routine cycle examinations that Southeast must adopt a different system, Southeast would have promptly implemented that change. But instead of engaging with Southeast on this issue, FINRA informed Black/Southeast of its changed position directly in the complaint FINRA filed against them three years later in 2015.

Southeast would not have neglected to make changes to the supervisory system if FINRA/SEC had communicated that a change was legally required. Similar issues were brought to his attention after the 2012 and 2014 FINRA exams. After the 2012 FINRA exam, it was noted that numerous email attachments and threads were missing. [JA102-103]. Southeast promptly corrected those issues as is evident from the 2014 FINRA examination in which Southeast showed how it had addressed them. [JA104-108].

Black/Southeast also complied with FINRA's regulations and rules. For example, upon FINRA's request, Black immediately implemented hard copy retention requirements on individual registered representatives. [JA132, 134-135]. Notably, unlike the press release on which FINRA relied, this notification from FINRA expressly indicated that action was required to follow securities regulations. [JA061].

On this point, even the FINRA adjudicatory council's decision acknowledged that installing Smarsh—an email archival system—fixed the supervisory problem, demonstrating the reasonableness of Black/Southeast's "honor system." [JA344]. FINRA employee Matthew Dale testified that printing out hard copies of emails was considered an appropriate alternative to retaining a third-party custodian, like Smarsh, to electronically archive the emails. [JA108-109]]. Moreover, Dale admitted that Smarsh would not capture emails from a broker who elected to use a personal email address not registered with the system or old-fashioned paper letters for correspondence [JA111-113], making even a system like Smarsh ultimately reliant on the honesty of the brokers. In other words, Smarsh, which FINRA found to be reasonable, also relies on the honor system, just like the Southeast honor system that FINRA now maintains is unreasonable. *See, e.g.*, [JA121] (explaining Smarsh as an honor system).

Black followed FINRA's recommendations. In 2015, when FINRA examiner Cormier informed Black that the email system Southeast utilized complied with FINRA rules—telling Black that if Southeast installed Smarsh, "[FINRA] will quit hassling you" and "[FINRA] will leave you alone," [JA114, 120, 133]—Black complied. He installed Smarsh—trading one FINRA-approved supervisory system for another FINRA-approved supervisory system.

In sum, Black adopted a reasonable supervisory system for Southeast's electronic communications. SEC's decision, affirming findings of violations and sanctions against Black/Southeast for an ineffective system for the retention of business-related emails, should therefore be reversed.

CONCLUSION

Those who govern the people must be accountable to the people. Transferring federal power to an unchecked private entity that is not elected, nominated, removable, or impeachable undercuts representative government.

This Court should declare FINRA/SEC's enforcement and adjudication unconstitutional, and vacate the SEC decision.

If the Court rejects Black/Southeast's constitutional arguments, the Court should find Black/Southeast's email supervisory system was reasonable, reverse the SEC's decision pertaining to the supervisory system, and vacate SEC's decision remanding to FINRA for relitigation the allegations pertaining to false documents and testimony.

Consequently, the Court should enjoin FINRA/SEC from taking further adverse action against Black/Southeast.

DATED: April 15, 2024.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B)(i) and Local Rule 32(b), I certify that the attached brief is proportionally spaced, has a typeface of 14 points and contains 12.959 words.

DATED: April 15, 2024.

s/ Aditya Dynar
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No. 23-2297

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FRANK HARMON BLACK; and
SOUTHEAST INVESTMENTS, N.C., INC.,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent,

and

FINANCIAL INDUSTRY REGULATORY AUTHORITY,

Intervenor.

On Petition for Review of the Decision and Order of the Securities and Exchange Commission under 15 U.S.C. § 78y(a)(1)

ADDENDUM TO PETITIONERS' OPENING BRIEF

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ADDENDUM

TABLE OF CONTENTS

Page(s)

United States Constitution

Statutes

Regulation

Rules

United States Constitution

Article II, Section 2

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

United State Constitution

Article II, Section 3

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

United States Constitution

Article III, Section 1

Judicial Power, Tenure and Compensation

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

United States Constitution

Amendment V

Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Takings without Just Compensation

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution

Amendment VII

Civil Trials

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Statutes

15 U.S.C. § 78c(a)(26)

Definitions and application

26. The term "self-regulatory organization" means any national securities exchange, registered securities association, or registered clearing agency, or (solely for purposes of sections 78s(b), 78s(c), and 78w(b) of this title) the Municipal Securities Rulemaking Board established by section 78o-4 of this title.

15 U.S.C. § 78o

Registration and regulation of brokers and dealers

(a) Registration of all persons utilizing exchange facilities to effect transactions; exemptions

(1) It shall be unlawful for any broker or dealer which is either a person other than a natural person or a natural person not associated with a broker or dealer which is a person other than a natural person (other than such a broker or dealer whose business is exclusively intrastate and who does not make use of any facility of a national securities exchange) to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) unless such broker or dealer is registered in accordance with subsection (b) of this section.

(2) The Commission, by rule or order, as it deems consistent with the public interest and the protection of investors, may conditionally or unconditionally exempt from paragraph (1) of this subsection any broker or dealer or class of brokers or dealers specified in such rule or order.

(b) Manner of registration of brokers and dealers

(1) A broker or dealer may be registered by filing with the Commission an application for registration in such form and containing such information and documents concerning such broker or dealer and any persons associated with such broker or dealer as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors. Within forty-five days of the date of the filing of such application (or within such longer period as to which the applicant consents), the Commission shall--

(A) by order grant registration, or

(B) institute proceedings to determine whether registration should be denied. Such proceedings shall include notice of the grounds for denial under consideration and opportunity for hearing and shall be concluded within one hundred twenty days of the date of the filing of the application for registration. At the conclusion of such proceedings, the Commission, by order, shall grant or deny such registration. The Commission may extend the time for conclusion of such proceedings for up to ninety days if it finds good cause for such extension and publishes its reasons for so finding or for such longer period as to which the applicant consents.

The Commission shall grant such registration if the Commission finds that the requirements of this section are satisfied. The order granting registration shall not be effective until such broker or dealer has become a member of a registered securities association, or until such broker or dealer has become a member of a national securities exchange, if such broker or dealer effects transactions solely on that exchange, unless the Commission has exempted such broker or dealer, by rule or order, from such membership. The Commission shall deny such registration if it does not make such a finding or if it finds that if the applicant were so registered, its registration would be subject to suspension or revocation under paragraph (4) of this subsection.

15 U.S.C. § 78o-3(b)(7)

(b) Determinations by Commission requisite to registration of applicant as national securities association

An association of brokers and dealers shall not be registered as a national securities association unless the Commission determines that—

* * *

(7) The rules of the association provide that (subject to any rule or order of the Commission pursuant to section 78q(d) or 78s(g)(2) of this title) its members and persons associated with its members shall be appropriately disciplined for violation of any provision of this chapter, the rules or regulations thereunder, the rules of the Municipal Securities Rulemaking Board, or the rules of the association, by expulsion, suspension, limitation of activities, functions, and operations, fine, censure, being suspended or barred from being associated with a member, or any other fitting sanction.

* * *

(e) Dealings with nonmember professionals

(1) The rules of a registered securities association may provide that no member thereof shall deal with any nonmember professional (as defined in paragraph (2) of this subsection) except at the same prices, for the same commissions or fees, and on the same terms and conditions as are by such member accorded to the general public.

(2) For the purposes of this subsection, the term "nonmember professional" shall include (A) with respect to transactions in securities other than municipal securities, any registered broker or dealer who is not a member of any registered securities association, except such a broker or dealer who deals exclusively in commercial paper, bankers' acceptances, and commercial bills, and (B) with respect to transactions in municipal securities, any municipal securities dealer (other than a bank or division or department of a bank) who is not a member of any registered securities association and any municipal securities broker who is not a member of any such association.

(3) Nothing in this subsection shall be so construed or applied as to prevent (A) any member of a registered securities association from granting to any other member of any registered securities association any dealer's discount, allowance, commission, or special terms, in connection with the purchase or sale of securities, or (B) any member of a registered securities association or any municipal securities dealer which is a bank or a division or department of a bank from granting to any member of any registered securities association or any such municipal securities dealer any dealer's discount, allowance, commission, or special terms in connection with the purchase or sale of municipal securities: *Provided, however*, That the granting of any such discount, allowance, commission, or special terms in connection with the purchase or sale of municipal securities shall be subject to rules of the Municipal Securities Rulemaking Board adopted pursuant to section 78*o*-4(b)(2)(K) of this title.

(f) Transactions in municipal securities

Nothing in subsection (b)(6) or (b)(11) of this section shall be construed to permit a registered securities association to make rules concerning any transaction by a registered broker or dealer in a municipal security.

(g) Denial of membership

(1) A registered securities association shall deny membership to any person who is not a registered broker or dealer.

(2) A registered securities association may, and in cases in which the Commission, by order, directs as necessary or appropriate in the public interest or for the protection of investors shall, deny membership to any registered broker or dealer, and bar from becoming associated with a member any person, who is subject to a statutory disqualification. A registered securities association shall file notice with the Commission not less than thirty days prior to admitting any registered broker or dealer to membership or permitting any person to become associated with a member, if the association knew, or in the exercise of reasonable care should have known, that such broker or dealer or person was subject to

a statutory disqualification. The notice shall be in such form and contain such information as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(3)(A) A registered securities association may deny membership to, or condition the membership of, a registered broker or dealer if (i) such broker or dealer does not meet such standards of financial responsibility or operational capability or such broker or dealer or any natural person associated with such broker or dealer does not meet such standards of training, experience, and competence as are prescribed by the rules of the association or (ii) such broker or dealer or person associated with such broker or dealer has engaged and there is a reasonable likelihood he will again engage in acts or practices inconsistent with just and equitable principles of trade. A registered securities association may examine and verify the qualifications of an applicant to become a member and the natural persons associated with such an applicant in accordance with procedures established by the rules of the association.

(B) A registered securities association may bar a natural person from becoming associated with a member or condition the association of a natural person with a member if such natural person (i) does not meet such standards of training, experience, and competence as are prescribed by the rules of the association or (ii) has engaged and there is a reasonable likelihood he will again engage in acts or practices inconsistent with just and equitable principles of trade. A registered securities association may examine and verify the qualifications of an applicant to become a person associated with a member in accordance with procedures established by the rules of the association and require a natural person associated with a member, or any class of such natural persons, to be registered with the association in accordance with procedures so established.

(C) A registered securities association may bar any person from becoming associated with a member if such person does not agree (i) to supply the association with such information with respect to its relationship and dealings with the member as may be specified in the

rules of the association and (ii) to permit examination of its books and records to verify the accuracy of any information so supplied.

(D) Nothing in subparagraph (A), (B), or (C) of this paragraph shall be construed to permit a registered securities association to deny membership to or condition the membership of, or bar any person from becoming associated with or condition the association of any person with, a broker or dealer that engages exclusively in transactions in municipal securities.

(4) A registered securities association may deny membership to a registered broker or dealer not engaged in a type of business in which the rules of the association require members to be engaged: *Provided, however,* That no registered securities association may deny membership to a registered broker or dealer by reason of the amount of such type of business done by such broker or dealer or the other types of business in which he is engaged.

(h) Discipline of registered securities association members and persons associated with members; summary proceedings

(1) In any proceeding by a registered securities association to determine whether a member or person associated with a member should be disciplined (other than a summary proceeding pursuant to paragraph (3) of this subsection) the association shall bring specific charges, notify such member or person of, and give him an opportunity to defend against, such charges, and keep a record. A determination by the association to impose a disciplinary sanction shall be supported by a statement setting forth--

(A) any act or practice in which such member or person associated with a member has been found to have engaged, or which such member or person has been found to have omitted;

(B) the specific provision of this chapter, the rules or regulations thereunder, the rules of the Municipal Securities Rulemaking Board, or the rules of the association which any such act or practice, or omission to act, is deemed to violate; and

(C) the sanction imposed and the reason therefor.

(2) In any proceeding by a registered securities association to determine whether a person shall be denied membership, barred from becoming associated with a member, or prohibited or limited with respect to access to services offered by the association or a member thereof (other than a summary proceeding pursuant to paragraph (3) of this subsection), the association shall notify such person of and give him an opportunity to be heard upon, the specific grounds for denial, bar, or prohibition or limitation under consideration and keep a record. A determination by the association to deny membership, bar a person from becoming associated with a member, or prohibit or limit a person with respect to access to services offered by the association or a member thereof shall be supported by a statement setting forth the specific grounds on which the denial, bar, or prohibition or limitation is based.

(3) A registered securities association may summarily (A) suspend a member or person associated with a member who has been and is expelled or suspended from any self-regulatory organization or barred or suspended from being associated with a member of any self-regulatory organization, (B) suspend a member who is in such financial or operating difficulty that the association determines and so notifies the Commission that the member cannot be permitted to continue to do business as a member with safety to investors, creditors, other members, or the association, or (C) limit or prohibit any person with respect to access to services offered by the association if subparagraph (A) or (B) of this paragraph is applicable to such person or, in the case of a person who is not a member, if the association determines that such person does not meet the qualification requirements or other prerequisites for such access and such person cannot be permitted to continue to have such access with safety to investors, creditors, members, or the association. Any person aggrieved by any such summary action shall be promptly afforded an opportunity for a hearing by the association in accordance with the provisions of paragraph (1) or (2) of this subsection. The Commission, by order, may stay any such summary action on its own motion or upon application by any person aggrieved thereby, if the Commission

determines summarily or after notice and opportunity for hearing (which hearing may consist solely of the submission of affidavits or presentation of oral arguments) that such stay is consistent with the public interest and the protection of investors.

(i) Obligation to maintain registration, disciplinary, and other data

(1) Maintenance of system to respond to inquiries

A registered securities association shall--

(A) establish and maintain a system for collecting and retaining registration information;

(B) establish and maintain a toll-free telephone listing, and a readily accessible electronic or other process, to receive and promptly respond to inquiries regarding--

(i) registration information on its members and their associated persons; and

(ii) registration information on the members and their associated persons of any registered national securities exchange that uses the system described in subparagraph (A) for the registration of its members and their associated persons; and

(C) adopt rules governing the process for making inquiries and the type, scope, and presentation of information to be provided in response to such inquiries in consultation with any registered national securities exchange providing information pursuant to subparagraph (B)(ii).

(2) Recovery of costs

A registered securities association may charge persons making inquiries described in paragraph (1)(B), other than individual investors, reasonable fees for responses to such inquiries.

(3) Process for disputed information

Each registered securities association shall adopt rules establishing an administrative process for disputing the accuracy of information provided in response to inquiries under this subsection in consultation

with any registered national securities exchange providing information pursuant to paragraph (1)(B)(ii).

(4) Limitation on liability

A registered securities association, or an exchange reporting information to such an association, shall not have any liability to any person for any actions taken or omitted in good faith under this subsection.

(5) Definition

For purposes of this subsection, the term "registration information" means the information reported in connection with the registration or licensing of brokers and dealers and their associated persons, including disciplinary actions, regulatory, judicial, and arbitration proceedings, and other information required by law, or exchange or association rule, and the source and status of such information.

(j) Registration for sales of private securities offerings

A registered securities association shall create a limited qualification category for any associated person of a member who effects sales as part of a primary offering of securities not involving a public offering, pursuant to section 77c(b), 77d(2), or 77d(6) of this title and the rules and regulations thereunder, and shall deem qualified in such limited qualification category, without testing, any bank employee who, in the six month period preceding November 12, 1999, engaged in effecting such sales.

15 U.S.C. § 78s.
Registration, responsibilities, and oversight of self-regulatory organizations

(d) Notice of disciplinary action taken by self-regulatory organization against a member or participant; review of action by appropriate regulatory agency; procedure

(1) If any self-regulatory organization imposes any final disciplinary sanction on any member thereof or participant therein, denies membership or participation to any applicant, or prohibits or limits any person in respect to access to services offered by such organization or member thereof or if any self-regulatory organization (other than a registered clearing agency) imposes any final disciplinary sanction on any person associated with a member or bars any person from becoming associated with a member, the self-regulatory organization shall promptly file notice thereof with the appropriate regulatory agency for the self-regulatory organization and (if other than the appropriate regulatory agency for the self-regulatory organization) the appropriate regulatory agency for such member, participant, applicant, or other person. The notice shall be in such form and contain such information as the appropriate regulatory agency for the self-regulatory organization, by rule, may prescribe as necessary or appropriate in furtherance of the purposes of this chapter.

(2) Any action with respect to which a self-regulatory organization is required by paragraph (1) of this subsection to file notice shall be subject to review by the appropriate regulatory agency for such member, participant, applicant, or other person, on its own motion, or upon application by any person aggrieved thereby filed within thirty days after the date such notice was filed with such appropriate regulatory agency and received by such aggrieved person, or within such longer period as such appropriate regulatory agency may determine. Application to such appropriate regulatory agency for review, or the institution of review by such appropriate regulatory agency on its own motion, shall not operate as a stay of such action unless such appropriate regulatory agency otherwise orders, summarily or after notice and opportunity for hearing

on the question of a stay (which hearing may consist solely of the submission of affidavits or presentation of oral arguments). Each appropriate regulatory agency shall establish for appropriate cases an expedited procedure for consideration and determination of the question of a stay.

(3) The provisions of this subsection shall apply to an exchange registered pursuant to section 78f(g) of this title or a national securities association registered pursuant to section 78*o*-3(k) of this title only to the extent that such exchange or association imposes any final disciplinary sanction for--

(A) a violation of the Federal securities laws or the rules and regulations thereunder; or

(B) a violation of a rule of such exchange or association, as to which a proposed change would be required to be filed under this section, except that, to the extent that the exchange or association rule violation relates to any account, agreement, contract, or transaction, this subsection shall apply only to the extent such violation involves a security futures product.

(e) Disposition of review; cancellation, reduction, or remission of sanction

(1) In any proceeding to review a final disciplinary sanction imposed by a self-regulatory organization on a member thereof or participant therein or a person associated with such a member, after notice and opportunity for hearing (which hearing may consist solely of consideration of the record before the self-regulatory organization and opportunity for the presentation of supporting reasons to affirm, modify, or set aside the sanction)--

(A) if the appropriate regulatory agency for such member, participant, or person associated with a member finds that such member, participant, or person associated with a member has engaged in such acts or practices, or has omitted such acts, as the self-regulatory organization has found him to have engaged in or omitted, that such acts or practices, or omissions to act, are in violation of such provisions of this chapter, the

rules or regulations thereunder, the rules of the self-regulatory organization, or, in the case of a registered securities association, the rules of the Municipal Securities Rulemaking Board as have been specified in the determination of the self-regulatory organization, and that such provisions are, and were applied in a manner, consistent with the purposes of this chapter, such appropriate regulatory agency, by order, shall so declare and, as appropriate, affirm the sanction imposed by the self-regulatory organization, modify the sanction in accordance with paragraph (2) of this subsection, or remand to the self-regulatory organization for further proceedings; or

(B) if such appropriate regulatory agency does not make any such finding it shall, by order, set aside the sanction imposed by the self-regulatory organization and, if appropriate, remand to the self-regulatory organization for further proceedings.

(2) If the appropriate regulatory agency for a member, participant, or person associated with a member, having due regard for the public interest and the protection of investors, finds after a proceeding in accordance with paragraph (1) of this subsection that a sanction imposed by a self-regulatory organization upon such member, participant, or person associated with a member imposes any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter or is excessive or oppressive, the appropriate regulatory agency may cancel, reduce, or require the remission of such sanction.

(f) Dismissal of review proceeding

In any proceeding to review the denial of membership or participation in a self-regulatory organization to any applicant, the barring of any person from becoming associated with a member of a self-regulatory organization, or the prohibition or limitation by a self-regulatory organization of any person with respect to access to services offered by the self-regulatory organization or any member thereof, if the appropriate regulatory agency for such applicant or person, after notice and opportunity for hearing (which hearing may consist solely of consideration of the record before the self-regulatory organization and

opportunity for the presentation of supporting reasons to dismiss the proceeding or set aside the action of the self-regulatory organization) finds that the specific grounds on which such denial, bar, or prohibition or limitation is based exist in fact, that such denial, bar, or prohibition or limitation is in accordance with the rules of the self-regulatory organization, and that such rules are, and were applied in a manner, consistent with the purposes of this chapter, such appropriate regulatory agency, by order, shall dismiss the proceeding. If such appropriate regulatory agency does not make any such finding or if it finds that such denial, bar, or prohibition or limitation imposes any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter, such appropriate regulatory agency, by order, shall set aside the action of the self-regulatory organization and require it to admit such applicant to membership or participation, permit such person to become associated with a member, or grant such person access to services offered by the self-regulatory organization or member thereof.

(g) Compliance with rules and regulations

(1) Every self-regulatory organization shall comply with the provisions of this chapter, the rules and regulations thereunder, and its own rules, and (subject to the provisions of section 78q(d) of this title, paragraph (2) of this subsection, and the rules thereunder) absent reasonable justification or excuse enforce compliance--

(A) in the case of a national securities exchange, with such provisions by its members and persons associated with its members;

(B) in the case of a registered securities association, with such provisions and the provisions of the rules of the Municipal Securities Rulemaking Board by its members and persons associated with its members; and

(C) in the case of a registered clearing agency, with its own rules by its participants.

(2) The Commission, by rule, consistent with the public interest, the protection of investors, and the other purposes of this chapter, may relieve any self-regulatory organization of any responsibility under this

chapter to enforce compliance with any specified provision of this chapter or the rules or regulations thereunder by any member of such organization or person associated with such a member, or any class of such members or persons associated with a member.

(h) Suspension or revocation of self-regulatory organization's registration; censure; other sanctions

(1) The appropriate regulatory agency for a self-regulatory organization is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter, to suspend for a period not exceeding twelve months or revoke the registration of such self-regulatory organization, or to censure or impose limitations upon the activities, functions, and operations of such self-regulatory organization, if such appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such self-regulatory organization has violated or is unable to comply with any provision of this chapter, the rules or regulations thereunder, or its own rules or without reasonable justification or excuse has failed to enforce compliance--

(A) in the case of a national securities exchange, with any such provision by a member thereof or a person associated with a member thereof;

(B) in the case of a registered securities association, with any such provision or any provision of the rules of the Municipal Securities Rulemaking Board by a member thereof or a person associated with a member thereof; or

(C) in the case of a registered clearing agency, with any provision of its own rules by a participant therein.

(2) The appropriate regulatory agency for a self-regulatory organization is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter, to suspend for a period not exceeding twelve months or expel from such self-

regulatory organization any member thereof or participant therein, if such member or participant is subject to an order of the Commission pursuant to section 78*o*(b)(4) of this title or if such appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such member or participant has willfully violated or has effected any transaction for any other person who, such member or participant had reason to believe, was violating with respect to such transaction--

(A) in the case of a national securities exchange, any provision of the Securities Act of 1933, the Investment Advisers Act of 1940, the Investment Company Act of 1940, this chapter, or the rules or regulations under any of such statutes;

(B) in the case of a registered securities association, any provision of the Securities Act of 1933, the Investment Advisers Act of 1940, the Investment Company Act of 1940, this chapter, the rules or regulations under any of such statutes, or the rules of the Municipal Securities Rulemaking Board; or

(C) in the case of a registered clearing agency, any provision of the rules of the clearing agency.

(3) The appropriate regulatory agency for a national securities exchange or registered securities association is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter, to suspend for a period not exceeding twelve months or to bar any person from being associated with a member of such national securities exchange or registered securities association, if such person is subject to an order of the Commission pursuant to section 78*o*(b)(6) of this title or if such appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such person has willfully violated or has effected any transaction for any other person who, such person associated with a member had reason to believe, was violating with respect to such transaction--

(A) in the case of a national securities exchange, any provision of the Securities Act of 1933, the Investment Advisers Act of 1940, the

Investment Company Act of 1940, this chapter, or the rules or regulations under any of such statutes; or

(B) in the case of a registered securities association, any provision of the Securities Act of 1933, the Investment Advisers Act of 1940, the Investment Company Act of 1940, this chapter, the rules or regulations under any of the statutes, or the rules of the Municipal Securities Rulemaking Board.

(4) The appropriate regulatory agency for a self-regulatory organization is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter, to remove from office or censure any person who is, or at the time of the alleged misconduct was, an officer or director of such self-regulatory organization, if such appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such person has willfully violated any provision of this chapter, the rules or regulations thereunder, or the rules of such self-regulatory organization, willfully abused his authority, or without reasonable justification or excuse has failed to enforce compliance--

(A) in the case of a national securities exchange, with any such provision by any member or person associated with a member;

(B) in the case of a registered securities association, with any such provision or any provision of the rules of the Municipal Securities Rulemaking Board by any member or person associated with a member; or

(C) in the case of a registered clearing agency, with any provision of the rules of the clearing agency by any participant.

15 U.S.C. § 78y

Court review of orders and rules

(a) Final Commission orders; persons aggrieved; petition; record; findings; affirmance, modification, enforcement, or setting aside of orders; remand to adduce additional evidence

(1) A person aggrieved by a final order of the Commission entered pursuant to this chapter may obtain review of the order in the United States Court of Appeals for the circuit in which he resides or has his principal place of business, or for the District of Columbia Circuit, by filing in such court, within sixty days after the entry of the order, a written petition requesting that the order be modified or set aside in whole or in part.

* * *

(4) The findings of the Commission as to the facts, if supported by substantial evidence, are conclusive.

15 U.S.C. § 78q

Records and reports

(a) Rules and regulations

(1) Every national securities exchange, member thereof, broker or dealer who transacts a business in securities through the medium of any such member, registered securities association, registered broker or dealer, registered municipal securities dealer municipal advisor, registered securities information processor, registered transfer agent, nationally recognized statistical rating organization, and registered clearing agency and the Municipal Securities Rulemaking Board shall make and keep for prescribed periods such records, furnish such copies thereof, and make and disseminate such reports as the Commission, by rule, prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter. Any report that a nationally recognized statistical rating organization is required by Commission rules under this paragraph to make and disseminate to the Commission shall be deemed furnished to the Commission.

(2) Every registered clearing agency shall also make and keep for prescribed periods such records, furnish such copies thereof, and make and disseminate such reports, as the appropriate regulatory agency for such clearing agency, by rule, prescribes as necessary or appropriate for the safeguarding of securities and funds in the custody or control of such clearing agency or for which it is responsible.

(3) Every registered transfer agent shall also make and keep for prescribed periods such records, furnish such copies thereof, and make such reports as the appropriate regulatory agency for such transfer agent, by rule, prescribes as necessary or appropriate in furtherance of the purposes of section 78q-1 of this title.

Regulations

17 C.F.R. § 240.17a-4

Records to be preserved by certain exchange members, brokers and dealers

This section applies to the following types of entities: A member of a national securities exchange who transacts a business in securities directly with others than members of a national securities exchange; a broker or dealer who transacts a business in securities through the medium of a member of a national securities exchange; a broker or dealer, including an OTC derivatives dealer as that term is defined in § 240.3b-12, registered pursuant to section 15 of the Act (15 U.S.C. 78*o*); a security-based swap dealer registered pursuant to section 15F of the Act (15 U.S.C. 78*o*-10) that is also a broker or dealer, including an OTC derivatives dealer, registered pursuant to section 15 of the Act; and a major security-based swap participant registered pursuant to section 15F of the Act that is also a broker or dealer, including an OTC derivatives dealer, registered pursuant to section 15 of the Act. Section 240.18a-6 (rather than this section) applies to the following types of entities: A security-based swap dealer registered pursuant to section 15F of the Act that is not also a broker or dealer, including an OTC derivatives dealer, registered pursuant to section 15 of the Act; and a major security-based swap participant registered pursuant to section 15F of the Act that is not also a broker or dealer, including an OTC derivatives dealer, registered pursuant to section 15 of the Act.

(a) Every member, broker or dealer subject to § 240.17a-3 must preserve for a period of not less than 6 years, the first two years in an easily accessible place, all records required to be made pursuant to § 240.17a-3(a)(1) through (3), (5), and (21) and (22), and analogous records created pursuant to § 240.17a-3(e).

(b) Every member, broker or dealer subject to § 240.17a-3 must preserve for a period of not less than three years, the first two years in an easily accessible place:

(1) All records required to be made pursuant to § 240.17a-3(a)(4), (6) through (11), (16), (18) through (20), and (25) through (31), and analogous records created pursuant to § 240.17a-3(e).

(2) All check books, bank statements, cancelled checks and cash reconciliations.

(3) All bills receivable or payable (or copies thereof), paid or unpaid, relating to the member, broker or dealer's business as such.

(4) Originals of all communications received and copies of all communications sent (and any approvals thereof) by the member, broker or dealer (including inter-office memoranda and communications) relating to its business as such, including all communications which are subject to rules of a self-regulatory organization of which the member, broker or dealer is a member regarding communications with the public. As used in this paragraph (b)(4), the term communications includes sales scripts and recordings of telephone calls required to be maintained pursuant to section 15F(g)(1) of the Act (15 U.S.C. 78*o*-10(g)(1)).

(5) All trial balances, computations of aggregate indebtedness and net capital (and working papers in connection therewith), financial statements, branch office reconciliations, and internal audit working papers, relating to the member, broker or dealer's business as such.

(6) All guarantees of accounts and all powers of attorney and other evidence of the granting of any discretionary authority given in respect of any account, and copies of resolutions empowering an agent to act on behalf of a corporation.

(7) All written agreements (or copies thereof) entered into by such member, broker or dealer relating to its business as such, including agreements with respect to any account. Written agreements with respect to a security-based swap customer or non-customer, including governing documents or any document establishing the terms and conditions of the customer's or non-customer's security-based swaps must be maintained with the customer's or non-customer's account records.

(8) Records which contain the following information in support of amounts included in the report prepared as of the fiscal year end on Part II or IIA of Form X-17A-5 (§ 249.617 of this chapter), as applicable, and in the annual financial statements filed with the Commission required by § 240.17a-5(d), § 240.17a-12(b), or § 240.18a-7(c), as applicable:

(i) Money balance and position, long or short, including description, quantity, price, and valuation of each security including contractual commitments in customers' accounts, in cash and fully secured accounts, partly secured accounts, unsecured accounts, and in securities accounts payable to customers;

(ii) Money balance and position, long or short, including description, quantity, price and valuation of each security including contractual commitments in non-customers' accounts, in cash and fully secured accounts, partly secured and unsecured accounts, and in securities accounts payable to non-customers;

(iii) Position, long or short, including description, quantity, price and valuation of each security including contractual commitments included in the Computation of Net Capital as commitments, securities owned, securities owned not readily marketable, and other investments owned not readily marketable;

(iv) Amount of secured demand note, description of collateral securing such secured demand note including quantity, price and valuation of each security and cash balance securing such secured demand note;

(v) Description of futures commodity contracts or swaps, contract value on trade date, market value, gain or loss, and liquidating equity or deficit in customers' and non-customers' accounts;

(vi) Description of futures commodity contracts or swaps, contract value on trade date, market value, gain or loss, and liquidating equity or deficit in trading and investment accounts;

(vii) Description, money balance, quantity, price, and valuation of each spot commodity, and swap position or commitments in customers' and non-customers' accounts;

(viii) Description, money balance, quantity, price, and valuation of each spot commodity, and swap position or commitments in trading and investment accounts;

(ix) Number of shares, description of security, exercise price, cost and market value of put and call options including short out of the money options having no market or exercise value, showing listed and unlisted put and call options separately;

(x) Quantity, price, and valuation of each security underlying the haircut for undue concentration made in the Computation for Net Capital;

(xi) Description, quantity, price and valuation of each security and commodity position or contractual commitment, long or short, in each joint account in which the broker or dealer has an interest, including each participant's interest and margin deposit;

(xii) Description, settlement date, contract amount, quantity, market price, and valuation for each aged failed to deliver requiring a charge in the Computation of Net Capital pursuant to § 240.15c3-1 or § 240.18a-1, as applicable;

(xiii) Detail relating to information for possession or control requirements under § 240.15c3-3 or § 240.18a-4, as applicable and reported in Part II or IIA of Form X-17A-5 (§ 249.617 of this chapter), as applicable;

(xiv) Detail relating to information for security-based swap possession or control requirements under § 240.15c3-3 or § 240.18a-4, as applicable, and reported in Part II or IIA of Form X-17A-5 (§ 249.617 of this chapter);

(xv) Detail of all items, not otherwise substantiated, which are charged or credited in the Computation of Net Capital pursuant to § 240.15c3-1 or § 240.18a-1, as applicable, such as cash margin deficiencies,

deductions related to securities values and undue concentration, aged securities differences, and insurance claims receivable;

(xvi) Detail relating to the calculation of the risk margin amount pursuant to § 240.15c3-1(c)(17) or § 240.18a-1(c)(6), as applicable; and

(xvii) Other schedules which are specifically prescribed by the Commission as necessary to support information reported as required by §§ 240.17a-5, 240.17a-12, and 240.18a-7, as applicable.

(9) The records required to be made pursuant to § 240.15c3-3(d)(5) and (o) or § 240.18a-4, as applicable.

(10) The records required to be made pursuant to § 240.15c3-4 and the results of the periodic reviews conducted pursuant to § 240.15c3-4(d).

(11) All notices relating to an internal broker-dealer system provided to the customers of the broker or dealer that sponsors such internal broker-dealer system, as defined in paragraph (a)(16)(ii)(A) of § 240.17a-3. Notices, whether written or communicated through the internal broker-dealer trading system or other automated means, must be preserved under this paragraph (b)(11) if they are provided to all customers with access to an internal broker-dealer system, or to one or more classes of customers. Examples of notices to be preserved under this paragraph (b)(11) include, but are not limited to, notices addressing hours of system operations, system malfunctions, changes to system procedures, maintenance of hardware and software, and instructions pertaining to access to the internal broker-dealer system.

(12) The records required to be made pursuant to § 240.15c3-1e(c)(4)(vi) or § 240.18a-1(e)(2)(iii)(F)(2), as applicable.

(13) The written policies and procedures the broker-dealer establishes, documents, maintains, and enforces to assess creditworthiness for the purpose of § 240.15c3-1(c)(2)(vi)(E), (c)(2)(vi)(F)(1) and (2), and (c)(2)(vi)(H) or § 240.18a-1(c)(1)(vi)(2), as applicable.

(14) A copy of information required to be reported under §§ 242.901 through 242.909 of this chapter (Regulation SBSR).

(15) Copies of documents, communications, disclosures, and notices related to business conduct standards as required under §§ 240.15Fh-1 through 240.15Fh-6 and 240.15Fk-1.

(16) Copies of documents used to make a reasonable determination with respect to special entities, including information relating to the financial status, the tax status, the investment or financing objectives of the special entity as required under section 15F(h)(4)(C) and (5)(A) of the Act (15 U.S.C. 78*o*-10(h)(4)(C) and (5)(A)).

(17) The written probability of default determination, relied upon by such broker or dealer, pursuant to § 242.101(c)(2)(i) or § 242.102(d)(2)(i) of this chapter (Rule 101 or Rule 102 of Regulation M), as applicable.

(c) Every member, broker or dealer subject to § 240.17a-3 must preserve for a period of not less than six years after the closing of any customer's account any account cards or records which relate to the terms and conditions with respect to the opening and maintenance of the account.

(d) Every member, broker or dealer subject to § 240.17a-3 must preserve during the life of the enterprise and of any successor enterprise all partnership articles or, in the case of a corporation, all articles of incorporation or charter, minute books, and stock certificate books (or, in the case of any other form of legal entity, all records such as articles of organization or formation, and minute books used for a purpose similar to those records required for corporations or partnerships), all Forms BD (§ 249.501 of this chapter), all Forms BDW (§ 249.501a of this chapter), all Forms SBSE-BD (§ 249.1600b of this chapter), all Forms SBSE-C (§ 249.1600c of this chapter), all Forms SBSE-W (§ 249.1601 of this chapter), all amendments to these forms, and all licenses or other documentation showing the registration of the member, broker or dealer with any securities regulatory authority or the Commodity Futures Trading Commission.

(e) Every member, broker or dealer subject to § 240.17a-3 must maintain and preserve in an easily accessible place:

(1) All records required under § 240.17a-3(a)(12) until at least three years after the associated person's employment and any other connection with the member, broker or dealer has terminated.

(2) All records required under § 240.17a-3(a)(13) until at least three years after the termination of employment or association of those persons required by § 240.17f-2 to be fingerprinted.

(3) All records required pursuant to § 240.17a-3(a)(15) during the life of the enterprise.

(4) All records required pursuant to § 240.17a-3(a)(14) for three years.

(5) All account record information required pursuant to § 240.17a-3(a)(17) and all records required pursuant to § 240.17a-3(a)(35), in each case until at least six years after the earlier of the date the account was closed or the date on which the information was collected, provided, replaced, or updated.

(6) Each report which a securities regulatory authority or the Commodity Futures Trading Commission has requested or required the member, broker or dealer to make and furnish to it pursuant to an order or settlement, and each securities regulatory authority, Commodity Futures Trading Commission, or prudential regulator examination report until three years after the date of the report.

(7) Each compliance, supervisory, and procedures manual, including any updates, modifications, and revisions to the manual, describing the policies and practices of the member, broker or dealer with respect to compliance with applicable laws and rules, and supervision of the activities of each natural person associated with the member, broker or dealer until three years after the termination of the use of the manual.

(8) All reports produced to review for unusual activity in customer accounts until eighteen months after the date the report was generated. In lieu of maintaining the reports, a member, broker or dealer may produce promptly the reports upon request by a representative of a securities regulatory authority. If a report was generated in a computer

system that has been changed in the most recent eighteen month period in a manner such that the report cannot be reproduced using historical data in the same format as it was originally generated, the report may be produced by using the historical data in the current system, but must be accompanied by a record explaining each system change which affected the reports. If a report is generated in a computer system that has been changed in the most recent eighteen month period in a manner such that the report cannot be reproduced in any format using historical data, the member, broker or dealer must promptly produce upon request a record of the parameters that were used to generate the report at the time specified by a representative of a securities regulatory authority, including a record of the frequency with which the reports were generated.

(9) All records required pursuant to § 240.17a-3(a)(23) until three years after the termination of the use of the risk management controls documented therein.

(10) All records required pursuant to § 240.17a-3(a)(24), as well as a copy of each Form CRS, until at least six years after such record or Form CRS is created.

(11) The written policies and procedures required pursuant to §§ 240.15Fi-3, 240.15Fi-4, and 240.15Fi-5 until three years after termination of the use of the policies and procedures.

(12)(i) Each written agreement with counterparties on the terms of portfolio reconciliation with those counterparties as required to be created under § 240.15Fi-3(a)(1) and (b)(1) until three years after the termination of the agreement and all transactions governed thereby.

(ii) Security-based swap trading relationship documentation with counterparties required to be created under § 240.15Fi-5 until three years after the termination of such documentation and all transactions governed thereby.

(iii) A record of the results of each audit required to be performed pursuant to § 240.15Fi-5(c) until three years after the conclusion of the audit.

(f) Subject to the conditions set forth in this paragraph (f), the records required to be maintained and preserved pursuant to § 240.17a-3 and this section may be immediately produced or reproduced by means of an electronic recordkeeping system or by means of micrographic media and be maintained and preserved for the required time in that form.

(1) For purposes of this paragraph (f):

(i) The term micrographic media means microfilm or microfiche, or any similar medium;

(ii) The term electronic recordkeeping system means a system that preserves records in a digital format in a manner that permits the records to be viewed and downloaded;

(iii) The term designated executive officer means a member of senior management of the member, broker, or dealer who has access to and the ability to provide records maintained and preserved on the electronic recordkeeping system either directly or through a designated specialist who reports directly or indirectly to the designated executive officer;

(iv) The term designated officer means an employee of the member, broker, or dealer who reports directly or indirectly to the designated executive officer and who has access to and the ability to provide records maintained and preserved on the electronic recordkeeping system either directly or through a designated specialist who reports directly or indirectly to the designated officer;

(v) The term designated specialist means an employee of the member, broker, or dealer who has access to, and the ability to provide records maintained and preserved on, the electronic recordkeeping system; and

(vi) The term designated third party means a person that is not affiliated with the member, broker, or dealer who has access to and the ability to provide records maintained and preserved on the electronic recordkeeping system.

(2) An electronic recordkeeping system must:

(i)(A) Preserve a record for the duration of its applicable retention period in a manner that maintains a complete time-stamped audit trail that includes:

(1) All modifications to and deletions of the record or any part thereof;

(2) The date and time of actions that create, modify, or delete the record;

(3) If applicable, the identity of the individual creating, modifying, or deleting the record; and

(4) Any other information needed to maintain an audit trail of the record in a way that maintains security, signatures, and data to ensure the authenticity and reliability of the record and will permit re-creation of the original record if it is modified or deleted; or

(B) Preserve the records exclusively in a non-rewriteable, non-erasable format;

(ii) Verify automatically the completeness and accuracy of the processes for storing and retaining records electronically;

(iii) If applicable, serialize the original and duplicate units of the storage media, and time-date the required period of retention for the information placed on such electronic storage media;

(iv) Have the capacity to readily download and transfer copies of a record and its audit trail (if applicable) in both a human readable format and in a reasonably usable electronic format and to readily download and transfer the information needed to locate the electronic record, as required by the staffs of the Commission, the self-regulatory organizations of which the member, broker, or dealer is a member, or any State securities regulator having jurisdiction over the member, broker, or dealer; and

(v)(A) Include a backup electronic recordkeeping system that meets the other requirements of this paragraph (f) and that retains the records required to be maintained and preserved pursuant to § 240.17a-3 and in

accordance with this section in a manner that will serve as a redundant set of records if the original electronic recordkeeping system is temporarily or permanently inaccessible; or

(B) Have other redundancy capabilities that are designed to ensure access to the records required to be maintained and preserved pursuant to § 240.17a-3 and this section.

(3) A member, broker, or dealer using an electronic recordkeeping system must:

(i) At all times have available, for examination by the staffs of the Commission, the self-regulatory organizations of which the member, broker, or dealer is a member, or any State securities regulator having jurisdiction over the member, broker, or dealer, facilities for immediately producing the records preserved by means of the electronic recordkeeping system and for producing copies of those records.

(ii) Be ready at all times to provide, and immediately provide, any record stored by means of the electronic recordkeeping system that the staffs of the Commission, the self-regulatory organizations of which the member, broker, or dealer is a member, or any State securities regulator having jurisdiction over the member, broker, or dealer may request.

(iii) For a broker-dealer operating pursuant to paragraph (f)(2)(i)(B) of this section, the member, broker, or dealer must have in place an audit system providing for accountability regarding inputting of records required to be maintained and preserved pursuant to § 240.17a-3 and this section to the electronic recordkeeping system and inputting of any changes made to every original and duplicate record maintained and preserved thereby.

(A) At all times, a member, broker, or dealer must be able to have the results of such audit system available for examination by the staffs of the Commission and the self-regulatory organization of which the broker or dealer is a member.

(B) The audit results must be preserved for the time required for the audited records.

(iv) Organize, maintain, keep current, and provide promptly upon request by the staffs of the Commission, the self-regulatory organizations of which the member, broker, or dealer is a member, or any State securities regulator having jurisdiction over the member, broker, or dealer all information necessary to access and locate records preserved by means of the electronic recordkeeping system.

(v)(A) Have at all times filed with the designated examining authority for the member, broker, or dealer the following undertakings with respect to such records signed by either a designated executive officer or designated third party (hereinafter, the "undersigned"):

The undersigned hereby undertakes to furnish promptly to the U.S. Securities and Exchange Commission ("Commission"), its designees or representatives, any self- regulatory organization of which [Name of the Member, Broker, or Dealer] is a member, or any State securities regulator having jurisdiction over [Name of the Member, Broker, or Dealer], upon reasonable request, such information as is deemed necessary by the staff of the Commission, any self-regulatory organization of which [Name of the Member, Broker, or Dealer] is a member, or any State securities regulator having jurisdiction over [Name of the Member, Broker, or Dealer], and to download copies of a record and its audit trail (if applicable) preserved by means of an electronic recordkeeping system of [Name of the Member, Broker, or Dealer] into both a human readable format and a reasonably usable electronic format in the event of a failure on the part of [Name of the Member, Broker, or Dealer] to download a requested record or its audit trail (if applicable).

Furthermore, the undersigned hereby undertakes to take reasonable steps to provide access to the information preserved by means of an electronic recordkeeping system of [Name of the Member, Broker, or Dealer], including, as appropriate, downloading any record required to be maintained and preserved by [Name of the Member, Broker, or Dealer] pursuant to §§ 240.17a-3 and 240.17a-4 in a format acceptable to the staff of the Commission, any self-regulatory organization of which [Name of the Member, Broker, or Dealer] is a member, or any State securities regulator having jurisdiction over [Name of the Member, Broker, or

Dealer]. Specifically, the undersigned will take reasonable steps to, in the event of a failure on the part of [Name of the Member, Broker, or Dealer] to download the record into a human readable format or a reasonably usable electronic format and after reasonable notice to [Name of the Member, Broker, or Dealer], download the record into a human readable format or a reasonably usable electronic format at the request of the staffs of the Commission, any self-regulatory organization of which [Name of the Member, Broker, or Dealer] is a member, or any State securities regulator having jurisdiction over [Name of the Member, Broker, or Dealer].

(B) A designated executive officer who signs the undertaking required pursuant to paragraph (f)(3)(v)(A) of this section may:

(1) Appoint in writing up to two designated officers who will take the steps necessary to fulfill the obligations of the designated executive officer set forth in the undertakings in the event the designated executive officer is unable to fulfill those obligations; and

(2) Appoint in writing up to three designated specialists.

(C) The appointment of, or reliance on, a designated officer or designated specialist does not relieve the designated executive officer of the obligations set forth in the undertaking.

(4) A broker-dealer using a micrographic media system must:

(i) At all times have available, for examination by the staffs of the Commission, self-regulatory organizations of which it is a member, and any State securities regulator having jurisdiction over the member, broker, or dealer, facilities for immediate, easily readable projection or production of micrographic media and for producing easily readable images;

(ii) Be ready at all times to provide, and immediately provide, any facsimile enlargement which the staffs of the Commission, any self-regulatory organization of which it is a member, or any State securities regulator having jurisdiction over the member, broker, or dealer may request;

(iii) Store, separately from the original, a duplicate copy of the record stored on any medium acceptable under this section for the time required; and

(iv) Organize and index accurately all information maintained on both original and duplicate storage media.

(A) At all times, a member, broker, or dealer must be able to have such indexes available for examination by the staffs of the Commission, the self-regulatory organizations of which the broker or dealer is a member, and any State securities regulator having jurisdiction over the member, broker or, dealer.

(B) Each index must be duplicated and the duplicate copies must be stored separately from the original copy of each index.

(C) Original and duplicate indexes must be preserved for the time required for the indexed records.

(g) If a person who has been subject to § 240.17a-3 ceases to transact a business in securities directly with others than members of a national securities exchange, or ceases to transact a business in securities through the medium of a member of a national securities exchange, or ceases to be registered pursuant to section 15 of the Act (15 U.S.C. 78*o*) such person must, for the remainder of the periods of time specified in this section, continue to preserve the records which it theretofore preserved pursuant to this section.

(h) For purposes of transactions in municipal securities by municipal securities brokers and municipal securities dealers, compliance with Rule G-9 of the Municipal Securities Rulemaking Board or any successor rule will be deemed to be in compliance with this section.

(i)(1)(i) If the records required to be maintained and preserved pursuant to the provisions of § 240.17a-3 and this section are prepared or maintained by an outside service bureau, depository, bank, or other recordkeeping service, including a recordkeeping service that owns and operates the servers or other storage devices on which the records are preserved or maintained, (none of which operate pursuant to § 240.17a-

3(c)) on behalf of the member, broker, or dealer required to maintain and preserve such records, such outside entity must file with the Commission a written undertaking in a form acceptable to the Commission, signed by a duly authorized person, to the effect that such records are the property of the member, broker, or dealer required to maintain and preserve such records and will be surrendered promptly on request of the member, broker, or dealer and including the following provision:

With respect to any books and records maintained or preserved on behalf of [Name of the Member, Broker, or Dealer], the undersigned hereby undertakes to permit examination of such books and records at any time or from time to time during business hours by representatives or designees of the Securities and Exchange Commission and to promptly furnish to said Commission or its designee true, correct, complete and current hard copies of any or all or any part of such books and records.

(ii)(A) If the records required to be maintained and preserved pursuant to the provisions of § 240.17a-3 and this section are maintained and preserved by means of an electronic recordkeeping system as defined in paragraph (f) of this section utilizing servers or other storage devices that are owned or operated by an outside entity (including an affiliate) and the broker, dealer, or member has independent access to the records as defined in paragraph (i)(1)(ii)(B) of this section, the outside entity may file with the Commission the following undertaking signed by a duly authorized person in lieu of the undertaking required under paragraph (i)(1)(i) of this section:

The undersigned hereby acknowledges that the records of [name of member, broker, or dealer] are the property of [name of member, broker, or dealer] and [name of member, broker, or dealer] has represented: one, that it is subject to rules of the Securities and Exchange Commission governing the maintenance and preservation of certain records, two, that it has independent access to the records maintained by [name of outside entity], and, three, that it consents to [name of outside entity] fulfilling the obligations set forth in this undertaking. The undersigned undertakes that [name of outside entity] will facilitate within its ability, and not impede or prevent, the examination, access, download, or

transfer of the records by a representative or designee of the Securities and Exchange Commission as permitted under the law. Further, the undersigned undertakes to facilitate within its ability, and not impede or prevent, a trustee appointed under the Securities Investor Protection Act of 1970 to liquidate [name of member, broker, or dealer] in accessing, downloading, or transferring the records as permitted under the law.

(B) A broker, dealer, or member utilizing servers or other storage devices that are owned or operated by an outside entity has independent access to records with respect to such outside entity if it can regularly access the records without the need of any intervention of the outside entity and through such access:

(1) Permit examination of the records at any time or from time to time during business hours by representatives or designees of the Commission; and

(2) Promptly furnish to the Commission or its designee a true, correct, complete and current hard copy of any or all or any part of such records.

(2) An agreement with an outside entity will not relieve such member, broker, or dealer from the responsibility to prepare and maintain records as specified in this section or in § 240.17a-3.

(j) Every member, broker and dealer subject to this section must furnish promptly to a representative of the Commission legible, true, complete, and current copies of those records of the member, broker, or dealer that are required to be preserved under this section, or any other records of the member, broker, or dealer subject to examination under section 17(b) of the Act (15 U.S.C. 78q(b)) that are requested by the representative of the Commission. The member, broker, or dealer must furnish a record and its audit trail (if applicable) preserved on an electronic recordkeeping system pursuant to paragraph (f) of this section in a reasonably usable electronic format, if requested by a representative of the Commission.

(k)(1) Except as provided in paragraph (k)(2) of this section, upon request of any designee or representative of the Commission or of any

self-regulatory organization of which it is a member, every member, broker or dealer subject to this section must request and obtain from its customers documentation regarding an exchange of security futures products for physical securities, including documentation of underlying cash transactions and exchanges. Upon receipt of such documentation, the member, broker or dealer must promptly provide that documentation to the requesting designee or representative.

(2) This paragraph (k) does not apply to an underlying cash transaction(s) or exchange(s) that was effected through a member, broker or dealer registered with the Commission and is of a type required to be recorded pursuant to § 240.17a-3.

(l) Records for the most recent two year period required to be made pursuant to § 240.17a-3(f) and paragraphs (b)(4) and (e)(7) of this section which relate to an office shall be maintained at the office to which they relate. If an office is a private residence where only one associated person (or multiple associated persons who reside at that location and are members of the same immediate family) regularly conducts business, and it is not held out to the public as an office nor are funds or securities of any customer of the member, broker or dealer handled there, the member, broker or dealer need not maintain records at that office, but the records must be maintained at another location within the same State as the member, broker or dealer may select. Rather than maintain the records at each office, the member, broker or dealer may choose to produce the records promptly at the request of a representative of a securities regulatory authority at the office to which they relate or at another location agreed to by the representative.

(m) When used in this section:

(1) The term office has the meaning set forth in § 240.17a-3(g)(1).

(2) The term principal has the meaning set forth in § 240.17a-3(g)(2).

(3) The term securities regulatory authority has the meaning set forth in § 240.17a-3(g)(3).

(4) The term associated person has the meaning set forth in § 240.17a-3(g)(4).

(5) The term business as such includes security-based swap activity.

FINRA Rules

2010. Standards of Commercial Honor and Principals of Trade

A member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade.

3110. Supervision

(a) Supervisory System

Each member shall establish and maintain a system to supervise the activities of each associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules. Final responsibility for proper supervision shall rest with the member. A member's supervisory system shall provide, at a minimum, for the following:

(1) The establishment and maintenance of written procedures as required by this Rule.

(2) The designation, where applicable, of an appropriately registered principal(s) with authority to carry out the supervisory responsibilities of the member for each type of business in which it engages for which registration as a broker-dealer is required.

(3) The registration and designation as a branch office or an office of supervisory jurisdiction (OSJ) of each location, including the main office, that meets the definitions contained in paragraph (f) of this Rule.

(4) The designation of one or more appropriately registered principals in each OSJ and one or more appropriately registered representatives or principals in each non-OSJ branch office with authority to carry out the supervisory responsibilities assigned to that office by the member.

(5) The assignment of each registered person to an appropriately registered representative(s) or principal(s) who shall be responsible for supervising that person's activities.

(6) The use of reasonable efforts to determine that all supervisory personnel are qualified, either by virtue of experience or training, to carry out their assigned responsibilities.

(7) The participation of each registered representative and registered principal, either individually or collectively, no less than annually, in an interview or meeting conducted by persons designated by

the member at which compliance matters relevant to the activities of the representative(s) and principal(s) are discussed. Such interview or meeting may occur in conjunction with the discussion of other matters and may be conducted at a central or regional location or at the representative's(') or principal's(') place of business.

(b) Written Procedures

(1) General Requirements

Each member shall establish, maintain, and enforce written procedures to supervise the types of business in which it engages and the activities of its associated persons that are reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules.

(2) Review of Member's Investment Banking and Securities Business

The supervisory procedures required by this paragraph (b) shall include procedures for the review by a registered principal, evidenced in writing, of all transactions relating to the investment banking or securities business of the member.

(3) Reserved.

(4) Review of Correspondence and Internal Communications

The supervisory procedures required by this paragraph (b) shall include procedures for the review of incoming and outgoing written (including electronic) correspondence and internal communications relating to the member's investment banking or securities business. The supervisory procedures must be appropriate for the member's business, size, structure, and customers. The supervisory procedures must require the member's review of:

(A) incoming and outgoing written (including electronic) correspondence to properly identify and handle in accordance with firm procedures, customer complaints, instructions, funds and securities, and

communications that are of a subject matter that require review under FINRA rules and federal securities laws.

(B) internal communications to properly identify those communications that are of a subject matter that require review under FINRA rules and federal securities laws.

Reviews of correspondence and internal communications must be conducted by a registered principal and must be evidenced in writing, either electronically or on paper.

(5) Review of Customer Complaints

The supervisory procedures required by this paragraph (b) shall include procedures to capture, acknowledge, and respond to all written (including electronic) customer complaints.

(6) Documentation and Supervision of Supervisory Personnel

The supervisory procedures required by this paragraph (b) shall set forth the supervisory system established by the member pursuant to paragraph (a) above, and shall include:

(A) the titles, registration status, and locations of the required supervisory personnel and the responsibilities of each supervisory person as these relate to the types of business engaged in, applicable securities laws and regulations, and FINRA rules.

(B) a record, preserved by the member for a period of not less than three years, the first two years in an easily accessible place, of the names of all persons who are designated as supervisory personnel and the dates for which such designation is or was effective.

(C) procedures prohibiting associated persons who perform a supervisory function from:

(i) supervising their own activities; and

(ii) reporting to, or having their compensation or continued employment determined by, a person or persons they are supervising.

a. If a member determines, with respect to any of its supervisory personnel, that compliance with subparagraph (i) or (ii) above is not possible because of the member's size or a supervisory personnel's position within the firm, the member must document:

1. the factors the member used to reach such determination; and

2. how the supervisory arrangement with respect to such supervisory personnel otherwise complies with paragraph (a) of this Rule.

(D) procedures reasonably designed to prevent the supervisory system required pursuant to paragraph (a) of this Rule from being compromised due to the conflicts of interest that may be present with respect to the associated person being supervised, including the position of such person, the revenue such person generates for the firm, or any compensation that the associated person conducting the supervision may derive from the associated person being supervised.

(7) Maintenance of Written Supervisory Procedures

A copy of a member's written supervisory procedures, or the relevant portions thereof, shall be kept and maintained in each OSJ and at each location where supervisory activities are conducted on behalf of the member. Each member shall promptly amend its written supervisory procedures to reflect changes in applicable securities laws or regulations, including FINRA rules, and as changes occur in its supervisory system. Each member is responsible for promptly communicating its written supervisory procedures and amendments to all associated persons to whom such written supervisory procedures and amendments are relevant based on their activities and responsibilities.

(c) Internal Inspections

(1) Each member shall conduct a review, at least annually (on a calendar-year basis), of the businesses in which it engages. The review shall be reasonably designed to assist the member in detecting and preventing violations of, and achieving compliance with, applicable securities laws and regulations, and with applicable FINRA rules. Each

member shall review the activities of each office, which shall include the periodic examination of customer accounts to detect and prevent irregularities or abuses. Each member shall also retain a written record of the date upon which each review and inspection is conducted.

(A) Each member shall inspect at least annually (on a calendar-year basis) every OSJ and any branch office that supervises one or more non-branch locations.

(B) Each member shall inspect at least every three years every branch office that does not supervise one or more non-branch locations. In establishing how often to inspect each non-supervisory branch office, the member shall consider whether the nature and complexity of the securities activities for which the location is responsible, the volume of business done at the location, and the number of associated persons assigned to the location require the non-supervisory branch office to be inspected more frequently than every three years. If a member establishes a more frequent inspection cycle, the member must ensure that at least every three years, the inspection requirements enumerated in paragraph (c)(2) have been met. The member's written supervisory and inspection procedures shall set forth the non-supervisory branch office examination cycle, an explanation of the factors the member used in determining the frequency of the examinations in the cycle, and the manner in which a member will comply with paragraph (c)(2) if using more frequent inspections than every three years.

(C) Each member shall inspect on a regular periodic schedule every non-branch location. In establishing such schedule, the member shall consider the nature and complexity of the securities activities for which the location is responsible and the nature and extent of contact with customers. The member's written supervisory and inspection procedures shall set forth the schedule and an explanation regarding how the member determined the frequency of the examination.

(2) An inspection and review by a member pursuant to paragraph (c)(1) must be reduced to a written report and kept on file by the member for a minimum of three years, unless the inspection is being conducted

pursuant to paragraph (c)(1)(C) and the regular periodic schedule is longer than a three-year cycle, in which case the report must be kept on file at least until the next inspection report has been written.

(A) If applicable to the location being inspected, that location's written inspection report must include, without limitation, the testing and verification of the member's policies and procedures, including supervisory policies and procedures in the following areas:

(i) safeguarding of customer funds and securities;

(ii) maintaining books and records;

(iii) supervision of supervisory personnel;

(iv) transmittals of funds (e.g., wires or checks, etc.) or securities from customers to third party accounts; from customer accounts to outside entities (e.g., banks, investment companies, etc.); from customer accounts to locations other than a customer's primary residence (e.g., post office box, "in care of" accounts, alternate address, etc.); and between customers and registered representatives, including the hand-delivery of checks; and

(v) changes of customer account information, including address and investment objectives changes and validation of such changes.

(B) The policies and procedures required by paragraph (c)(2)(A)(iv) must include a means or method of customer confirmation, notification, or follow-up that can be documented. Members may use reasonable risk-based criteria to determine the authenticity of the transmittal instructions.

(C) The policies and procedures required by paragraph (c)(2)(A)(v) must include, for each change processed, a means or method of customer confirmation, notification, or follow-up that can be documented and that complies with SEA Rules 17a-3(a)(17)(i)(B)(2) and 17a-3(a)(17)(i)(B)(3).

(D) If a member does not engage in all of the activities enumerated in paragraphs (c)(2)(A)(i) through (c)(2)(A)(v) at the location being inspected, the member must identify those activities in the member's

written supervisory procedures or the location's written inspection report and document in the member's written supervisory procedures or the location's written inspection report that supervisory policies and procedures for such activities must be in place at that location before the member can engage in them.

(3) For each inspection conducted pursuant to paragraph (c), a member must:

(A) have procedures reasonably designed to prevent the effectiveness of the inspections required pursuant to paragraph (c)(1) of this Rule from being compromised due to the conflicts of interest that may be present with respect to the location being inspected, including but not limited to, economic, commercial, or financial interests in the associated persons and businesses being inspected; and

(B) ensure that the person conducting an inspection pursuant to paragraph (c)(1) is not an associated person assigned to the location or is not directly or indirectly supervised by, or otherwise reporting to, an associated person assigned to the location.

(C) If a member determines that compliance with paragraph (c)(3)(B) is not possible either because of a member's size or its business model, the member must document in the inspection report both the factors the member used to make its determination and how the inspection otherwise complies with paragraph (c)(1).

(d) Transaction Review and Investigation

(1) Each member shall include in its supervisory procedures a process for the review of securities transactions that are reasonably designed to identify trades that may violate the provisions of the Exchange Act, the rules thereunder, or FINRA rules prohibiting insider trading and manipulative and deceptive device that are effected for the:

(A) accounts of the member;

(B) accounts introduced or carried by the member in which a person associated with the member has a beneficial interest or the authority to make investment decisions;

(C) accounts of a person associated with the member that are disclosed to the member pursuant to Rule 3210; and

(D) covered accounts.

(2) Each member must conduct promptly an internal investigation into any such trade to determine whether a violation of those laws or rules has occurred.

(3) A member engaging in investment banking services must file with FINRA, written reports, signed by a senior officer of the member, at such times and, without limitation, including such content, as follows:

(A) within ten business days of the end of each calendar quarter, a written report describing each internal investigation initiated in the previous calendar quarter pursuant to paragraph (d)(2), including the identity of the member, the date each internal investigation commenced, the status of each open internal investigation, the resolution of any internal investigation reached during the previous calendar quarter, and, with respect to each internal investigation, the identity of the security, trades, accounts, associated persons of the member, or associated person of the member's family members holding a covered account, under review, and that includes a copy of the member's policies and procedures required by paragraph (d)(1).

(B) within five business days of completion of an internal investigation pursuant to paragraph (d)(2) in which it was determined that a violation of the provisions of the Exchange Act, the rules thereunder, or FINRA rules prohibiting insider trading and manipulative and deceptive devices had occurred, a written report detailing the completion of the investigation, including the results of the investigation,any internal disciplinary action taken, and any referral of the matter to FINRA, another self-regulatory organization, the SEC, or any other federal, state, or international regulatory authority.

(4) Definitions

For purposes of this Rule:

(A) The term "covered account" shall include any account introduced or carried by the member that is held by:

(i) the spouse of a person associated with the member;

(ii) a child of the person associated with the member or such person's spouse, provided that the child resides in the same household as or is financially dependent upon the person associated with the member;

(iii) any other related individual over whose account the person associated with the member has control; or

(iv) any other individual over whose account the associated person of the member has control and to whose financial support such person materially contributes.

(B) The term "investment banking services" shall include, without limitation, acting as an underwriter, participating in a selling group in an offering for the issuer, or otherwise acting in furtherance of a public offering of the issuer; acting as a financial adviser in a merger or acquisition; providing venture capital or equity lines of credit or serving as placement agent for the issuer or otherwise acting in furtherance of a private offering of the issuer.

(e) Responsibility of Member to Investigate Applicants for Registration

Each member shall ascertain by investigation the good character, business reputation, qualifications and experience of an applicant before the member applies to register that applicant with FINRA and before making a representation to that effect on the application for registration.

If the applicant previously has been registered with FINRA or another self-regulatory organization, the member shall review a copy of the applicant's most recent Form U5, including any amendments thereto, within 60 days of the filing date of an application for registration, or demonstrate to FINRA that it has made reasonable efforts to do so. In conducting its review of the Form U5, the member shall take such action as may be deemed appropriate.

The member shall also review an applicant's employment experience to determine if the applicant has been recently employed by a Futures Commission Merchant or an Introducing Broker that is notice-registered with the SEC pursuant to Section 15(b)(11) of the Exchange Act. In such a case, the member shall also review a copy of the applicant's most recent CFTC Form 8-T, including any amendments thereto, within 60 days of the filing date of an application for registration, or demonstrate to FINRA that it has made reasonable efforts to do so. In conducting its review of a Form 8-T, the member shall take such action as may be deemed appropriate.

In addition, each member shall establish and implement written procedures reasonably designed to verify the accuracy and completeness of the information contained in an applicant's initial or transfer Form U4 no later than 30 calendar days after the form is filed with FINRA. Such procedures shall, at a minimum, provide for a search of reasonably available public records to be conducted by the member, or a third-party service provider, to verify the accuracy and completeness of the information contained in the applicant's initial or transfer Form U4.

(f) Definitions

(1) "Office of Supervisory Jurisdiction" means any office of a member at which any one or more of the following functions take place:

(A) order execution or market making;

(B) structuring of public offerings or private placements;

(C) maintaining custody of customers' funds or securities;

(D) final acceptance (approval) of new accounts on behalf of the member;

(E) review and endorsement of customer orders, pursuant to paragraph (b)(2) above;

(F) final approval of retail communications for use by persons associated with the member, pursuant to Rule 2210(b)(1), except for an office that solely conducts final approval of research reports; or

(G) responsibility for supervising the activities of persons associated with the member at one or more other branch offices of the member.

(2)

(A) A "branch office" is any location where one or more associated persons of a member regularly conducts the business of effecting any transactions in, or inducing or attempting to induce the purchase or sale of, any security, or is held out as such, excluding:

(i) Any location that is established solely for customer service or back office type functions where no sales activities are conducted and that is not held out to the public as a branch office;

(ii) Any location that is the associated person's primary residence; provided that

a. Only one associated person, or multiple associated persons who reside at that location and are members of the same immediate family, conduct business at the location;

b. The location is not held out to the public as an office and the associated person does not meet with customers at the location;

c. Neither customer funds nor securities are handled at that location;

d. The associated person is assigned to a designated branch office, and such designated branch office is reflected on all business cards, stationery, retail communications and other communications to the public by such associated person;

e. The associated person's correspondence and communications with the public are subject to the firm's supervision in accordance with this Rule;

f. Electronic communications (e.g., e-mail) are made through the member's electronic system;

g. All orders are entered through the designated branch office or an electronic system established by the member that is reviewable at the branch office;

h. Written supervisory procedures pertaining to supervision of sales activities conducted at the residence are maintained by the member; and

i. A list of the residence locations is maintained by the member;

(iii) Any location, other than a primary residence, that is used for securities business for less than 30 business days in any one calendar year, provided the member complies with the provisions of subparagraphs (2)(A)(ii)a. through h. above;

(iv) Any office of convenience, where associated persons occasionally and exclusively by appointment meet with customers, which is not held out to the public as an office; *

(v) Any location that is used primarily to engage in non-securities activities and from which the associated person(s) effects no more than 25 securities transactions in any one calendar year; provided that any retail communication identifying such location also sets forth the address and telephone number of the location from which the associated person(s) conducting business at the non-branch locations are directly supervised;

(vi) The Floor of a registered national securities exchange where a member conducts a direct access business with public customers; or

(vii) A temporary location established in response to the implementation of a business continuity plan.

(B) Notwithstanding the exclusions in subparagraph (2)(A), any location that is responsible for supervising the activities of persons associated with the member at one or more non-branch locations of the member is considered to be a branch office.

(C) The term "business day" as used in paragraph (f)(2)(A) of this Rule shall not include any partial business day provided that the associated person spends at least four hours on such business day at his

or her designated branch office during the hours that such office is normally open for business.

Supplementary Material:

.01 Registration of Main Office. A member's main office location is required to be registered and designated as a branch office or OSJ if it meets the definitions of a "branch office" or "office of supervisory jurisdiction" as set forth in Rule 3110(f). In general, the nature of activities conducted at a main office will satisfy the requirements of such terms.

.02 Designation of Additional OSJs. In addition to the locations that meet the definition of OSJ in Rule 3110(f), each member shall also register and designate other offices as OSJs as is necessary to supervise its associated persons in accordance with the standards set forth in Rule 3110. In making a determination as to whether to designate a location as an OSJ, the member should consider the following factors:

(a) whether registered persons at the location engage in retail sales or other activities involving regular contact with public customers;

(b) whether a substantial number of registered persons conduct securities activities at, or are otherwise supervised from, such location;

(c) whether the location is geographically distant from another OSJ of the firm;

(d) whether the member's registered persons are geographically dispersed; and

(e) whether the securities activities at such location are diverse or complex.

.03 Supervision of Multiple OSJs by a Single Principal. Rule 3110(a)(4) requires a member to designate one or more appropriately registered principals in each OSJ with the authority to carry out the supervisory responsibilities assigned to that office ("on-site principal"). The designated on-site principal for each OSJ must have a physical presence, on a regular and routine basis, at each OSJ for which the

principal has supervisory responsibilities. Consequently, there is a general presumption that a principal will not be designated and assigned to be the on-site principal pursuant to Rule 3110(a)(4) to supervise more than one OSJ. If a member determines it is necessary to designate and assign one appropriately registered principal to be the on-site principal pursuant to Rule 3110(a)(4) to supervise two or more OSJs, the member must take into consideration, among others, the following factors:

(a) whether the on-site principal is qualified by virtue of experience and training to supervise the activities and associated persons in each location;

(b) whether the on-site principal has the capacity and time to supervise the activities and associated persons in each location;

(c) whether the on-site principal is a producing registered representative;

(d) whether the OSJ locations are in sufficiently close proximity to ensure that the on-site principal is physically present at each location on a regular and routine basis; and

(e) the nature of activities at each location, including size and number of associated persons, scope of business activities, nature and complexity of products and services offered, volume of business done, the disciplinary history of persons assigned to such locations, and any other indicators of irregularities or misconduct.

The member must establish, maintain, and enforce written supervisory procedures regarding the supervision of all OSJs. In all cases where a member designates and assigns one on-site principal to supervise more than one OSJ, the member must document in the member's written supervisory and inspection procedures the factors used to determine why the member considers such supervisory structure to be reasonable and the determination by the member will be subject to scrutiny.

.04 Annual Compliance Meeting. A member is not required to conduct in-person meetings with each registered person or group of

registered persons to comply with the annual compliance meeting (or interview) required by Rule 3110(a)(7). A member that chooses to conduct compliance meetings using other methods (e.g., on-demand webcast or course, video conference, interactive classroom setting, telephone, or other electronic means) must ensure, at a minimum, that each registered person attends the entire meeting (e.g., an on-demand annual compliance webcast would require each registered person to use a unique user ID and password to gain access and use a technology platform to track the time spent on the webcast, provide click-as-you go confirmation, and have an attestation of completion at the end of a webcast) and is able to ask questions regarding the presentation and receive answers in a timely fashion (e.g., an on-demand annual compliance webcast that allows registered persons to ask questions via an email to a presenter or a centralized address or via a telephone hotline and receive timely responses directly or view such responses on the member's intranet site).

.05 Risk-based Review of Member's Investment Banking and Securities Business. A member may use a risk-based review system to comply with Rule 3110(b)(2)'s requirement that a registered principal review, all transactions relating to the investment banking or securities business of the member. A member is not required to conduct detailed reviews of each transaction if a member is using a reasonably designed risk-based review system that provides a member with sufficient information that permits the member to focus on the areas that pose the greatest numbers and risks of violation.

.06 Risk-based Review of Correspondence and Internal Communications. By employing risk-based principles, a member must decide the extent to which additional policies and procedures for the review of:

(a) incoming and outgoing written (including electronic) correspondence that fall outside of the subject matters listed in Rule 3110(b)(4) are necessary for its business and structure. If a member's procedures do not require that all correspondence be reviewed before use or distribution, the procedures must provide for:

(1) the education and training of associated persons regarding the firm's procedures governing correspondence;

(2) the documentation of such education and training; and

(3) surveillance and follow-up to ensure that such procedures are implemented and followed.

(b) internal communications that are not of a subject matter that require review under FINRA rules and federal securities laws are necessary for its business and structure.

.07 Evidence of Review of Correspondence and Internal Communications. The evidence of review required in Rule 3110(b)(4) must be chronicled either electronically or on paper and must clearly identify the reviewer, the internal communication or correspondence that was reviewed, the date of review, and the actions taken by the member as a result of any significant regulatory issues identified during the review. Merely opening a communication is not sufficient review.

.08 Delegation of Correspondence and Internal Communication Review Functions. In the course of the supervision and review of correspondence and internal communications required by Rule 3110(b)(4), a supervisor/principal may delegate certain functions to persons who need not be registered. However, the supervisor/principal remains ultimately responsible for the performance of all necessary supervisory reviews, irrespective of whether he or she delegates functions related to the review. Accordingly, supervisors/principals must take reasonable and appropriate action to ensure delegated functions are properly executed and should evidence performance of their procedures sufficiently to demonstrate overall supervisory control.

.09 Retention of Correspondence and Internal Communications. Each member shall retain the internal communications and correspondence of associated persons relating to the member's investment banking or securities business for the period of time and accessibility specified in SEA Rule 17a-4(b). The names of the persons who prepared outgoing correspondence and who reviewed the

correspondence shall be ascertainable from the retained records, and the retained records shall be readily available to FINRA, upon request.

.10 Supervision of Supervisory Personnel. A member's determination that it is not possible to comply with paragraphs (b)(6)(C)(i) or (b)(6)(C)(ii) of Rule 3110 prohibiting supervisory personnel from supervising their own activities and from reporting to, or otherwise having compensation or continued employment determined by, a person or persons they are supervising generally will arise in instances where:

(a) the member is a sole proprietor in a single-person firm;

(b) a registered person is the member's most senior executive officer (or similar position); or

(c) a registered person is one of several of the member's most senior executive officers (or similar positions).

.11 Use of Electronic Media to Communicate Written Supervisory Procedures. A member may use electronic media to satisfy its obligation to communicate its written supervisory procedures, and any amendment thereto, pursuant to Rule 3110(b)(7), provided that: (1) the written supervisory procedures have been promptly communicated to, and are readily accessible by, all associated persons to whom such supervisory procedures apply based on their activities and responsibilities through, for example, the member's intranet system; (2) all amendments to the written supervisory procedures are promptly posted to the member's electronic media; (3) associated persons are notified that amendments relevant to their activities and responsibilities have been made to the written supervisory procedures; (4) the member has reasonable procedures to monitor and maintain the security of the material posted to ensure that it cannot be altered by unauthorized persons; and (5) the member retains current and prior versions of its written supervisory procedures in compliance with the applicable record retention requirements of SEA Rule 17a-4(e)(7).

.12 Standards for Reasonable Review. In fulfilling its obligations under Rule 3110(c), each member must conduct a review, at least annually, of the businesses in which it engages. The review must be

reasonably designed to assist in detecting and preventing violations of and achieving compliance with applicable securities laws and regulations and with FINRA rules. Each member shall establish and maintain supervisory procedures that must take into consideration, among other things, the firm's size, organizational structure, scope of business activities, number and location of the firm's offices, the nature and complexity of the products and services offered by the firm, the volume of business done, the number of associated persons assigned to a location, the disciplinary history of registered representatives or associated persons, and any indicators of irregularities or misconduct (i.e., "red flags"), etc. The procedures established and reviews conducted must provide that the quality of supervision at remote locations is sufficient to ensure compliance with applicable securities laws and regulations and with FINRA rules. A member must be especially diligent in establishing procedures and conducting reasonable reviews with respect to a non-branch location where a registered representative engages in securities activities. Based on the factors outlined above, members may need to impose reasonably designed supervisory procedures for certain locations or may need to provide for more frequent reviews of certain locations.

.13 General Presumption of Three-Year Limit for Periodic Inspection Schedules. Rule 3110(c)(1)(C) requires a member to inspect on a regular periodic schedule every non-branch location. In establishing a non-branch location inspection schedule, there is a general presumption that a non-branch location will be inspected at least every three years, even in the absence of any indicators of irregularities or misconduct (i.e., "red flags"). If a member establishes a longer periodic inspection schedule, the member must document in its written supervisory and inspection procedures the factors used in determining that a longer periodic inspection cycle is appropriate.

.14 Exception to Persons Prohibited from Conducting Inspections. A member's determination that it is not possible to comply with Rule 3110(c)(3)(B) with respect to who is not allowed to conduct a location's inspection will generally arise in instances where:

(a) the member has only one office; or

(b) the member has a business model where small or single-person offices report directly to an OSJ manager who is also considered the offices' branch office manager.

.15 Temporary Program to Address Underreported Form U4 Information. FINRA is establishing a temporary program that will issue a refund to members of Late Disclosure Fees assessed for the late filing of responses to Form U4 Question 14M (unsatisfied judgments or liens) if the Form U4 amendment is filed between April 24, 2014 and December 1, 2015 and one of the following conditions is met: (1) the judgment or lien has been satisfied, and at the time it was unsatisfied, it was under $5,000 and the date the judgment or lien was filed with a court (as reported on Form U4 Judgment/Lien DRP, Question 4.A.) was on or before August 13, 2012; or (2) the unsatisfied judgment or lien was satisfied within 30 days after the individual learned of the judgment or lien (as reported on Form U4 Judgment/Lien DRP, Question 4.B.). This program has a retroactive effective date of April 24, 2014, and it will automatically sunset on December 1, 2015. Members will not be able to use the program after December 1, 2015.

.16 Temporary Extension of Time to Complete Office Inspections. Each member obligated to complete an inspection of an office of supervisory jurisdiction, branch office or non-branch location in calendar year 2020 pursuant to, as applicable, paragraphs (c)(1)(A), (B) and (C) under Rule 3110, shall be deemed to have satisfied such obligation if the applicable inspection is completed on or before March 31, 2021.

.17 Temporary Relief to Allow Remote Inspections for Calendar Years 2020, 2021, 2022, 2023, and Through the Earlier of the Effective Date of the Remote Inspections Pilot Program, if Approved, or June 30, 2024.

(a) Use of Remote Inspections. Each member obligated to conduct an inspection of an office of supervisory jurisdiction, branch office or non-branch location in the calendar years specified in this supplementary material pursuant to, as applicable, paragraphs (c)(1)(A), (B) and (C) under Rule 3110 may, subject to the requirements of this Rule 3110.17,

satisfy such obligation by conducting the applicable inspection remotely, without an on-site visit to the office or location. In accordance with Rule 3110.16, inspections for calendar year 2020 must have been completed on or before March 31, 2021. Inspections for calendar year 2021 must have been completed on or before December 31, 2021, for calendar year 2022, on or before December 31, 2022, and for calendar year 2023, on or before December 31, 2023. With respect to a member's obligation to conduct an inspection of an office or location in calendar year 2024, a member has the option to conduct those inspections remotely through the earlier of the effective date of the Remote Inspections Pilot Program proposed in File No. SR-FINRA-2023-007, if approved, or June 30, 2024. Notwithstanding Rule 3110.17, a member shall remain subject to the other requirements of Rule 3110(c).

(b) Written Supervisory Procedures for Remote Inspections. Consistent with a member's obligation under Rule 3110(b)(1), a member that elects to conduct its inspections remotely for any of the calendar years specified in this supplementary material must amend or supplement its written supervisory procedures to provide for remote inspections that are reasonably designed to assist in detecting and preventing violations of and achieving compliance with applicable securities laws and regulations, and with applicable FINRA rules. Reasonably designed procedures for conducting remote inspections of offices or locations should include, among other things: (1) a description of the methodology, including technologies permitted by the member, that may be used to conduct remote inspections; and (2) the use of other risk-based systems employed generally by the member firm to identify and prioritize for review those areas that pose the greatest risk of potential violations of applicable securities laws and regulations, and of applicable FINRA rules.

(c) Effective Supervisory System. The requirement to conduct inspections of offices and locations is one part of the member's overall obligation to have an effective supervisory system and therefore, the member must continue with its ongoing review of the activities and functions occurring at all offices and locations, whether or not the

member conducts inspections remotely. A member's use of a remote inspection of an office or location will be held to the same standards for review as set forth under Rule 3110.12. Where a member's remote inspection of an office or location identifies any indicators of irregularities or misconduct (i.e., "red flags"), the member may need to impose additional supervisory procedures for that office or location or may need to provide for more frequent monitoring of that office or location, including potentially a subsequent physical, on-site visit on an announced or unannounced basis. The temporary relief provided by this Rule 3110.17 does not extend to a member's inspection requirements beyond the earlier of the effective date of the Remote Inspections Pilot Program proposed in File No. SR-FINRA-2023-007, if approved, or June 30, 2024, and such inspections must be conducted in compliance with Rule 3110(c).

(d) Documentation Requirement. A member must maintain and preserve a centralized record for the calendar years specified in this supplementary material that separately identifies: (1) all offices or locations that had inspections that were conducted remotely; and (2) any offices or locations for which the member determined to impose additional supervisory procedures or more frequent monitoring, as provided in Rule 3110.17(c). A member's documentation of the results of a remote inspection for an office or location must identify any additional supervisory procedures or more frequent monitoring for that office or location that were imposed as a result of the remote inspection.

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* Where such office of convenience is located on bank premises, signage necessary to comply with applicable federal and state laws, rules and regulations and applicable rules and regulations of other self-regulatory organizations, and securities and banking regulators may be displayed and shall not be deemed "holding out" for purposes of this section.

4511. General Requirements

(a) Members shall make and preserve books and records as required under the FINRA rules, the Exchange Act and the applicable Exchange Act rules.

(b) Members shall preserve for a period of at least six years those FINRA books and records for which there is no specified period under the FINRA rules or applicable Exchange Act rules.

(c) All books and records required to be made pursuant to the FINRA rules shall be preserved in a format and media that complies with SEA Rule 17a-4.

8210. Provision of Information and Testimony and Inspection and Copying of Books

(a) Authority of Adjudicator and FINRA Staff

For the purpose of an investigation, complaint, examination, or proceeding authorized by the FINRA By-Laws or rules, an Adjudicator or FINRA staff shall have the right to:

(1) require a member, person associated with a member, or any other person subject to FINRA's jurisdiction to provide information orally, in writing, or electronically (if the requested information is, or is required to be, maintained in electronic form) and to testify at a location specified by FINRA staff, under oath or affirmation administered by a court reporter or a notary public if requested, with respect to any matter involved in the investigation, complaint, examination, or proceeding; and

(2) inspect and copy the books, records, and accounts of such member or person with respect to any matter involved in the investigation, complaint, examination, or proceeding that is in such member's or person's possession, custody or control.

(b) Other SROs and Regulators

(1) FINRA staff may enter into an agreement with a domestic federal agency, or subdivision thereof, or foreign regulator to share any information in FINRA's possession for any regulatory purpose set forth in such agreement, provided that the agreement must require the other regulator, in accordance with the terms of the agreement, to treat any shared information confidentially and to assert such confidentiality and other applicable privileges in response to any requests for such information from third parties.

Any such agreement with a foreign regulator must also meet the following conditions:

(A) the other regulator party to the agreement must have jurisdiction over common regulatory matters; and

(B) the agreement must require the other regulator to reciprocate and share with FINRA information of regulatory interest or concern to FINRA.

(2) FINRA staff may exercise the authority set forth in paragraph (a) for the purpose of an investigation, complaint, examination, or proceeding conducted by another domestic or foreign self-regulatory organization, association, securities or contract market, or regulator of such markets with which FINRA has entered into an agreement providing for the exchange of information and other forms of material assistance solely for market surveillance, investigative, enforcement, or other regulatory purposes.

(c) Requirement to Comply

No member or person shall fail to provide information or testimony or to permit an inspection and copying of books, records, or accounts pursuant to this Rule.

(d) Notice

A notice under this Rule shall be deemed received by the member or currently or formerly registered person to whom it is directed by mailing or otherwise transmitting the notice to the last known business address of the member or the last known residential address of the person as reflected in the Central Registration Depository. With respect to a person who is currently associated with a member in an unregistered capacity, a notice under this Rule shall be deemed received by the person by mailing or otherwise transmitting the notice to the last known business address of the member as reflected in the Central Registration Depository. With respect to a person subject to FINRA's jurisdiction who was formerly associated with a member in an unregistered capacity, a notice under this Rule shall be deemed received by the person upon personal service, as set forth in Rule 9134(a)(1).

If the Adjudicator or FINRA staff responsible for mailing or otherwise transmitting the notice to the member or person has actual knowledge that the address in the Central Registration Depository is out

of date or inaccurate, then a copy of the notice shall be mailed or otherwise transmitted to:

(1) the last known business address of the member or the last known residential address of the person as reflected in the Central Registration Depository; and

(2) any other more current address of the member or the person known to the Adjudicator or FINRA staff who is responsible for mailing or otherwise transmitting the notice.

If the Adjudicator or FINRA staff responsible for mailing or otherwise transmitting the notice to the member or person knows that the member or person is represented by counsel regarding the investigation, complaint, examination, or proceeding that is the subject of the notice, then the notice shall be served upon counsel by mailing or otherwise transmitting the notice to the counsel in lieu of the member or person, and any notice served upon counsel shall be deemed received by the member or person.

(e) Electronic Interface

In carrying out its responsibilities under this Rule, FINRA may, as appropriate, establish programs for the submission of information to FINRA on a regular basis through a direct or indirect electronic interface between FINRA and members.

(f) Inspection and Copying

A witness, upon proper identification, may inspect the official transcript of the witness' own testimony. Upon written request, a person who has submitted documentary evidence or testimony in a FINRA investigation may procure a copy of the person's documentary evidence or the transcript of the person's testimony upon payment of the appropriate fees, except that prior to the issuance of a complaint arising from the investigation, FINRA staff may for good cause deny such request.

(g) Encryption of Information Provided in Electronic Form

(1) Any member or person who, in response to a request pursuant to this Rule, provides the requested information on a portable media device must ensure that such information is encrypted.

(2) For purposes of this Rule, a "portable media device" is a storage device for electronic information, including but not limited to a flash drive, CD-ROM, DVD, portable hard drive, laptop computer, disc, diskette, or any other portable device for storing and transporting electronic information.

(3) For purposes of this Rule, "encrypted" means the transformation of data into a form in which meaning cannot be assigned without the use of a confidential process or key. To ensure that encrypted information is secure, a member or person providing encrypted information to FINRA staff pursuant to this Rule shall (a) use an encryption method that meets industry standards for strong encryption, and (b) provide the confidential process or key regarding the encryption to FINRA staff in a communication separate from the encrypted information itself.

Supplementary Material:

.01 Books and Records Relating to Investigations. This rule requires FINRA members, associated persons and persons subject to FINRA's jurisdiction to provide FINRA staff and adjudicators with requested books, records and accounts. In specifying the books, records and accounts "of such member or person," paragraph (a) of the rule refers to books, records and accounts that the broker-dealer or its associated persons make or keep relating to its operation as a broker-dealer or relating to the person's association with the member. This includes but is not limited to records relating to a FINRA investigation of outside business activities, private securities transactions or possible violations of just and equitable principles of trade, as well as other FINRA rules, MSRB rules, and the federal securities laws. It does not ordinarily include books and records that are in the possession, custody or control of a member or associated person, but whose bona fide ownership is held by an independent third party and the records are unrelated to the business of the member. The rule requires, however, that a FINRA member, associated person, or person subject to FINRA's jurisdiction must make available its books, records or accounts when these books, records or accounts are in the possession of another person or entity, such as a professional service provider, but the FINRA member, associated person or person subject to FINRA's jurisdiction controls or has a right to demand them.

9211. Authorization of Complaint

(a) Complaint

(1) If the Department of Enforcement believes that any FINRA member or associated person is violating or has violated any rule, regulation, or statutory provision, including the federal securities laws and the regulations thereunder, which FINRA has jurisdiction to enforce, the Department of Enforcement may request authorization from the Office of Disciplinary Affairs to issue a complaint.

(2) The FINRA Regulation Board and the FINRA Board each shall have the authority to direct the Office of Disciplinary Affairs to authorize and the Department of Enforcement to issue a complaint when, on the basis of information and belief, either of such boards is of the opinion that any FINRA member or associated person is violating or has violated any rule, regulation, or statutory provision, including the federal securities laws and the regulations thereunder, which FINRA has jurisdiction to enforce.

(b) Commencement of Disciplinary Proceeding

A disciplinary proceeding shall begin when the complaint is served and filed.

9212. Complaint Issuance — Requirements, Service, Amendment, Withdrawal, and Docketing

(a) Form, Content, Notice, Docketing, and Service

(1) If a complaint is authorized, the Department of Enforcement shall issue the complaint. Each complaint shall be in writing and signed by the Department of Enforcement. The complaint shall specify in reasonable detail the conduct alleged to constitute the violative activity and the rule, regulation, or statutory provision the Respondent is alleged to be violating or to have violated. If the complaint consists of several causes of action, each cause shall be stated separately. Complaints shall be served by the Department of Enforcement on each Party pursuant to Rules 9131 and 9134, and filed at the time of service with the Office of Hearing Officers pursuant to Rules 9135, 9136, and 9137.

(2) At the time of issuance of a complaint, the Department of Enforcement may propose:

(A) an appropriate location for the hearing; and

(B) if the complaint alleges at least one cause of action involving a violation of a statute or a rule described in Rule 9120 (u), that the Chief Hearing Officer select a Market Regulation Committee Panelist for the Hearing Panel, or, if applicable, the Extended Hearing Panel as described in Rule 9231.

(b) Amendments to Complaint

The Department of Enforcement may file and serve an amended complaint once as a matter of course at any time before the Respondent answers the complaint. Otherwise, upon motion by the Department of Enforcement, the Hearing Officer may permit the Department of Enforcement to amend the complaint, including amendments so as to make the complaint conform to the evidence presented, after considering whether the Department of Enforcement has shown good cause for the amendment and whether any Respondent will suffer any unfair prejudice if the amendment is allowed. Amendments to complaints will be freely granted when justice so requires.

(c) Withdrawal of Complaint

With prior leave of the Hearing Officer, the Department of Enforcement may withdraw a complaint. If the Department of Enforcement withdraws the complaint before the earlier of (1) the Hearing Panel's or, if applicable, the Extended Hearing Panel's, issuance of a ruling on a motion for summary disposition, or (2) the start of the hearing on the merits, the withdrawal of the complaint by the Department of Enforcement shall be without prejudice and the Department of Enforcement shall be permitted to refile a case based on allegations concerning the same facts and circumstances that are set forth in the withdrawn complaint. If the Department of Enforcement requests to withdraw such complaint after the occurrence of either of the two events set forth in (1) and (2) in this paragraph, the Hearing Panel or, if applicable, the Extended Hearing Panel, after considering the facts and circumstances of the request, shall determine whether the withdrawal shall be granted with prejudice.

(d) Disciplinary Proceeding Docket

The Office of Hearing Officers shall promptly record each complaint filed with it in FINRA's disciplinary proceeding docket, and record in the disciplinary proceeding docket each event, filing, and change in the status of a disciplinary proceeding.

9213. Assignment of Hearing Officer and Appointment of Panelists to Hearing Panel or Extended Hearing Panel

(a) Assignment of Hearing Officer

As soon as practicable after the Department of Enforcement has filed a complaint with the Office of Hearing Officers, the Chief Hearing Officer shall assign a Hearing Officer to preside over the disciplinary proceeding and shall serve the Parties with notice of the Hearing Officer's assignment pursuant to Rule 9132.

(b) Appointment of Panelists

As soon as practicable after assigning a Hearing Officer to preside over a disciplinary proceeding, the Chief Hearing Officer shall appoint Panelists pursuant to Rules 9231 and 9232 to a Hearing Panel or, if the Chief Hearing Officer determines that an Extended Hearing Panel should be appointed, to an Extended Hearing Panel.

9235. Hearing Officer Authority

(a) Hearing Officer Authority

The Hearing Officer shall be selected by the Chief Hearing Officer and shall have authority to do all things necessary and appropriate to discharge his or her duties. In addition to the powers exercised by all members of the Hearing Panel or, if applicable, the Extended Hearing Panel, the powers of the Hearing Officer include, but are not limited to:

(1) holding pre-hearing and other conferences and requiring the attendance at any such conference of at least one representative of each Party who has authority to negotiate the resolution of issues in controversy;

(2) regulating the course of the hearing;

(3) ordering the Parties to present oral arguments at any stage of the disciplinary proceeding;

(4) resolving any and all procedural and evidentiary matters, discovery requests, and other non-dispositive motions, subject to any limitations set forth elsewhere in the Code;

(5) reopening any hearing, upon notice to all Parties, prior to the issuance of the decision of the Hearing Panel or, if applicable, the Extended Hearing Panel;

(6) creating and maintaining the official record of the disciplinary proceeding;

(7) drafting a decision that represents the views of the majority of the Hearing Panel or, if applicable, the Extended Hearing Panel; and

(8) ruling on a motion pursuant to Rule 9285 for conditions or restrictions.

(b) Authority in the Absence of Hearing Officer

If the Hearing Officer appointed to a case is temporarily unavailable or unable for any reason to discharge his or her duties in a particular proceeding under conditions not requiring the appointment of

a replacement Hearing Officer, the Chief Hearing Officer or the Deputy Chief Hearing Officer in his or her discretion may exercise the necessary authority in the same manner as if he or she had been appointed Hearing Officer in the particular proceeding.

9252. Requests for Information

(a) Content and Timing of Requests

A Respondent who requests that FINRA invoke Rule 8210 to compel the production of Documents or testimony at the hearing shall do so in writing and serve copies on all Parties. Such request shall: be submitted to the Hearing Officer no later than 21 days before the scheduled hearing date; describe with specificity the Documents, the category or type of Documents, or the testimony sought; state why the Documents, the category or type of Documents, or the testimony are material; describe the requesting Party's previous efforts to obtain the Documents, the category or type of Documents, or the testimony through other means; and state whether the custodian of each Document, or the custodian of the category or type of Documents, or each proposed witness is subject to FINRA's jurisdiction.

(b) Standards for Issuance

A request that FINRA compel the production of Documents or testimony shall be granted only upon a showing that: the information sought is relevant, material, and non-cumulative; the requesting Party has previously attempted in good faith to obtain the desired Documents and testimony through other means but has been unsuccessful in such efforts; and each of the persons from whom the Documents and testimony are sought is subject to FINRA's jurisdiction. In addition, the Hearing Officer shall consider whether the request is unreasonable, oppressive, excessive in scope, or unduly burdensome, and whether the request should be denied, limited, or modified.

(c) Limitations on Requests

If, after consideration of all the circumstances, the Hearing Officer determines that a request submitted pursuant to this Rule is unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she shall deny the request, or grant it only upon such conditions as fairness requires. In making the foregoing determination, the Hearing Officer may inquire of the other Parties whether they shall stipulate to the facts sought to be proved by the Documents or testimony sought. If

the Hearing Officer grants the request, the Hearing Officer shall order that requested Documents be produced to all Parties not less than ten days before the hearing, and order that witnesses whose testimony was requested appear and testify at the hearing. If the Hearing Officer grants the request ten or fewer days before a hearing on the merits is scheduled to begin or after such hearing begins, the Documents or testimony shall be produced immediately to all Parties.

9253. Production of Witness Statements

(a) Availability

Notwithstanding the provisions of Rule 9251(b),

(1) A Respondent in a disciplinary proceeding may file a motion requesting that the Department of Enforcement produce for inspection and copying any statement of any person called or to be called as a witness by the Department of Enforcement that pertains, or is expected to pertain, to his or her direct testimony and which is "a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement," as that phrase is used in 18 U.S.C. § 3500(e)(2).

(2) A Respondent in a disciplinary proceeding may also file a motion requesting that the Department of Enforcement produce for inspection and copying any contemporaneously written statement made by an Interested FINRA Staff member during a routine examination or inspection about the substance of oral statements made by a non-FINRA person when (a) either the Interested FINRA Staff member or non-FINRA person is called as a witness by the Department of Enforcement, and (b) that portion of the statement for which production is sought directly relates to the Interested FINRA Staff member's testimony or the testimony of the non-FINRA witness.

(b) Failure to Produce — Harmless Error

In the event that a statement required to be made available for inspection and copying by a Respondent is not provided by the Department of Enforcement, there shall be no rehearing of a proceeding already heard, or issuance of an amended decision in a proceeding already decided, unless the Respondent establishes that the failure to provide the statement was not harmless error. The Hearing Officer, or upon appeal or review, a Subcommittee, an Extended Proceeding Committee, or the National Adjudicatory Council, shall determine whether the failure to provide any statement was not harmless error, applying applicable FINRA, SEC, and federal judicial precedent.

9263. Evidence: Admissibility

(a) Criteria for Receiving and Excluding Evidence

The Hearing Officer shall receive relevant evidence, and may exclude all evidence that is irrelevant, immaterial, unduly repetitious, or unduly prejudicial.

(b) Objections

Objections to the admission or exclusion of evidence shall be made on the record and shall succinctly state the grounds relied upon. Excluded material shall be deemed a supplemental document, which shall be attached to the record and retained under Rule 9267.

9268. Decision of Hearing Panel or Extended Hearing Panel

(f) Effectiveness of Sanctions

(2) a bar or an expulsion specified in a decision shall become effective immediately upon the decision becoming the final disciplinary action of FINRA for purposes of SEA Rule 19d-1(c)(1).

9280. Contemptuous Conduct

(a) Persons Subject to Sanctions

If a Party, attorney for a Party, or other person authorized to represent others by Rule 9141, engages in conduct in violation of an order of a Hearing Officer, a Hearing Panel or, if applicable, an Extended Hearing Panel, or other contemptuous conduct during a proceeding, a Hearing Officer, Hearing Panel or, if applicable, an Extended Hearing Panel, may:

(1) subject the Party, attorney for a Party, or other person authorized to represent others by Rule 9141, to the sanctions set forth in paragraph (b); and

(2) exclude an attorney for a Party, or other person authorized to represent others by Rule 9141, under Rule 9150.

(b) Sanctions Other Than Exclusion

A Hearing Officer, Hearing Panel or, if applicable, an Extended Hearing Panel, may make such orders as are just in regard to a Party, an attorney for a Party, or other person authorized to represent others by Rule 9141.

(1) Such orders may include:

(A) an order providing that the matters on which the order is made or any other designated facts shall be taken to be established for the purposes of the disciplinary proceeding in accordance with the claim of the Party obtaining the order;

(B) an order providing that the disobedient Party may not support or oppose designated claims or defenses, or may not introduce designated matters in evidence;

(C) an order providing that pleadings or a specified part of the pleading shall be stricken, or an order providing that the proceeding shall be stayed until the Party subject to the order obeys it;

(D) in lieu of any of the foregoing orders or in addition thereto, an order providing that contemptuous conduct includes the failure to obey any order; and

(E) an order as provided in subparagraphs (A), (B), and (C) where a Party has failed to comply with an order to produce a person for examination, unless the Party failing to comply shows that such Party is unable to produce such person for examination.

(2) A Party that without substantial justification fails to disclose information required by the Rule 9240 Series and the Rule 9250 Series or otherwise required by order of the Hearing Officer, Hearing Panel or, if applicable, the Extended Hearing Panel, shall not, unless such failure is harmless, be permitted to use as evidence at a hearing, in a motion or in any other filing of papers, or in oral argument, any witness or information not so disclosed. In addition to, or in lieu of this sanction, the Hearing Officer, Hearing Panel or, if applicable, the Extended Hearing Panel, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. These sanctions may include any of the sanctions provided for in paragraphs (b)(1)(A) through (C).

(c) National Adjudicatory Council Review of Exclusions

If an attorney for a Party, or other person authorized to represent others by Rule 9141, is excluded from a disciplinary hearing or conference, or any portion thereof, such attorney or other person may seek review of the exclusion by filing a motion to vacate with the National Adjudicatory Council. Such motion to vacate shall be filed and served on all Parties within five days after service of the exclusion order. Any response shall be filed with the National Adjudicatory Council and served on all Parties within five days after the service of the motion to vacate. The National Adjudicatory Council or the Review Subcommittee shall consider such motion on an expedited basis and promptly issue a written order. The filing of a motion to vacate shall stay all aspects of the disciplinary proceeding until at least seven days after service of the order of the National Adjudicatory Council or the Review Subcommittee. The

review proceedings shall be conducted on the basis of the written record without oral argument.

(d) Adjournment

The hearing, conferences, or other activities relating to the disciplinary proceeding shall be stayed pending the review by the National Adjudicatory Council or the Review Subcommittee of an exclusion order in paragraph (c). In the event that the National Adjudicatory Council or the Review Subcommittee upholds an exclusion of an attorney or other person authorized to represent others by Rule 9141, the Hearing Officer may, upon motion by a Party represented by an attorney or other person subject to an order of exclusion, grant an adjournment to allow the retention of new counsel or selection of a new representative. In determining whether to grant an adjournment or the length of an adjournment, the Hearing Officer shall consider whether there are other counsel or representatives of record on behalf of the Party, the availability of other counsel or other members of an excluded attorney's firm, or the availability of other representatives for the Party, and any other relevant factors.

9311. Appeal by Any Party; Cross-Appeal

(a) Time to File Notice of Appeal

A Respondent or the Department of Enforcement may file a written notice of appeal within 25 days after service of a decision issued pursuant to Rule 9268 or Rule 9269.

(b) Effect

An appeal to the National Adjudicatory Council from a decision issued pursuant to Rule 9268 or Rule 9269 shall operate as a stay of that decision until the National Adjudicatory Council issues a decision pursuant to Rule 9349 or, in cases called for discretionary review by the FINRA Board, until a decision is issued pursuant to Rule 9351. Any such appeal, however, will not stay a decision, or that part of a decision, that imposes a permanent cease and desist order. Notwithstanding the stay of sanctions under this Rule, the Hearing Officer may impose such conditions and restrictions on the activities of a Respondent as the Hearing Officer considers reasonably necessary for the purpose of preventing customer harm in accordance with Rule 9285(a), and the Review Subcommittee shall consider any motion filed pursuant to Rule 9285(b) to modify or remove any or all of the conditions or restrictions.

(c) Notice of Appeal Content and Signature Requirements

A Party appealing pursuant to this Rule shall file a written notice of appeal with the Office of Hearing Officers and serve the notice on the Parties. The notice of appeal shall be signed by the appealing Party, or his or her counsel or representative, and shall contain:

(1) the name of the disciplinary proceeding;

(2) the disciplinary proceeding docket number;

(3) the name of the Party on whose behalf the appeal is made;

(4) a statement on whether oral argument before the National Adjudicatory Council is requested; and

(5) a brief statement of the findings, conclusions, or sanctions as to which exceptions are taken.

(d) Notice of Cross-Appeal

A Party who is served with a notice of appeal may file a written notice of cross-appeal and serve the notice of cross-appeal on the Parties. The notice of cross-appeal shall be filed within five days after service of the notice of appeal. The notice of cross-appeal shall be signed by the Party cross-appealing, or his or her counsel, and shall contain the information set forth in paragraphs (c)(1), (c)(2), (c)(4), and (c)(5), and the name of the Party on whose behalf the cross-appeal is made.

(e) Waiver of Issues Not Raised

The National Adjudicatory Council may, in its discretion, deem waived any issue not raised in the notice of appeal or cross-appeal. The National Adjudicatory Council, the Review Subcommittee, a Subcommittee, the General Counsel or, if applicable, an Extended Proceeding Committee, shall provide the Parties with notice of, and an opportunity to submit briefs on, any issue that shall be considered by the National Adjudicatory Council if such issue was not previously set forth in the notice of appeal. Parties may submit motions to either the Review Subcommittee or the National Adjudicatory Council challenging requests for briefing made by the General Counsel under this Rule of issues that were not previously set forth in the notice of appeal.

(f) Withdrawal of Notice of Appeal or Cross-Appeal

A Party may withdraw a notice of appeal or a notice of cross-appeal filed by him or her at any time by filing a written notice of withdrawal of appeal or cross-appeal with the Office of Hearing Officers and serving notice thereof on the Parties. The notice of withdrawal of appeal or cross-appeal shall contain: the name of the disciplinary proceeding; the disciplinary proceeding docket number; and the name of the Party on whose behalf the notice of appeal or cross-appeal was filed previously. The notice of withdrawal of appeal or cross-appeal shall be signed by the Party, or his or her counsel or representative. Upon the withdrawal of a

notice of appeal, any outstanding cross-appeal shall be treated as an appeal unless it is withdrawn.

(g) FINRA Notification to Member

When an appeal is filed from a decision finding that a Respondent violated a statute or rule provision, the Office of Hearing Officers shall promptly notify each FINRA member with which the Respondent is associated that an appeal has been filed.

9348. Powers of the National Adjudicatory Council on Review

In any appeal or review proceeding pursuant to the Rule 9300 Series, the National Adjudicatory Council may affirm, dismiss, modify, or reverse with respect to each finding, or remand the disciplinary proceeding with instructions. The National Adjudicatory Council may affirm, modify, reverse, increase, or reduce any sanction (including the terms of any permanent cease and desist order), or impose any other fitting sanction.

9349. National Adjudicatory Council Formal Consideration; Decision

(a) Decision of National Adjudicatory Council, Including Remand

In an appeal or review of a disciplinary proceeding governed by the Rule 9300 Series that is not withdrawn or dismissed prior to a decision on the merits, the National Adjudicatory Council, after considering all matters presented in the appeal or review and the written recommended decision of the Subcommittee or, if applicable, the Extended Proceeding Committee, may affirm, dismiss, modify or reverse the decision of the Hearing Panel or, if applicable, Extended Hearing Panel, with respect to each Respondent who has appealed or cross-appealed or is subject to a call for review. The National Adjudicatory Council may affirm, modify, reverse, increase, or reduce any sanction, or impose any other fitting sanction. Alternatively, the National Adjudicatory Council or the Review Subcommittee may remand the disciplinary proceeding with instructions. The National Adjudicatory Council shall prepare a proposed written decision pursuant to paragraph (b).

(b) Contents of Decision

The decision shall include:

(1) a statement describing the investigative or other origin of the disciplinary proceeding, if not otherwise contained in the record;

(2) the specific statutory or rule provisions that were alleged to have been violated;

(3) a statement setting forth the findings of fact with respect to any act or practice the Respondent was alleged to have committed or omitted;

(4) the conclusions as to whether the Respondent violated any provision alleged in the complaint;

(5) a statement in support of the disposition of the principal issues raised in the proceeding; and

(6) a statement describing any sanction imposed, the reasons therefor, and, pursuant to Rule 9360, the date upon which such sanction shall become effective.

(c) Issuance of Decision After Expiration of Call for Review Period

The National Adjudicatory Council shall provide its proposed written decision to the FINRA Board. The FINRA Board may call the disciplinary proceeding for review pursuant to Rule 9351. If the FINRA Board does not call the disciplinary proceeding for review, the proposed written decision of the National Adjudicatory Council shall become final, and the National Adjudicatory Council shall serve its written decision on the Parties and provide a copy to each member of FINRA with which a Respondent is associated. The National Adjudicatory Council may serve its written decision by electronic mail. Service by electronic mail shall be deemed complete upon sending the decision. The decision shall constitute the final disciplinary action of FINRA for purposes of SEA Rule 19d-1(c)(1), unless the National Adjudicatory Council remands the proceeding.

9370. Application to SEC for Review

(a) Appeal to SEC; Effect

A Respondent aggrieved by final disciplinary action pursuant to the Rule 9200 Series or the Rule 9300 Series may apply for review by the SEC pursuant to Section 19(d)(2) of the Exchange Act. The filing with the SEC of an application for review by the SEC shall stay the effectiveness of any sanction, other than a bar or an expulsion, imposed in a decision constituting final disciplinary action of FINRA for purposes of SEA Rule 19d-1(c)(1).

(b) FINRA Notification to Member

FINRA shall promptly notify any FINRA member with which a Respondent is associated if the Respondent files an application for review to the SEC.

NASD Rules

3010. Supervision

This rule is no longer applicable. NASD IM-3010 has been superseded by FINRA Rule 3110.
Please consult the appropriate FINRA Rule.

(a) Supervisory System

Each member shall establish and maintain a system to supervise the activities of each registered representative, registered principal, and other associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable NASD Rules. Final responsibility for proper supervision shall rest with the member. A member's supervisory system shall provide, at a minimum, for the following:

(1) The establishment and maintenance of written procedures as required by paragraphs (b) and (c) of this Rule.

(2) The designation, where applicable, of an appropriately registered principal(s) with authority to carry out the supervisory responsibilities of the member for each type of business in which it engages for which registration as a broker/dealer is required.

(3) The designation as an office of supervisory jurisdiction (OSJ) of each location that meets the definition contained in paragraph (g) of this Rule. Each member shall also designate such other OSJs as it determines to be necessary in order to supervise its registered representatives, registered principals, and other associated persons in accordance with the standards set forth in this Rule, taking into consideration the following factors:

(A) whether registered persons at the location engage in retail sales or other activities involving regular contact with public customers;

(B) whether a substantial number of registered persons conduct securities activities at, or are otherwise supervised from, such location;

(C) whether the location is geographically distant from another OSJ of the firm;

(D) whether the member's registered persons are geographically dispersed; and

(E) whether the securities activities at such location are diverse and/or complex.

(4) The designation of one or more appropriately registered principals in each OSJ, including the main office, and one or more appropriately registered representatives or principals in each non-OSJ branch office with authority to carry out the supervisory responsibilities assigned to that office by the member.

(5) The assignment of each registered person to an appropriately registered representative(s) and/or principal(s) who shall be responsible for supervising that person's activities.

(6) Reasonable efforts to determine that all supervisory personnel are qualified by virtue of experience or training to carry out their assigned responsibilities.

(7) The participation of each registered representative and registered principal, either individually or collectively, no less than annually, in an interview or meeting conducted by persons designated by the member at which compliance matters relevant to the activities of the representative(s) and principal(s) are discussed. Such interview or meeting may occur in conjunction with the discussion of other matters and may be conducted at a central or regional location or at the representative's(') or principal's(') place of business.

(b) Written Procedures

(1) Each member shall establish, maintain, and enforce written procedures to supervise the types of business in which it engages and to supervise the activities of registered representatives, registered principals, and other associated persons that are reasonably designed to achieve compliance with applicable securities laws and regulations, and with the applicable Rules of NASD.

(2) Tape recording of conversations

(A) Each member that either is notified by NASD or otherwise has actual knowledge that it meets one of the criteria in paragraph (b)(2)(H) relating to the employment history of its registered persons at a Disciplined Firm as defined in paragraph (b)(2)(J) shall establish, maintain, and enforce special written procedures for supervising the telemarketing activities of all of its registered persons.

(B) The member must establish and implement the supervisory procedures required by this paragraph within 60 days of receiving notice from NASD or obtaining actual knowledge that it is subject to the provisions of this paragraph.

A member that meets one of the criteria in paragraph (b)(2)(H) for the first time may reduce its staffing levels to fall below the threshold levels within 30 days after receiving notice from NASD pursuant to the provisions of paragraph (b)(2)(A) or obtaining actual knowledge that it is subject to the provisions of the paragraph, provided the firm promptly notifies the Department of Member Regulation, NASD, in writing of its becoming subject to the Rule. Once the member has reduced its staffing levels to fall below the threshold levels, it shall not rehire a person terminated to accomplish the staff reduction for a period of 180 days. On or prior to reducing staffing levels pursuant to this paragraph, a member must provide the Department of Member Regulation, NASD with written notice, identifying the terminated person(s).

(C) The procedures required by this paragraph shall include tape-recording all telephone conversations between the member's registered persons and both existing and potential customers.

(D) The member shall establish reasonable procedures for reviewing the tape recordings made pursuant to the requirements of this paragraph to ensure compliance with applicable securities laws and regulations and applicable rules of NASD. The procedures must be appropriate for the member's business, size, structure, and customers.

(E) All tape recordings made pursuant to the requirements of this paragraph shall be retained for a period of not less than three years from

the date the tape was created, the first two years in an easily accessible place. Each member shall catalog the retained tapes by registered person and date.

(F) Such procedures shall be maintained for a period of three years from the date that the member establishes and implements the procedures required by the provisions of this paragraph.

(G) By the 30th day of the month following the end of each calendar quarter, each member firm subject to the requirements of this paragraph shall submit to NASD a report on the member's supervision of the telemarketing activities of its registered persons.

(H) The following members shall be required to adopt special supervisory procedures over the telemarketing activities of their registered persons:

• A firm with at least five but fewer than ten registered persons, where 40% or more of its registered persons have been associated with one or more Disciplined Firms in a registered capacity within the last three years;

• A firm with at least ten but fewer than twenty registered persons, where four or more of its registered persons have been associated with one or more Disciplined Firms in a registered capacity within the last three years;

• A firm with at least twenty registered persons, where 20% or more of its registered persons have been associated with one or more Disciplined Firms in a registered capacity within the last three years.

For purposes of the calculations required in subparagraph (H), firms should not include registered persons who:

(1) have been registered for an aggregate total of 90 days or less with one or more Disciplined Firms within the past three years; and

(2) do not have a disciplinary history.

(I) For purposes of this Rule, the term "registered person" means any person registered with NASD as a representative, principal, or

assistant representative pursuant to the Rule 1020, 1030, 1040, and 1110 Series or pursuant to Municipal Securities Rulemaking Board ("MSRB") Rule G-3.

(J) For purposes of this Rule, the term "disciplined firm" means either a member that, in connection with sales practices involving the offer, purchase, or sale of any security, has been expelled from membership or participation in any securities industry self-regulatory organization or is subject to an order of the Securities and Exchange Commission revoking its registration as a broker/dealer; or a futures commission merchant or introducing broker that has been formally charged by either the Commodity Futures Trading Commission or a registered futures association with deceptive telemarketing practices or promotional material relating to security futures, those charges have been resolved, and the futures commission merchant or introducing broker has been closed down and permanently barred from the futures industry as a result of those charges; or a futures commission merchant or introducing broker that, in connection with sales practices involving the offer, purchase, or sale of security futures is subject to an order of the Securities and Exchange Commission revoking its registration as a broker or dealer.

(K) For purposes of this Rule, the term "disciplinary history" means a finding of a violation by a registered person in the past five years by the Securities and Exchange Commission, a self-regulatory organization, or a foreign financial regulatory authority of one or more of the provisions (or comparable foreign provision) listed in IM-1011-1 or rules or regulations thereunder.

(L) Pursuant to the Rule 9600 Series, NASD may in exceptional circumstances, taking into consideration all relevant factors, exempt any member unconditionally or on specified terms and conditions from the requirements of this paragraph. A member seeking an exemption must file a written application pursuant to the Rule 9600 Series within 30 days after receiving notice from NASD or obtaining actual knowledge that it meets one of the criteria in paragraph (b)(2)(H). A member that meets one of the criteria in paragraph (b)(2)(H) for the first time may elect to

reduce its staffing levels pursuant to the provisions of paragraph (b)(2)(B) or, alternatively, to seek an exemption pursuant to paragraph (b)(2)(L), as appropriate; such a member may not seek relief from the Rule by both reducing its staffing levels pursuant to paragraph (b)(2)(B) and requesting an exemption.

(3) The member's written supervisory procedures shall set forth the supervisory system established by the member pursuant to paragraph (a) above, and shall include the titles, registration status and locations of the required supervisory personnel and the responsibilities of each supervisory person as these relate to the types of business engaged in, applicable securities laws and regulations, and the Rules of this Association. The member shall maintain on an internal record the names of all persons who are designated as supervisory personnel and the dates for which such designation is or was effective. Such record shall be preserved by the member for a period of not less than three years, the first two years in an easily accessible place.

(4) A copy of a member's written supervisory procedures, or the relevant portions thereof, shall be kept and maintained in each OSJ and at each location where supervisory activities are conducted on behalf of the member. Each member shall amend its written supervisory procedures as appropriate within a reasonable time after changes occur in applicable securities laws and regulations, including the Rules of this Association, and as changes occur in its supervisory system, and each member shall be responsible for communicating amendments through its organization.

(c) Internal Inspections

(1) Each member shall conduct a review, at least annually, of the businesses in which it engages, which review shall be reasonably designed to assist in detecting and preventing violations of, and achieving compliance with, applicable securities laws and regulations, and with applicable NASD rules. Each member shall review the activities of each office, which shall include the periodic examination of customer accounts to detect and prevent irregularities or abuses.

(A) Each member shall inspect at least annually every office of supervisory jurisdiction and any branch office that supervises one or more non-branch locations.

(B) Each member shall inspect at least every three years every branch office that does not supervise one or more non-branch locations. In establishing how often to inspect each non-supervisory branch office, the firm shall consider whether the nature and complexity of the securities activities for which the location is responsible, the volume of business done, and the number of associated persons assigned to the location require the non-supervisory branch office to be inspected more frequently than every three years. If a member establishes a more frequent inspection cycle, the member must ensure that at least every three years, the inspection requirements enumerated in paragraph (c)(2) have been met. The non-supervisory branch office examination cycle, an explanation of the factors the member used in determining the frequency of the examinations in the cycle, and the manner in which a member will comply with paragraph (c)(2) if using more frequent inspections than every three years shall be set forth in the member's written supervisory and inspection procedures.

(C) Each member shall inspect on a regular periodic schedule every non-branch location. In establishing such schedule, the firm shall consider the nature and complexity of the securities activities for which the location is responsible and the nature and extent of contact with customers. The schedule and an explanation regarding how the member determined the frequency of the examination schedule shall be set forth in the member's written supervisory and inspection procedures.

Each member shall retain a written record of the dates upon which each review and inspection is conducted.

(2) An office inspection and review by a member pursuant to paragraph (c)(1) must be reduced to a written report and kept on file by the member for a minimum of three years, unless the inspection is being conducted pursuant to paragraph (c)(1)(C) and the regular periodic schedule is longer than a three-year cycle, in which case the report must

be kept on file at least until the next inspection report has been written. The written inspection report must also include, without limitation, the testing and verification of the member's policies and procedures, including supervisory policies and procedures in the following areas:

(A) Safeguarding of customer funds and securities;

(B) Maintaining books and records;

(C) Supervision of customer accounts serviced by branch office managers;

(D) Transmittal of funds between customers and registered representatives and between customers and third parties;

(E) Validation of customer address changes; and

(F) Validation of changes in customer account information.

If a member does not engage in all of the activities enumerated above, the member must identify those activities in which it does not engage in the written inspection report and document in the report that supervisory policies and procedures for such activities must be in place before the member can engage in them.

(3) An office inspection by a member pursuant to paragraph (c)(1) may not be conducted by the branch office manager or any person within that office who has supervisory responsibilities or by any individual who is directly or indirectly supervised by such person(s). However, if a member is so limited in size and resources that it cannot comply with this limitation (e.g., a member with only one office or a member has a business model where small or single-person offices report directly to an office of supervisory jurisdiction manager who is also considered the offices' branch office manager), the member may have a principal who has the requisite knowledge to conduct an office inspection perform the inspections. The member, however, must document in the office inspection reports the factors it has relied upon in determining that it is so limited in size and resources that it has no other alternative than to comply in this manner.

A member must have in place procedures that are reasonably designed to provide heightened office inspections if the person conducting the inspection reports to the branch office manager's supervisor or works in an office supervised by the branch manager's supervisor and the branch office manager generates 20% or more of the revenue of the business units supervised by the branch office manager's supervisor. For the purposes of this subsection only, the term "heightened inspection" shall mean those inspection procedures that are designed to avoid conflicts of interest that serve to undermine complete and effective inspection because of the economic, commercial, or financial interests that the branch manager's supervisor holds in the associated persons and businesses being inspected. In addition, for the purpose of this section only, when calculating the 20% threshold, all of the revenue generated by or credited to the branch office or branch office manager shall be attributed as revenue generated by the business units supervised by the branch office manager's supervisor irrespective of a member's internal allocation of such revenue. A member must calculate the 20% threshold on a rolling, twelve-month basis.

* * *

(g) Definitions

(2)(A) A "branch office" is any location where one or more associated persons of a member regularly conducts the business of effecting any transactions in, or inducing or attempting to induce the purchase or sale of any security, or is held out as such, excluding:

(i) Any location that is established solely for customer service and/or back office type functions where no sales activities are conducted and that is not held out to the public as a branch office;

(ii) Any location that is the associated person's primary residence; provided that

a. Only one associated person, or multiple associated persons who reside at that location and are members of the same immediate family, conduct business at the location;

b. The location is not held out to the public as an office and the associated person does not meet with customers at the location;

c. Neither customer funds nor securities are handled at that location;

d. The associated person is assigned to a designated branch office, and such designated branch office is reflected on all business cards, stationery, retail communications and other communications to the public by such associated person;

e. The associated person's correspondence and communications with the public are subject to the firm's supervision in accordance with Rule 3010;

f. Electronic communications (e.g., e-mail) are made through the member's electronic system;

g. All orders are entered through the designated branch office or an electronic system established by the member that is reviewable at the branch office;

h. Written supervisory procedures pertaining to supervision of sales activities conducted at the residence are maintained by the member; and

i. A list of the residence locations is maintained by the member;

(iii) Any location, other than a primary residence, that is used for securities business for less than 30 business days in any one calendar year, provided the member complies with the provisions of paragraph (A)(2)(ii)a. through h. above;

(iv) Any office of convenience, where associated persons occasionally and exclusively by appointment meet with customers, which is not held out to the public as an office;*

(v) Any location that is used primarily to engage in non-securities activities and from which the associated person(s) effects no more than 25 securities transactions in any one calendar year; provided that any retail communication identifying such location also sets forth the address

and telephone number of the location from which the associated person(s) conducting business at the non-branch locations are directly supervised;

(vi) The Floor of a registered national securities exchange where a member conducts a direct access business with public customers; or

(vii) A temporary location established in response to the implementation of a business continuity plan.

(B) Notwithstanding the exclusions in paragraph (2)(A), any location that is responsible for supervising the activities of persons associated with the member at one or more non-branch locations of the member is considered to be a branch office.

(C) The term "business day" as used in Rule 3010(g)(2)(A) shall not include any partial business day provided that the associated person spends at least four hours on such business day at his or her designated branch office during the hours that such office is normally open for business.

* Where such office of convenience is located on bank premises, signage necessary to comply with applicable federal and state laws, rules and regulations and applicable rules and regulations of the NYSE, other self-regulatory organizations, and securities and banking regulators may be displayed and shall not be deemed “holding out” for purposes of this section.

3110. Books and Records

IM-3110. Customer Account Information

This rule is no longer applicable. NASD IM-3110 has been superseded by FINRA Rule 4510 Series.
Please consult the appropriate FINRA Rule.

(a) Members should be aware that any transaction that involves a non-exchange-listed equity security trading for less than five dollars per share may be subject to the provisions of SEC Rules 15g-1 through 15g-9, and those rules should be reviewed to determine if an executed customer suitability agreement is required.

(b) Additional information is required to be obtained prior to making recommendations to customers (see Rule 2310) and in connection with discretionary accounts (see Rule 2510).

(c) Accounts opened, and recommendations made prior to January 1, 1991 remain subject to former Article III, Sections 2 and 21(c) as previously in effect as set forth in Notice to Members 90-52 (August 1990).