fair procedure for the disciplining of ETP Holders and Associated Persons by providing for a clearly demarcated and orderly transition from the current 25 day period to the proposed 10 day period.

Finally, the Exchange believes that the non-substantive changes to clarify the cross-reference to Rule 10.9310 in Rules 10.9216 would remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, protect investors and the public interest because the proposed non-substantive changes would add clarity, transparency and consistency to the Exchange's disciplinary rules. The Exchange believes that market participants would benefit from the increased clarity, thereby reducing potential confusion and ensuring that persons subject to the Exchange's jurisdiction, regulators, and the investing public can more easily navigate and understand the Exchange's rules.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not intended to address competitive issues but is rather concerned with facilitating less burdensome regulatory compliance and processes and enhancing the quality of the regulatory process. The Exchange believes the proposed rule changes would reduce the burdens within the disciplinary process, as well as move matters through the process expeditiously by providing for more efficient finality of negotiated settlements and offers of settlement, to the benefit of all ETP Holders, Associated Persons and the investing public.

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

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

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

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act[16] and subparagraph (f)(6) of Rule 19b–4 thereunder.[17]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NYSENAT–2020–36 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSENAT–2020–36. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSENAT–2020–36, and should be submitted on or before January 6, 2021.

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

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–27595 Filed 12–15–20; 8:45 am]

BILLING CODE 8011–01–P

[16] 15 U.S.C. 78s(b)(3)(A)(iii).

[17] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90635; File No. SR–FINRA–2020–011]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving a Proposed Rule Change, as Modified by Amendment No. 1, To Address Brokers With a Significant History of Misconduct

December 10, 2020.

I. Introduction

On April 3, 2020, Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend FINRA's rules to help further address the issue of associated persons with a significant history of misconduct and the broker-dealers that employ them.

The proposed rule change was published for comment in the **Federal**

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Register on April 14, 2020.[3] On May 27, 2020, FINRA consented to an extension of the time period in which the Commission must approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change to July 13, 2020.[4] On July 2, 2020, FINRA responded to the comment letters received in response to the Notice and filed an amendment to the proposed rule change (''Amendment No. 1'').[5] On July 13, 2020, the Commission filed an Order Instituting Proceedings to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.[6] On October 5, 2020, FINRA consented to an extension of the time period in which the Commission must approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change to December 10, 2020.[7] On October 7, FINRA responded to the comment letter received in response to the Order Instituting Proceedings.[8] This order approves the proposed rule change, as modified by Amendment No. 1.

II. Description of the Proposed Rule Change

Background

FINRA's proposed rule change would: (1) Amend the FINRA Rule 9200 Series (Disciplinary Proceedings) and the 9300 Series (Review of Disciplinary Proceedings by National Adjudicatory Council and FINRA Board; Application for SEC Review) to allow a hearing officer to impose conditions or restrictions on the activities of a respondent member broker-dealer or respondent associated person (each a ''Respondent'' or collectively ''Respondents''), and require the member broker-dealer employing a respondent associated person to adopt heightened supervisory procedures for such associated persons, when a disciplinary matter is appealed to the National Adjudicatory Council (''NAC'') or called for NAC review; (2) amend the FINRA Rule 9520 Series (Eligibility Proceedings) to require member broker-dealers to adopt heightened supervisory procedures for statutorily disqualified associated persons during the period a statutory disqualification eligibility request is under review by FINRA; (3) amend FINRA Rule 8312 (FINRA BrokerCheck Disclosure) to require disclosure through FINRA BrokerCheck of the status of a member broker-dealer as a ''taping firm'' under FINRA Rule 3170 (Tape Recording of Registered Persons by Certain Firms); and (4) amend the FINRA Rule 1000 Series (Member Application and Associated Person Registration) to require a member broker-dealer to submit a written request to FINRA's Department of Member Regulation (''Member Regulation''), through the Membership Application Group (''MAP Group''), seeking a materiality consultation[9] and approval of a continuing membership application, if required, when a natural person seeking to become an owner, control person, principal, or registered person of the member broker-dealer has, in the prior five years, one or more ''final criminal matters'' or two or more ''specified risk events.''[10]

Proposed Rule Change to the FINRA Rule 9200 Series (Disciplinary Proceedings) and 9300 Series (Review of Disciplinary Proceeding by National Adjudicatory Council and FINRA Board; Application for SEC Review)

FINRA proposed amendments to the Rule 9200 Series and Rule 9300 Series to address investor protection concerns during the pendency of an appeal from, or a NAC review of, a hearing panel or hearing officer disciplinary decision, by authorizing hearing officers to impose conditions or restrictions on disciplined Respondents and requiring broker-dealers to adopt heightened supervision plans concerning their associated persons who are disciplined respondents.[11] The proposed rule change would also establish a process for an expedited review by the Review Subcommittee of the NAC of any conditions or restrictions imposed.[12] Currently, when a hearing panel or hearing officer decision is on appeal or review before the NAC, any sanctions imposed by the decision, including bars and expulsions, are automatically stayed and not enforced against the Respondent during the pendency of the appeal or review proceeding.[13] Thereafter, the filing of an application for Commission review stays the effectiveness of any sanction, other than a bar or an expulsion, imposed in a decision constituting a final FINRA disciplinary action.[14]

Proposed Rule 9285(a) would provide that the hearing officer who participated in an underlying disciplinary proceeding may impose conditions or restrictions on the activities of the Respondent during the appeal of any adverse finding. Specifically, if the hearing officer found that a Respondent violated a statute or rule provision, which is subsequently appealed to the NAC or called for NAC review, the hearing officer may impose conditions or restrictions reasonably necessary for the purpose of preventing customer harm.[15] The scope of these conditions or

[3] *See* Exchange Act Release No. 88600 (Apr. 8, 2020), 85 FR 20745 (Apr. 14, 2020) (File No. SR–FINRA–2020–011) (''Notice'').

[4] *See* letter from Michael Garawski, Associate General Counsel, Office of General Counsel, FINRA, to Daniel Fisher, Branch Chief, Division of Trading and Markets, Commission, dated May 27, 2020.

[5] *See* letter from Michael Garawski, Associate General Counsel, Office of General Counsel, FINRA, to Vanessa Countryman, Secretary, Commission, dated July 2, 2020 (''FINRA July 2 Letter''). The FINRA July 2 Letter is available at the Commission's website at *https://www.sec.gov/comments/sr-finra-2020-011/srfinra2020011-7399761-219028.pdf*. Amendment No. 1 is available at *https://www.finra.org/sites/default/files/2020-07/sr-finra-2020-011-amendment-no-1.pdf*.

[6] *See* Exchange Act Release No. 89305 (July 13, 2020), 85 FR 43627 (July 17, 2020) (File No. SR–FINRA–2020–011) (''Order Instituting Proceedings'').

[7] *See* letter from Michael Garawski, Associate General Counsel, Office of General Counsel, FINRA, to Daniel Fisher, Branch Chief, Division of Trading and Markets, Commission, dated October 5, 2020.

[8] *See* letter from Michael Garawski, Associate General Counsel, Office of General Counsel, FINRA, to Vanessa Countryman, Secretary, Commission, dated October 7, 2020 (''FINRA October 7 Letter''). The FINRA October 7 Letter is available at the Commission's website at *https://www.sec.gov/comments/sr-finra-2020-011/srfinra2020011-7884211-224193.pdf*.

[9] In general, a member broker-dealer initiates a materiality consultation with Member Regulation by submitting a letter, requesting its determination on whether a proposed change is material such that it requires the submission of a Continuing Membership Application (''CMA''). If Member Regulation determines that a proposed change is material, it will instruct the broker-dealer to file a CMA if it intends to proceed with the proposed change. *See* Regulatory Notice 18–23 (Proposal Regarding the Rules Governing the New and Continuing Membership Application Process) (July 2018).

[10] *See* Notice at 20745.

[11] *See* Notice at 20746.

[12] *Id.*

[13] *See* FINRA Rules 9311(b) and 9312(b).

[14] *See* FINRA Rule 9370(a).

[15] *See* Notice at 20747. Under the proposed rule, the hearing officer could not impose these conditions or restrictions sua sponte but rather may only act on a motion by FINRA's Department of Enforcement (''Enforcement''). Proposed Rule 9285(a)(1) would allow Enforcement, within ten days after service of a notice of appeal from, or the notice of a call for NAC review of, a disciplinary decision of a hearing officer or hearing panel, to file a motion for the imposition of conditions or restrictions on the activities of a Respondent that are reasonably necessary for the purpose of preventing customer harm. The motion must specify the conditions and restrictions that are sought to be imposed and explain why they are necessary. A Respondent would have the right to file an opposition or other response to the motion within ten days after service of the motion, unless otherwise ordered by the hearing officer, and must explain why no conditions or restrictions should be imposed or specify alternative conditions and restrictions that would prevent customer harm. The hearing officer would then decide Enforcement's motion for conditions or restrictions based on the

Continued

restrictions would depend on what the hearing officer determines to be reasonably necessary for the purpose of preventing customer harm. Further, the conditions and restrictions would target the misconduct demonstrated in the disciplinary proceeding and be tailored to the specific risks posed by the Respondents during the appeal period.[16] Accordingly, the conditions and restrictions are not intended to be as restrictive as the underlying sanctions and would likely not be economically equivalent to imposing the sanctions during the appeal.[17] In addition, Respondents would be able to seek expedited reviews of orders imposing conditions or restrictions.[18]

Currently, any sanctions imposed by the hearing panel or hearing officer decision, including bars and expulsions, are automatically stayed and not enforced against the Respondent during the pendency of the NAC appeal or review proceeding.[19] Under the proposed rule change, the conditions or restrictions imposed by a hearing officer would remain in place until FINRA's final decision takes effect and all appeals are exhausted.[20] In addition, proposed FINRA Rule 9285(e) would require a member broker-dealer to adopt a written plan of heightened supervision for an associated person who is found to have violated a statute or rule provision. The plan of heightened supervision would be required to comply with FINRA Rule 3110, be reasonably designed and tailored to include specific supervisory policies and procedures that address the violations found by the hearing panel or hearing officer, and be reasonably designed to prevent or detect a reoccurrence of these violations.[21]

Proposed Rule Change to the FINRA Rule 9520 Series (Eligibility Proceedings)

A broker-dealer is not currently required to place a statutorily disqualified individual on heightened supervision while FINRA reviews the member broker-dealer's application to continue associating with the individual (although FINRA generally will not approve an application without an acceptable plan of supervision).[22] Under the proposed rule change, FINRA would amend FINRA Rule 9522 to require a member broker-dealer that files an application to continue associating with a statutorily disqualified associated person under FINRA Rule 9522(a)(3) or 9522(b)(1)(B) to include an interim plan of heightened supervision that would be in effect throughout the entirety of the application review process.[23] The proposed rule changes would delineate the circumstances under which a statutorily disqualified individual may remain associated with a FINRA member while FINRA is reviewing the application.[24]

Proposed Rule Change to FINRA Rule 8312 (FINRA BrokerCheck Disclosure)

FINRA proposed an amendment to FINRA Rule 8312 governing the information FINRA releases to the public through its BrokerCheck system. Currently, FINRA Rule 8312(b) requires that FINRA release information about, among other things, whether a particular member broker-dealer is subject to the provisions of FINRA Rule 3170 (''Taping Rule''), but only in response to telephonic inquiries via the BrokerCheck toll-free telephone listing.[25] The Taping Rule is designed to ensure that a member broker-dealer with a significant number of registered persons that previously were employed by ''disciplined firms'' [26] has specified supervisory procedures in place to prevent fraudulent and improper sales practices or customer harm, including, among other things, procedures for recording all telephone conversations between the taping firm's registered persons and both existing and potential customers.[27] Proposed Rule 8312(b) would not eliminate the toll-free telephone listing but rather would also require FINRA to release through BrokerCheck information as to whether a particular member broker-dealer is subject to the Taping Rule.[28] The proposed rule change would remove the requirement in FINRA Rule 8312(b) that FINRA inform the public that a member broker-dealer is subject to the Taping Rule only in response to telephonic inquiry via the BrokerCheck toll-free telephone listing.[29] FINRA believes that broadening the disclosure through BrokerCheck of the status of a member broker-dealer as a taping firm would help inform more investors of the heightened procedures required of the firm, which may incentivize investors to research more carefully the background of a registered representative associated with the taping firm.[30]

Proposed Rule Change to FINRA Rule 1000 Series (Member Application and Associated Person Registration)

The FINRA Rule 1000 Series governs, among other things, FINRA's membership proceedings. Currently, a member broker-dealer is permitted (subject to exceptions) to expand its business under the safe harbor set forth in FINRA interpretive material IM–1011–1 without the filing and prior approval of a CMA.[31] For example, under the existing parameters of this safe harbor, a broker-dealer could hire an associated person even if he or she has a significant history of misconduct.[32] The proposed rule change would limit the application of the safe harbor by imposing additional obligations on a member broker-dealer when a natural person who has, in the prior five years, either one or more ''final criminal matters'' or two or more ''specified risk events'' seeks to become

moving and opposition papers. *See* Proposed Rule 9285(a)(2)–(5) and (c); *see also* Notice at 20747.

[16] *See* Notice at 20747.

[17] *See* Notice at 20756.

[18] *Id.*

[19] *See* FINRA Rules 9311(b) and 9312(b); *see also* Notice at 20747. *See also* FINRA Rule 9370(a), which states that the filing of an application for review by the SEC of the NAC's decision shall stay the effectiveness of any sanction, other than a bar or expulsion imposed in a final disciplinary action by FINRA.

[20] *See* Notice at 20748. The proposed rule change would also amend Rule 9556 to grant FINRA the authority to bring an expedited proceeding against a Respondent that fails to comply with conditions and restrictions imposed pursuant to proposed Rule 9285 that could result in a suspension or cancellation of membership or suspension or bar from associating with any FINRA member. *See* Notice at 20749.

[21] *See* Notice at 20748.

[22] *See* Notice at 20750.

[23] *See* Notice at 20749.

[24] *Id.*

[25] *See* FINRA Rule 8312(b). Under the Taping Rule, a broker-dealer with a specified percentage of registered persons who have been associated with disciplined firms in a registered capacity in the last three years is designated as a ''taping firm.'' *See* FINRA Rule 3170.

[26] *See* FINRA Rule 3170(a)(2) (defining the term ''disciplined firm'').

[27] *See* Notice at 20751.

[28] FINRA Rule 8312 (FINRA BrokerCheck Disclosure) governs the information FINRA releases to the public through its BrokerCheck system (the BrokerCheck website address is *brokercheck.finra.org*). BrokerCheck helps investors make informed choices about the brokers and member firms with which they conduct business by providing registration and disciplinary history to investors. FINRA requires member firms to inform their customers of the availability of BrokerCheck. Specifically, FINRA Rule 2210(d)(8) requires that each of a member's websites include a readily apparent reference and hyperlink to BrokerCheck on the initial web page that the member intends to be viewed by retail investors and any other web page that includes a professional profile of one or more registered persons who conduct business with retail investors; and FINRA Rule 2267 requires members to provide to customers the FINRA BrokerCheck Hotline Number and a statement as to the availability to the customer of an investor brochure that includes information describing BrokerCheck. *See* Notice at 20751.

[29] *Id.*

[30] *Id.*

[31] *See* Notice at 20752.

[32] *Id.*

an owner, control person, principal, or registered person of the broker-dealer.[33] Specifically, when a natural person seeking to become an owner, control person, principal, or registered person of a member broker-dealer has, in the prior five years, one or more ''final criminal matters'' or two or more ''specified risk events,'' proposed Rule 1017(a)(7) would require a member broker-dealer to either: (1) File a CMA; or (2) submit a written request seeking a materiality consultation for the contemplated activity with FINRA's MAP Group.[34] If the broker-dealer seeks a materiality consultation, the MAP Group would consider, among other things, whether the ''final criminal matters'' or ''specified risk events'' are customer-related; whether they represent discrete actions or are based on the same underlying conduct; the anticipated activities of the person; the disciplinary history, experience and background of the proposed supervisors, if applicable; and the disciplinary history, supervisory practices, standards, systems and internal controls of the member broker-dealer and whether they are reasonably designed to achieve compliance with applicable securities laws and regulations and FINRA rules.[35] Where FINRA determines that a contemplated organizational change is material, FINRA would instruct the broker-dealer to file a CMA if it intends to proceed with such change.

Additionally, the proposed rule change would adopt a corresponding change to IM–1011–1 (Business Expansions and Persons with Specified Risk Events) to specify that the safe-harbor for business expansions in IM–1011–1 would not be available to any broker-dealer seeking to add a natural person who: (i) Has, in the prior five years, one or more ''final criminal matters'' or two or more ''specified risk events'' and (ii) seeks to become an owner, control person, principal, or registered person of the member.[36] In those circumstances, proposed IM–1011–3 would provide that if the broker-dealer is not otherwise required to file a CMA, it must comply with the requirements of proposed FINRA Rule 1017(a)(7).[37] Proposed Rule 1017(a)(7) would establish that the safe-harbor for business expansions in IM–1011–1 would not be available to a member broker-dealer when a materiality consultation is required.[38]

The proposed rule change would also make non-substantive changes to the MAP rules by renumbering paragraphs and updating cross-references to reflect the other proposed rule changes.

III. Discussion and Commission Findings

After careful review of the proposed rule change, as modified by Amendment No. 1, the comment letters, and FINRA's responses to the comments, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Exchange Act and the rules and regulations thereunder that are applicable to a national securities association.[39] Specifically, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with Section 15A(b)(6) of the Exchange Act,[40] which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

Rule 9200 Series (Disciplinary Proceedings) and 9300 Series (Review of Disciplinary Proceeding by National Adjudicatory Council and FINRA Board; Application for SEC Review)

The proposed rule change to authorize hearing officers to impose conditions or restrictions on disciplined Respondents reasonably necessary for the purpose of preventing customer harm, and to require broker-dealers to adopt heightened supervision plans concerning individual respondents, will help protect investors from associated persons found to have violated a statute or rule provision, by potentially preventing them from engaging in additional misconduct during the appeal process. These proposed rule changes are designed to help prevent fraudulent and manipulative acts and practices and address concerns related to misconduct that may occur during the pendency of an appeal from, or a NAC review of, a hearing panel or hearing officer disciplinary decision.[41] The Commission believes the ability to impose conditions or restrictions along with the proposed requirement to adopt a plan of heightened supervision will lead to greater oversight of disciplined Respondents' activities during the appeal period, thereby reducing the

[33] *Id.* The proposed rule change would also adopt definitions of ''final criminal matter'' and ''specified risk event'' to help identify when a member broker-dealer must submit a materiality consultation or continuing membership application when a natural person seeks to become an owner, control person, principal, or registered person of the firm and the person's history of misconduct meets one or more of these definitions. Amendment No. 1 amended proposed FINRA Rule 1011(h) to include in the definition of ''final criminal matter'' a relevant criminal event that ''is or was'' required to be disclosed on a Uniform Registration Form, and to make some grammar- and syntax-related modifications. The amendment clarified that both ''final criminal matter'' and ''specified risk event'' include disclosures that are required if the member broker-dealer and natural person proceed with the contemplated change, including disclosures that are required on Uniform Registration Forms that have not yet been executed. For example, Sections 14A and 14B of Form U4 (defined below) require representatives of broker-dealers to disclose, among other things, if they have ever been convicted of or pled guilty or nolo contendere (''no contest'') in a domestic, foreign or military court to (1) any felony, or (2) a misdemeanor involving: investments or an investment-related business or any fraud, false statements or omissions, wrongful taking of property, bribery, perjury, forgery, counterfeiting, extortion, or a conspiracy to commit any of these offenses. Proposed Rule 1011(r) would define ''Uniform Registration Forms'' to mean the Uniform Application for Broker-Dealer Registration (Form BD), the Uniform Application for Securities Industry Registration or Transfer (Form U4), the Uniform Termination Notice for Securities Industry Registration (Form U5) and the Uniform Disciplinary Action Reporting Form (Form U6), as such may be amended or any successor(s) thereto.

[34] *See* Notice at 20752 and 20753. This requirement would not apply when the member is required to file a statutory disqualification application or written request for relief pursuant to Rule 9522 for approval of the same contemplated association. *Id.* at 20753 and note 51.

[35] *See* Notice at 20753.

[36] *Id.*

[37] *See* Notice at 20753. Proposed Rule 1017(a)(7) would require the broker-dealer to submit a written request seeking a materiality consultation for the contemplated activity so that FINRA's MAP Group can determine whether a CMA is required. In a teleconference between Michael Garawski, Associate General Counsel, Office of General Counsel, FINRA, Kosha Dalal, Vice President and Associate General Counsel, Legal Policy, Office of General Counsel, FINRA, Lourdes Gonzalez, Assistant Chief Counsel, Division of Trading and Markets, Commission, Daniel Fisher, Branch Chief, Division of Trading and Markets, Commission, Edward Schellhorn, Special Counsel, Division of Trading and Markets, Commission, and Meredith MacVicar, Special Counsel, Division of Trading and Markets, Commission, on December 3, 2020, FINRA staff stated that of the 388 materiality consultations received in 2019, the average processing time was approximately 15 calendar days. FINRA completed the review of 336 CMAs that were received in 2019 and the average processing time was approximately 97 calendar days.

[38] *See* Notice at 20753.

[39] In approving this rule change, the Commission has considered the rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[40] 15 U.S.C. 78o–3(b)(6).

[41] In a teleconference between Michael Garawski, Associate General Counsel, Office of General Counsel, FINRA, Kosha Dalal, Vice President and Associate General Counsel, Legal Policy, Office of General Counsel, FINRA, Lourdes Gonzalez, Assistant Chief Counsel, Division of Trading and Markets, Commission, Daniel Fisher, Branch Chief, Division of Trading and Markets, Commission, Edward Schellhorn, Special Counsel, Division of Trading and Markets, Commission, and Meredith MacVicar, Special Counsel, Division of Trading and Markets, Commission, on December 1, 2020 (''December 1, 2020 Teleconference''), FINRA stated that during 2013–2019 the NAC issued decisions in 131 disciplinary matters. The NAC affirmed the hearing panel or hearing officer findings 121 times (92%), modified the findings 6 times (5%), and reversed or dismissed the findings 4 times (3%).

potential risk of customer harm that may occur during this period.

Two commenters supported the proposed rule change.[42] Two other commenters, however, expressed concern that these proposed rule changes to the Rule 9200 Series and 9300 Series do not adequately ensure due process and one specifically recommended FINRA take additional steps to ''ensure due process, both in appearance and actual.'' [43] In response, FINRA detailed the procedural protections proposed Rule 9285 would establish. Specifically, prior to imposing any conditions or restrictions the proposed rule change would: (i) Require Enforcement to file a motion with a hearing officer, seeking the imposition of conditions or restrictions that are reasonably necessary for the purpose of preventing customer harm, specifying the conditions and restrictions that are sought to be imposed, and explaining why they are necessary; (ii) provide the Respondent an opportunity to file a written opposition or other response to the motion; (iii) require the hearing officer to issue a written order ruling upon the motion no later than 20 days after any opposition or response is filed; and (iv) afford a Respondent the right to seek expedited review [44] before the NAC's Review Subcommittee of an order that imposes conditions or restrictions, and an automatic stay when a Respondent requests such an expedited review.[45]

As stated above, currently any sanctions imposed by the hearing panel or hearing officer decision, including bars and expulsions, are automatically stayed and not enforced against the respondent during the pendency of the NAC appeal or review proceeding.[46] One of the commenters urging FINRA to ensure due process stated that the proposed rule change should not ''be stripped away'' by changing the existing stay and giving a hearing officer authority to impose conditions and restrictions on the Respondent during the process of appealing a hearing officer's decision. Accordingly, the commenter expressed concern that the imposition of such conditions or restrictions could ruin a broker-dealer's business before the expedited review process has concluded, especially a smaller broker-dealer with fewer alternatives to withstand extended impediments to one of its business lines.[47] Another commenter,[48] however, expressed support for the proposed rule change and advocated for FINRA to go further by eliminating the existing stay of decisions by the hearing officer or hearing panel in disciplinary matters pursuant to Rule 9268 [49] or Rule 9269,[50] in which the adjudicator finds that a Respondent violated a statute or rule provision, during an appeal to the NAC by repealing FINRA Rule 9311.[51]

FINRA considered both suggestions and decided not to amend the proposed rule change. Specifically, FINRA believes that enforcing the hearing panel's disciplinary sanctions against the Respondents during the pendency of the appeal or review proceedings could be too restrictive in disciplinary matters with significant sanctions and where the risk of harm may be specific to particular activities.[52] On the other hand, FINRA stated that the proposed rule change would authorize a hearing officer to impose conditions and restrictions that are tailored specifically to the risk posed by the Respondent during the pendency of the appeals, and reasonably necessary for the purpose of preventing customer harm that may occur during the pendency of the appeal. Accordingly, FINRA determined that the proposed rule change would strike a reasonable balance between protecting investors and preventing undue burden on individuals and firms while their appeals are pending.[53]

A system designed to protect investors and the public interest will generally produce both costs and benefits. In this instance, FINRA's proposed rule change should reduce the probability of investor losses resulting from the violation of statutes or rules. At the same time, a decision to impose conditions or restrictions may disrupt the business opportunities of certain broker-dealers and individuals. In order to assess the potential risk posed by brokers during the appeal period, FINRA examined cases that were appealed to the NAC during the period of 2013–2016 and determined whether the brokers associated with an appeal to the NAC had a new disclosure event—for this analysis, a ''final criminal matter'' or a ''specified risk event,'' as defined above—at any time from the filing of the appeal through the year-end after the year in which the appeal reached a decision. Based on this analysis, FINRA estimated that 21 of the 75 brokers who appealed to the NAC during the 2013–2016 period were associated with a total of 28 disclosure events that occurred during the interstitial period after the filing of their appeal to the NAC.[54]

[42] *See* letter from William A. Jacobson, Esq., Clinical Professor of Law, Cornell Law School, and Director, Securities Law Clinic, and Ayomikun Loye, Student, Cornell Law School, to Vanessa Countryman, Secretary, Commission, dated May 5, 2020; letter from Samuel B. Edwards, President, Public Investors Advocate Bar Association, to Brent J. Fields, Secretary, Commission, dated May 5, 2020.

[43] *See* letter from Professor Lisa Miller, Esq., dated April 30, 2020; *see also* letter from Aaron D. Lebenta, Parsons Behle & Latimore, to Vanessa Countryman, Secretary, Commission, dated August 3, 2020 (''Lebenta Letter'') (concerned that the proposed rule change does not establish an effective appeal process to help ensure FINRA's disciplinary decision is correct, and that the sanctions are warranted, before they are imposed).

[44] Under proposed Rule 9285, an expedited review should take no longer than 45 days from the date the hearing officer serves the written order imposing conditions or restrictions on the Respondent. Specifically, proposed Rule 9285(b)(1) states that the Respondent may file a motion to modify or remove any or all of the conditions or restrictions within ten (10) days after service of the order, proposed Rule 9285(b)(3) would provide Enforcement up to five (5) days from service of Respondent's motion to file an opposition or other response to the motion, and proposed Rule 9285(b)(5) would provide the Review Subcommittee up to thirty (30) days after any opposition filed pursuant to Rule 9285(b)(3) to serve a written order ruling upon a motion to modify or remove conditions or restrictions in an expeditious manner.

[45] *See* FINRA July 2 Letter and FINRA October 7 Letter; *see also* Notice at 20746.

[46] *See* FINRA Rules 9311(b) and 9312(b).

[47] *See* Lebenta Letter (stating that a hearing officer restricting a broker-dealer from engaging in the same activity which is the subject of the initial sanction during its appeal of that sanction would essentially impose the original sanction while the matter is on appeal).

[48] *See* letter from Lev Bagramian, Senior Securities Policy Advisor, Better Markets, Inc. to Vanessa A. Countryman, Secretary, Commission, dated June 19, 2020 (''Better Markets Letter'').

[49] FINRA Rule 9268(f) states that unless otherwise provided in the majority decision constituting a final disciplinary action of FINRA issued under Rule 9268(a), a sanction (other than a bar or an expulsion) specified in the decision shall become effective on a date to be determined by FINRA, and a bar or an expulsion specified in a decision shall become effective immediately upon the decision becoming the final disciplinary action of FINRA.

[50] FINRA Rule 9269(d) states that unless otherwise provided in the default decision constituting a final disciplinary action of FINRA, the sanctions shall become effective on a date to be determined by FINRA staff, except that a bar or expulsion shall become effective immediately upon the default decision.

[51] FINRA Rule 9311(b) states that an appeal to the NAC from a decision issued pursuant to Rule 9268 or Rule 9269 shall operate as a stay of that decision until the NAC issues a decision pursuant to Rule 9349 (National Adjudicatory Council Formal Consideration; Decision) or, in cases called for discretionary review by the FINRA Board, until a decision is issued pursuant to Rule 9351 (Discretionary Review by FINRA Board). Any such appeal, however, will not stay a decision, or that part of a decision, that imposes a permanent cease and desist order.

[52] *See* Notice at 20760.

[53] *See* Notice at 20760.

[54] *See* Notice at 20756. FINRA notes that these estimates likely underrepresent the overall risk of customer harm posed by these brokers, because they are based on a specific set of events and outcomes used for classifying brokers for the proposed amendments to the MAP Rules. In addition, these brokers had other disclosure events after their appeal was filed, and some of these other events may also be associated with risk of customer harm. *See* Notice at note 75.

After considering these benefits and costs, the Commission believes that the proposed procedural protections provide a reasonable process to Respondents who may disagree with the particular set of conditions or restrictions imposed by a hearing officer to challenge those conditions or restrictions before they go into effect by, among other things, establishing an expedited process for the review of a hearing officer's order by the Review Subcommittee of the NAC. During a hearing officer's review, he or she may consider the specific facts and circumstances when weighing the additional risk(s) posed by the Respondent while the matter is on appeal against the costs of possible restrictions and sanctions. The Commission believes this potential disruption of the business opportunities of certain broker-dealers and individuals has been appropriately balanced against the investor protections the proposed rule change would establish, as well as the need to prevent potential customer harm from Respondents who have been found in violation of FINRA rules by a hearing officer or hearing panel.[55]

Rule 9520 (Eligibility Proceedings)

The proposed rule change to require broker-dealers to include a plan of heightened supervision with an application to continue associating with a statutorily disqualified individual that would be in effect throughout the entirety of the application review process also would address an investor protection concern by lowering the risk of customer harm during the pendency of an application. One commenter opposed this proposed rule change, arguing that establishing plans of heightened supervision are costly and burdensome and would discourage broker-dealers from hiring associated persons who have been disciplined.[56] However, FINRA is not creating an additional burden with respect to the requirement to create a plan of heightened supervision; it is only requiring a member broker-dealer implement such plan at an earlier point in time than under the existing rules. Currently, as part of the application process, a member broker-dealer will propose a written plan of heightened supervision to become effective upon approval of the application, and generally, the continued association of a statutorily disqualified person approved through a FINRA eligibility proceeding is conditioned on the individual being subject to a heightened supervision plan.[57] This proposed rule change would help limit the potential for customer harm at an earlier point in time and thereby help protect customers. In order to assess the potential risk posed by a statutorily disqualified person during the pendency of his or her application, FINRA examined whether individuals who filed an application between 2013–2016 had a disclosure event at any time from the filing of the application through two years after filing. Based on this analysis, FINRA estimated that 26 (or 51 percent) of the 51 individuals associated with an applications during the 2013–2016 period had a total of 41 disclosure events during the interstitial period after the filing of their application.[58]

As stated above, although the Commission recognizes the potential burden imposed by requiring the supervision plan to become effective at an earlier stage of this process, it believes that the benefits of added oversight of disqualified individuals subject to the pending application process justifies the earlier timeframe. Accordingly, while the proposed rule change may negatively impact the ability of certain individuals to retain or find employment, it is a reasonable approach for seeking to achieve greater oversight by sponsoring broker-dealers of the activities of statutorily disqualified individuals during the pendency of an application. The Commission believes that applying heightened supervision specifically tailored in response to the misconduct giving rise to the statutory disqualification at an earlier stage in the process will facilitate a broker-dealer's supervision of statutorily disqualified individuals and better protect its customers from future harm.

Rule 8312 (FINRA BrokerCheck Disclosure)

The proposed rule change adding disclosure in BrokerCheck of member broker-dealers that are subject to the Taping Rule would help inform more investors when certain broker-dealers are subject to certain heightened procedures.[59] One commenter stressed that this disclosure may not be sufficient to ensure investors understand what it means to be designated a ''taping firm'' and suggested that FINRA amend the proposed rule change to require the BrokerCheck profiles of individual registered representatives to denote when they are associated with taping firms. FINRA did not accept this comment because it would be a substantive amendment to what is otherwise a proposed technical change.[60] FINRA also expressed concern that the commenter's suggestion to include a disclosure on the BrokerCheck profile of individuals would capture registered representatives of a taping firm with clean disciplinary histories.[61] The commenter also recommended that any disclosure of a firm as a taping firm on BrokerCheck should include ''clear and complete information, comprehensible to investors, explaining what it means to be such a firm.'' [62] FINRA agreed with the view expressed that the BrokerCheck disclosure should include a clear explanation of what it means to be subject to the Taping Rule to help investors understand why the taping firm is subject to heightened procedures.[63] FINRA did not make a corresponding amendment to the rule but the Commission understands that FINRA has committed to including a

[55] The Commission notes that the proposed rule change is consistent with the adopted rules of other SROs, including: BOX Rule 12110 (''Pending effectiveness of a decision imposing a sanction on the Respondent, the person, committee or panel issuing the decision (the 'adjudicator') may impose such conditions and restrictions on the activities of the Respondent as it considers reasonably necessary for the protection of investors and the Exchange''); CBOE Rule 13.11(b) (''Pending effectiveness of a decision imposing a sanction on the Respondent, the Hearing Panel or the Chief Regulatory Officer (''CRO''), as applicable, may impose such conditions and restrictions on the activities of the Respondent as the Hearing Panel or the CRO, as applicable, considers reasonably necessary for the protection of investors and the Exchange''); and CBOE BZX Rule 8.11 (''Pending effectiveness of a decision imposing a penalty on the Respondent, the CRO, Hearing Panel or committee of the Board, as applicable, may impose such conditions and restrictions on the activities of the Respondent as he, she or it considers reasonably necessary for the protection of investors, creditors and the Exchange.''). *See* Notice at note 112.

[56] *See* Lebenta Letter. This commenter also recommended FINRA streamline the statutory disqualification review process to produce faster results, noting that imposing heightened supervisory procedures would be unduly costly and burdensome if the statutorily disqualified associated person's proposed association with a member broker-dealer is denied. *See* Lebenta Letter. The Commission must consider the proposed rule change that was filed and FINRA's process for reviewing applications for statutorily disqualified associated persons to associate with a member broker-dealer is beyond the scope of this filing.

[57] *See* FINRA Regulatory Notice 18–23 and Notice at 20750.

[58] *See* Notice at 20757. FINRA notes that these results likely underrepresent the overall risk of customer harm, because the disclosure events in this analysis included only final criminal matters and specified risk events. *See* Notice at note 84.

[59] Currently, investors can only learn about a broker-dealer's status as a Taping Firm in response to telephonic inquiries via the BrokerCheck toll-free telephone listing. *See* FINRA Rule 8312(b).

[60] December 1, 2020 Teleconference.

[61] *Id.*

[62] *See* Better Markets Letter.

[63] *See* Notice at 20765.

clear explanation on BrokerCheck about what being subject to the Taping Rule means.[64]

The Commission believes that this proposed rule change would improve the ease of obtaining this information for investors through a preexisting database with which the public is already familiar. Furthermore, the Commission believes that the proposed rule change would incentivize investors to research more carefully the background of a registered representative associated with a broker-dealer that is designated as a taping firm, including those registered representatives associated with the firm who are not subject to heightened supervision.

Rule 1000 Series (Member Application and Associated Person Registration)

The proposed rule change, requiring a member broker-dealer to seek a materiality consultation when a natural person seeking to become an owner, control person, principal, or registered person has a significant history of misconduct, would give FINRA an opportunity to assess whether the proposed association is material and warrants closer regulatory scrutiny. Similarly, in situations where a proposed association of a natural person with a significant history of misconduct would require the broker-dealer to submit a CMA, FINRA would be able to: (i) Assess whether the broker-dealer would continue to meet all of the membership standards in FINRA Rule 1014 if the proposed association were approved, and (ii) prevent the proposed association if the broker-dealer does not demonstrate that it can continue to meet those standards. This proposed rule change will further promote investor protection by applying additional safeguards and disclosure obligations for a broker-dealer's continuing membership with FINRA and for changes to a current member broker-dealer's ownership, control, or business operations. The heightened scrutiny by FINRA of registered representatives, registered principals, owners, and control persons who meet the proposed definitions and criteria would be beneficial in promoting investor protection by disincentivizing broker-dealers from engaging in higher-risk activity that could lead to additional regulatory restrictions.[65] For example, one commenter stated that this proposed rule would create obstacles for broker-dealers seeking to hire and onboard associated persons with a significant history of misconduct,[66] which may incentivize broker-dealers to reexamine their hiring practices and certain associated persons to change their behavior to avoid future misconduct.[67]

Two commenters raised several concerns about, and suggested revisions to, the proposed rule changes to the Rule 1000 Series (Member Application and Associated Person Registration).[68] One of these commenters questioned whether adding one person should constitute a material change in business operations. Specifically, the commenter disagreed that adding a new owner or control person is sufficient to make a material impact in business operations unless that person is involved in sales. Accordingly, the commenter recommended revising proposed IM–1011–3 to exclude from the IM–1011–1 safe harbor only broker-dealers increasing their business operations by adding associated persons involved in sales.[69] FINRA declined to amend the proposed rule change as suggested because adding a natural person as an owner, control person, principal, or registered person who has, in the prior five years, one or more final criminal matters or two or more specified risk events could constitute a material change in business operations given the greater risk of harm to customers than the risk stemming from other associated persons. FINRA reiterated that IM–1011–3 is designed to prevent broker-dealers from relying on the IM–1011–1 safe harbor to avoid a materiality consultation—and any CMA that is subsequently required—when it seeks to add such persons.[70]

The Commission agrees with FINRA's assessment of what could constitute a material change in business operations. Specifically, the Commission believes that natural persons with a certain history of misconduct holding authority to control a firm's business operations may increase the risk of investor harm. Accordingly, limiting the interpretation of materiality to persons involved in sales as suggested by the commenter could weaken the effectiveness of the proposed rule change to protect investors and incentivize improved behavior. The Commission also notes that the materiality consultation process required by proposed Rule 1017(a)(7) would be similar to FINRA's existing materiality consultation process and would provide the member broker-dealer an opportunity to be heard on whether the contemplated change is material. Specifically, under proposed Rule 1017(a)(7), a member broker-dealer would submit a written request seeking a materiality consultation and addressing the issues that are central to the materiality consultation; as part of the materiality consultation, Member Regulation must consider the written request and other information or documents provided by the member, including whether the proposed association would materially impact the broker-dealer's business operations. If Member Regulation determines that a CMA is required, the CMA would be governed by the existing process set forth in FINRA Rule 1017 and the Rule 1010 Series, including its appeal rights. The Commission agrees with FINRA's assessment that these procedures would be similar to FINRA's existing materiality consultation process and would provide the member broker-dealer an opportunity to be heard on whether the contemplated change is material.[71]

The other commenter, critical of the proposed changes to the Rule 1000 Series, believes that the proposed rule changes are overbroad and that inclusion of settled matters as a

[64] In a teleconference between Michael Garawski, Associate General Counsel, Office of General Counsel, FINRA, and Daniel Fisher, Branch Chief, Division of Trading and Markets, Commission, on October 5, 2020, FINRA confirmed with the Division of Trading and Markets that between now and the effective date of the proposed rule change it has committed to including a clear explanation on BrokerCheck about what being subject to the Taping Rule means.

[65] According to FINRA, the cost of this proposed rule change would fall on the broker-dealers that seek to add owners, control persons, principals, or registered persons who meet the proposed criteria. These broker-dealers would be directly impacted through the requirements to seek a materiality consultation with FINRA and, potentially, to file a CMA. While there is no FINRA fee for seeking a materiality consultation, broker-dealers may incur internal costs or costs associated with engaging external experts in conjunction with filing a CMA. In addition, the proposed rule change could result in delays to a broker-dealer's ability to add owners, control persons, principals or registered persons who meet the proposed criteria, during the time the mandatory materiality consultation and any required CMA is being processed. These anticipated costs may deter some broker-dealers from hiring individuals meeting the proposed criteria, who as a result may find it difficult to remain in the industry. *See* Notice at 20758.

[66] *See* Better Markets Letter (stating that requiring materiality consultations before hiring is an important regulatory innovation); *see also* Notice at 20766.

[67] The proposed rule change would not prevent a firm from hiring an associated person with a history of ''final criminal matters'' or ''specified risk events.'' Instead, the proposed rule change would establish a system of investor protections tailored to the facts and circumstances for firms that do seek to hire such associated persons.

[68] *See* letter from Andrew R. Harvin, Partner, Doyle, Restrepo, Harvin & Robbins, LLP, to Jill M. Peterson, Assistant Secretary, Commission, dated April 28, 2020 (''Harvin Letter''); *see also* Lebenta Letter.

[69] *See* Harvin Letter.

[70] *See* FINRA July 2 Letter.

[71] *Id.*

criterion is ''indefensible.'' [72] FINRA considered this comment but did not exclude settled matters from the list of determining factors. Instead, FINRA chose not to include certain settled matters in the proposed rule changes to the Rule 1000 Series in order to exclude individuals who are less likely to subsequently pose risk of harm to customers.[73] Specifically, in order to focus its analysis on outcomes that are more likely associated with material customer harm, FINRA studied complaints that led to an award against a broker or settled above a de minimis threshold ($15,000), which is the current CRD settlement threshold for reporting customer complaints on Uniform Registration Forms. FINRA found that a proposal based on events disclosed on the Uniform Registration Forms, which are generally available to firms and FINRA, was important to avoid confusion and provide transparency about the events that will trigger the need for a materiality consultation.[74]

The Commission agrees that the proposed rule changes to the Rule 1000 Series are tailored sufficiently to achieving the goal of protecting investors from the risks associated with associated persons who have a significant history of misconduct. Specifically, the Commission agrees that excluding some settled matters from these thresholds is appropriate. For instance, recently settled matters are likely more indicative of an associated person's future misconduct than matters occurring over five years ago (absent any intervening disciplinary or other regulatory events); and individuals with a history of misconduct who have little or no control over a broker-dealer's activities may pose less threat to the broker-dealer's customers than individuals who can exercise some discretion when performing their jobs. Accordingly, settlements beyond the five-year lookback period and settlements by persons other than those seeking to be an owner, control person, principal, or registered person may have less relevance in achieving the goal of protecting investors from the risks associated with associated persons who have a significant history of misconduct.[75]

This commenter also argued that FINRA's proposed definition of a ''specified risk event''—a key triggering factor for the proposed enhanced membership application proceedings—is overbroad and would lead to unnecessary costs, burdens and disruptions for broker-dealer members.[76] As proposed, the definition would include any ''final investment-related, consumer initiated arbitration'' that results in an award or a settlement ''at or above $15,000.'' The commenter believes the use of arbitration awards and settlements with customers at such a ''low'' dollar threshold is over-inclusive and would not appropriately describe a ''risk event'' that should require a CMA or the proposed mandatory materiality consultation.[77]

FINRA disagrees with the commenter's assessment that the proposed definition of ''specified risk event'' attempts to replace the analysis conducted in a CMA with a bright-line rule that any customer arbitration at or above the $15,000 threshold is defined as creating a risk to investors.[78] Under proposed Rule 1017(a)(7), only arbitration awards or settlements meeting the specific parameters detailed in Rule 1017(a)(7) and IM–1011–3 would be considered for determining when a materiality consultation would be required.[79] Moreover, a single award or settlement would not necessarily require a materiality consultation. In fact, even if a person meets the Rule 1017(a)(7) standard, it would not necessarily mean a CMA is required or, if it is, that the broker-dealer could not satisfy FINRA's membership standards.[80] FINRA also stated that the dollar thresholds as proposed are appropriate given that settlements at that level are more likely to be associated with material customer harm [81] and they are the same thresholds as those used for determining appropriate disclosure events in FINRA's Uniform Registration Forms.[82] FINRA has noted that using different thresholds may result in less transparency to the public, registered persons, and broker-dealers.[83]

The Commission believes FINRA made a reasonable argument for including settlements of at least $15,000 in its study [84] and that its proposed definition of ''specified risk event'' furthers the goal of protecting investors from high risk associated persons. In addition, the Commission believes that the proposed criteria and definitions of ''final criminal matter'' and ''specified risk event'' would provide transparency regarding how the proposed rules would be applied, as the underlying events are based on disclosure events required to be reported on the Uniform Registration Forms. Accordingly, broker-dealers would be able to identify the specific set of disclosure events that would count towards the proposed criteria and, using available data, determine independently whether a proposed association with an individual would require a materiality consultation.

One commenter also challenged FINRA's statistical justification for the proposed rule change.[85] In particular, the commenter questioned whether the studies upon which FINRA relied adequately demonstrate that past disciplinary and other regulatory events associated with a member broker-dealer or individual can be predictive of similar future events, such as repeated disciplinary actions, arbitrations, and

[72] *See* Lebenta Letter (stating that the inclusion of settlements is indefensible by FINRA because respondents may choose to settle for any number of reasons that do not reflect the respondent's own liability). When Member Regulation evaluates compliance with the Rule 1000 Series, it takes into consideration, among other things, whether persons associated with an applicant are the subject of disciplinary actions taken against them by industry authorities, criminal actions, civil actions, arbitrations, customer complaints, remedial actions, or other industry-related matters that could pose a threat to public investors. Some of these matters are considered whether they are adjudicated, settled or pending. *See* Notice at 20752.

[73] *See* FINRA October 7 Letter.

[74] *See* FINRA Study at 9; *see also* Notice at 20761 and 20767.

[75] *Id.*

[76] *See* Lebenta Letter.

[77] *Id.* This commenter also argued that FINRA's inclusion of customer-initiated arbitration settlements for $15,000 or more in the statistics it used to measure the recent rate of disciplinary events was overly broad and thus does not support the premise of the proposed rule change that there is a pattern of increased risk to customers. Similarly, the commenter believes that relying on past violative conduct to predict future wrongdoing undermines the principle of due process and is not supported by FINRA's data. *But see* Better Markets Letter (opining that the proposed rule change would reflect an improvement over the status quo but is still insufficient, and that FINRA should do more to reduce the number of brokers with a significant history of misconduct and the prevalence of recidivism (*e.g.,* banning registered representatives with two criminal convictions or three ''specified risk events'' at a $5,000 level (instead of the proposed $15,000 level) and immediately and permanently expelling a broker-dealer where more than 20% of its registered representatives have three or more ''specified risk events'').

[78] *See* FINRA October 7 Letter (citing the Lebenta Letter).

[79] *See* FINRA October 7 Letter (outlining the proposed parameters including the lookback period, the number of disclosure events required, and the types of roles sought).

[80] *Id.*

[81] *Id.*

[82] *See supra* note 33.

[83] *See* FINRA October 7 Letter.

[84] *See* Hammad Qureshi & Jonathan Sokobin, Do Investors Have Valuable Information About Brokers? (FINRA Office of the Chief Economist Working Paper, Aug. 2015) (''FINRA Study''). The Commission believes the FINRA Study dealt with a common issue in empirical work, the tradeoff between an increase in statistical power that results from a larger sample size and the inclusion of data points that may not be of the most interest, and made a reasonable empirical design decision. Accordingly, contrary to the commenter's concern, the Commission believes that FINRA had a sound basis upon which to base the proposed rule change.

[85] *See* Lebenta Letter.

complaints.[86] The commenter suggested, among other things, that FINRA's reports used data (*i.e.,* violative events) to measure the likelihood of recidivist behavior that would not be the subject of a disciplinary action under the proposed rule change. Accordingly, the commenter did not believe FINRA's statistical evidence justified the proposed rule change, including the additional costs and loss of rights that would result from approving the proposed rule change.[87]

In response, FINRA reiterated its concern about the potential risks posed by broker-dealers that persistently employ associated persons who engage in misconduct, as well as its findings that past disciplinary and other regulatory events, such as repeated disciplinary actions, arbitrations and complaints associated with a member broker-dealer or individual can be predictive of similar future events.[88] Moreover, FINRA believes the estimated number of disclosure events associated with persons who appeal disciplinary decisions reflects a specific potential risk to investors.[89] FINRA asserted that the proposed rule change would adopt processes directly tailored to target this specific misconduct and minimize further investor harm.[90]

The Commission believes that the commenter's challenge to FINRA's statistical justification for the proposed rule change obfuscates the point of the FINRA Study. In its study, FINRA uses a model that predicts investor harm based on information publicly released in BrokerCheck and non-public Central Registration Depository data and found that 20% of the 181,133 brokers in their sample with the highest *ex ante* predicted probability of investor harm are associated with more than 55% of the investor harm events and more than 55% of total dollar harm. Accordingly, FINRA concluded that the risk of future harm is predictable.[91] The Commission believes that the methodology used in the FINRA Study had a sound statistical basis. The Commission understands the commenter's point that the FINRA Study measured the likelihood of recidivist behavior using data (*i.e.,* violative acts) that would not be captured under the proposed rule change; however, the Commission believes FINRA shows its result is not sensitive to a particular threshold value. In addition, while the Commission understands the commenter's point that FINRA continues the analysis through the year-end after the year in which the appeal reached a decision, the FINRA Study states that the complaint system tracks the date the complaint was filed but not the date of the actual occurrence of investor harm. The study makes a conservative assumption that the harm occurred the year before the filing so that when running a regression to predict an occurrence of harm, FINRA would not be predicting an event with data that was only available concurrently with or subsequent to the event.[92] Accordingly, the Commission believes that the methodology FINRA used to conduct its study had a sound statistical basis and that FINRA had a sound basis upon which to base the proposed rule change.

In sum, for the above reasons, the Commission believes that the proposed rule change would strengthen the tools available to FINRA in responding to associated persons who have a significant history of misconduct. In addition, the Commission believes that the proposed rule change has sufficiently tailored the proposed processes to target the specific misconduct it seeks to address, which would minimize the potential costs to broker-dealers. Moreover, the proposed rules would establish processes by which an associated person or broker-dealer would have adequate opportunities to challenge the imposed conditions and restrictions and seek further review.

Accordingly, the Commission finds the proposed rule change would result in greater investor protections by helping address the concerns raised by associated persons with a significant history of misconduct and the broker-dealers that employ them while narrowly tailoring the review process to mitigate the potential burdens on those individuals and broker-dealers.

IV. Conclusion

It Is Therefore Ordered pursuant to Section 19(b)(2) of the Exchange Act[93] that the proposed rule change (SR–FINRA–2020–011), as modified by Amendment No. 1, be, and hereby is, approved.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2020–27626 Filed 12–15–20; 8:45 am]

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[86] *Id.* (stating that in the FINRA Study, the rate of new disclosure events by associated persons during the pendency of their appeals is less than 30%).

[87] *Id.* (arguing that the FINRA Study continued its analysis through the year-end after the year in which the appeal reached a decision thus skewing its results).

[88] *See* FINRA October 7 Letter; *see also* Notice at 20745–46, 20755 and note 5.

[89] *See* FINRA October 7 Letter; *see also* Notice at 20748.

[90] *See* FINRA October 7 Letter; *see also* Notice at 20750, 20754.

[91] *See* FINRA Study at 17. Additional academic research suggests that a higher rate of new disciplinary and other disclosure events is highly correlated with past disciplinary and other disclosure events, as far back as nine years prior. *See* Notice at note 5.

[92] *See* FINRA Study at 9–10.

[93] 15 U.S.C. 78s(b)(2).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90627; File No. SR–ICEEU–2020–013]

Self-Regulatory Organizations; ICE Clear Europe Limited; Order Approving Proposed Rule Change Relating to the ICE Clear Europe Investment Management Procedures

December 10, 2020.

I. Introduction

On October 23, 2020, ICE Clear Europe Limited (''ICE Clear Europe'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend its Investment Management Procedures (the ''Procedures'') to make certain clarifications and updates with respect to permissible investments.[3] The proposed rule change was published for comment in the **Federal Register** on November 5, 2020.[4] The Commission did not receive comments regarding the proposed rule change. For the reasons discussed below, the Commission is approving the proposed rule change.

II. Description of the Proposed Rule Change

The proposed rule change would amend the Procedures to clarify the requirements for investment of customer funds by FCM/BD Clearing Members[5] resulting from the expansion of permitted investments to include qualifying Euro-denominated non-U.S. sovereign debt pursuant to an exemptive order issued by the U.S. Commodity

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Filing of Proposed Rule Change Relating to the ICE Clear Europe Investment Management Procedures, Exchange Act Release No. 90290 (October 30, 2020), 85 FR 70697 (November 5, 2020) (SR–ICEEU–2020–013) (''Notice'').

[4] *See* Notice *supra* note 3.

[5] Capitalized terms used but not defined herein have the meanings specified in the Procedures or the ICE Clear Europe Clearing Rules (the ''Rules''), as applicable.