

# Regulatory Notice

# 23-13

## Code of Procedure

### FINRA Amends Its Rules to Allow Video Conference Hearings Before the Office of Hearing Officers and the National Adjudicatory Council Under Specified Conditions

Effective Date: August 23, 2023

#### Summary

FINRA has adopted changes to its rules to allow for video conference hearings before the Office of Hearing Officers and the National Adjudicatory Council under specified conditions. These amendments will become effective August 23, 2023.

Questions concerning this *Notice* should be directed to:

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- ▶ Ilana Herscovitz Reid, Associate General Counsel, OGC, at (202) 728-8268 or [Ilana.Reid@finra.org](mailto:Ilana.Reid@finra.org).

#### Background & Discussion

FINRA has amended its rules to allow for video conference hearings before the Office of Hearing Officers (OHO) and the National Adjudicatory Council (NAC) under specified conditions.<sup>1</sup> These rule changes make permanent, with some modifications, temporary amendments that allowed OHO and the NAC to order, without a motion, hearings to proceed by video conference based on public health risks related to COVID-19.<sup>2</sup>

Under the amended rules, OHO's and the NAC's authority<sup>3</sup> to order hearings by video conference extends beyond the public health risks posed by COVID-19 to similar situations in which proceeding in person may endanger the health or safety of the participants or would be impracticable. For example, appearing in person may be impracticable

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#### Notice Type

- ▶ Rule Amendment

#### Suggested Routing

- ▶ Compliance
- ▶ Legal
- ▶ Registered Representatives
- ▶ Senior Management

#### Key Topics

- ▶ Code of Procedure
- ▶ National Adjudicatory Council
- ▶ Office of Hearing Officers

#### Referenced Rules & Notices

- ▶ FINRA Rule 1015
- ▶ FINRA Rule 9261
- ▶ FINRA Rule 9341
- ▶ FINRA Rule 9524
- ▶ FINRA Rule 9830
- ▶ Funding Portal Rule 900

in the event of a natural disaster or terrorist attack that caused travel to be cancelled for a period of time. The amended rules also permit OHO and the NAC to order a hearing to proceed by video conference based on a motion filed by one or both parties, as applicable.

FINRA notes that in-person hearings remain the default method for conducting hearings, which may take place where safe and appropriate.

The amended rules with respect to evidentiary hearings before OHO and the NAC, and oral argument hearings before the NAC, are described, below.<sup>4</sup>

#### **Evidentiary Hearings Before OHO and the NAC (Amended FINRA Rules 1015, 9261, 9524, 9830 and Funding Portal Rule 900)**

OHO conducts hearings in disciplinary proceedings<sup>5</sup> and hearings for temporary and permanent cease and desist orders (“TCDOs” and “PCDOs”).<sup>6</sup> The NAC conducts hearings in membership proceedings,<sup>7</sup> eligibility proceedings,<sup>8</sup> and Funding Portal eligibility proceedings.<sup>9</sup>

For evidentiary hearings, the amendments give OHO or the NAC authority to order an evidentiary hearing to occur by video conference, in whole or in part, if OHO or the NAC determines that proceeding in person may endanger the health or safety of the participants or would be impracticable, as described above. Based on that determination, OHO and the NAC could order a hearing to proceed by video conference on their own (*i.e., sua sponte*).<sup>10</sup> In addition, parties may file a joint motion requesting the hearing to occur, in whole or in part, by video conference based on a showing of good cause.<sup>11</sup>

Whether acting on its own or based on a joint motion of the parties, OHO and the NAC have reasonable discretion to exercise their authority to order a hearing to proceed by video conference. In deciding whether to schedule a hearing by video conference, OHO and the NAC could consider and balance a variety of factors including, for example and without limitation, a hearing participant’s individual health concerns and access to the connectivity and technology necessary to participate in a video conference hearing.

#### **Oral Argument Before the NAC (Amended FINRA Rule 9341)**

When orders in disciplinary proceedings are appealed, the NAC holds hearings on oral argument.<sup>12</sup> NAC oral arguments are typically shorter than evidentiary hearings (generally two hours or less), contain no presentation of new documentary evidence or witness testimony, and are often conducted by counsel.

Under amended FINRA Rule 9341, the NAC has authority to order an oral argument hearing to occur by video conference, in whole or in part, if it determines that proceeding in person may endanger the health or safety of the participants or would be impracticable. Based on that determination, the NAC could order a hearing to

proceed by video conference on its own (*i.e., sua sponte*). In addition, the NAC has authority — on its own or on consideration of a motion by any party — to order oral argument to occur by video conference, in whole or in part, for other reasons (*i.e.* reasons not limited to public health, safety or impracticability). Under such circumstances, an opposing party would have the opportunity to demonstrate that the hearing should proceed in person because proceeding by video conference would materially disadvantage that party. Whether a party has shown material disadvantage would depend on the facts and circumstances. Considerations may include, for example and without limitation, case complexity, the issues on appeal, and whether the respondent is *pro se* and desires to appear in person.

Whether acting on its own or based on a motion of a party, the NAC has reasonable discretion to exercise its authority under the rule change. In deciding whether to order an oral argument hearing by video conference, the NAC could consider and balance a variety of factors including, for example and without limitation, a hearing participant's individual health concerns, access to video conference technology, whether a party has delayed or refused to appear in person, and whether proceeding by video conference would materially disadvantage any party.<sup>13</sup>

### Effective Date

The amendments to FINRA Rules 1015, 9261, 9341, 9524, 9830 and Funding Portal Rule 900 become effective on August 23, 2023.

## Endnotes

1. The Securities and Exchange Commission approved the amendments on July 31, 2023. See Securities Exchange Act Release No. 98029 (July 31, 2023), 88 FR 51879 (August 4, 2023) (Order Approving File No. SR-FINRA-2023-008).
  2. The temporary amendments allowed OHO and the NAC to order, without a motion, hearings to proceed by video conference based on public health risks related to COVID-19. See Securities Exchange Act Release No. 88917 (May 20, 2020), 85 FR 31832 (May 27, 2020) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2020-015); Securities Exchange Act Release No. 89737 (September 2, 2020), 85 FR 55712 (September 9, 2020) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2020-027); Securities Exchange Act Release No. 90619 (December 9, 2020), 85 FR 81250 (December 15, 2020) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2020-042); Securities Exchange Act Release No. 91495 (April 7, 2021), 86 FR 19306 (April 13, 2021) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2021-006); Securities Exchange Act Release No. 92685 (August 17, 2021), 86 FR 47169 (August 23, 2021) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2021-019); Securities Exchange Act Release No. 93758 (December 13, 2021), 86 FR 71695 (December 17, 2021) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2021-031); Securities Exchange Act Release No. 94430 (March 16, 2022), 87 FR 16262 (March 22, 2022) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2022-004); Securities Exchange Act Release No. 95281 (July 14, 2022), 87 FR 43335 (July 20, 2022) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2022-018); Securities Exchange Act Release No. 96107 (October 19, 2022), 87 FR 64526 (October 25, 2022) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2022-029); and Securities Exchange Act Release No. 96746 (January 25, 2023), 88 FR 6346 (January 31, 2023) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2023-001).
- For ease of reference in this Regulatory Notice, FINRA refers to the temporary changes to the original rules as the “temporary amendments.”
3. For OHO hearings, the Chief or Deputy Chief Hearing Officer has such authority; for NAC hearings, the NAC or relevant Subcommittee has such authority.
  4. For ease of reference, “evidentiary hearings” refers to hearings conducted before OHO under FINRA Rules 9261 and 9830, and the NAC under FINRA Rules 1015, 9524, and Funding Portal Rule 900. “Oral argument” refers to hearings conducted before the NAC in appeals from disciplinary proceedings under FINRA Rule 9341. See *infra* notes 5-9 & 12, and accompanying text.
  5. See FINRA Rule 9261. The FINRA Rule 9200 Series sets forth the procedures for disciplinary proceedings initiated by the Department of Enforcement against any FINRA member or associated person for alleged violation of any rule, regulation, or statutory provision that FINRA has jurisdiction to enforce, including the federal securities laws and the regulations thereunder.
  6. See FINRA Rule 9830. The FINRA Rule 9800 Series sets forth the procedures for TCDO and PCDO proceedings. These provide a mechanism to take necessary remedial action against a member or associated person where there is a significant

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- risk that the alleged misconduct could cause continuing harm to the investing public, if not addressed expeditiously.
7. See FINRA Rule 1015. The FINRA Rule 1000 Series governs, among other things, the process for (i) applying for FINRA membership; (ii) FINRA members to seek approval of a change in ownership, control or business operations, and (iii) an applicant to request that the NAC review a FINRA decision rendered under the Rule 1000 Series.
  8. See FINRA Rule 9524. The FINRA Rule 9520 Series sets forth the procedures for eligibility proceedings and review of those proceedings by the NAC and FINRA Board.
  9. See Funding Portal Rule 900. Funding portal members are subject to the FINRA Rule 9000 Series, except for the FINRA Rule 9520 Series, FINRA Rule 9557, FINRA Rule 9561, and the FINRA Rule 9700 Series and specified provisions, as set forth under Funding Portal Rule 900, written specifically for funding portals. See Securities Exchange Act Release No. 76970 (January 22, 2016), 81 FR 4931 (January 28, 2016) (Order Approving File No. SR-FINRA-2015-040). Paragraph (b) of Funding Portal Rule 900 was established as a streamlined version of the FINRA Rule 9520 Series and sets forth the procedures for funding portal eligibility proceedings. Although paragraph (b) was not temporarily amended, FINRA has amended it on a permanent basis so that the procedures for funding portal eligibility proceedings are aligned with eligibility proceedings under the FINRA Rule 9520 Series. The amendments allow for both of those types of hearings to be conducted by video conference.
  10. OHO and the NAC have such authority over the objection of a party. The same was true under the temporary amendments. See SR-FINRA-2020-027, *supra* note 2.
  11. FINRA notes that its current practice is to allow witnesses in an otherwise in-person hearing to appear by video conference. In evidentiary hearings, a party may file a motion to offer witness testimony by telephone or video conference. Further, even prior to the COVID-19 pandemic, Adjudicators have allowed telephone participation by witnesses who are unable or unwilling to appear in person, such as customers over whom FINRA does not have jurisdiction and therefore cannot compel testimony under FINRA Rule 8210.
  12. See FINRA Rule 9341. The FINRA Rule 9300 Series sets forth the procedures for review of disciplinary proceedings by the NAC.
  13. FINRA notes that the amendments impact all members, including members that are funding portals or have elected to be treated as capital acquisition brokers (“CABs”), given that the CAB rule set incorporate the impacted FINRA rules by reference and that, under the Funding Portal Rules, funding portal members are subject to the FINRA Rule 9000 Series, with specified exceptions as set forth under Funding Portal Rule 900. See *supra* note 9.