

February 15, 2021

Jennifer Piorko Mitchell  
Office of the Corporate Secretary  
FINRA  
1735 K Street, NW  
Washington, DC 20006-1506

Submitted via E-Mail

Re: Theta Lake, Inc.'s Feedback on FINRA Regulatory Notice 20-42

Dear Ms. Mitchell:

Theta Lake, Inc. ("Theta Lake") submits this letter in response to the Financial Industry Regulatory Authority's ("FINRA") Regulatory Notice 20-42 "Retrospective Rule Review" request for feedback on experiences and lessons learned during the ongoing COVID-19 pandemic.

## **I. Background**

We work with hundreds of firms globally who have been deploying remote operations to facilitate business continuity and resiliency during the pandemic. This new work from anywhere paradigm is supported by the rapid adoption of collaboration platforms like Zoom, Microsoft Teams, and Cisco Webex to facilitate engagement and connection among employees. The abrupt transition to work from anywhere likely signals a more permanent shift to geographically dispersed teams, which will endure after the pandemic subsides.

During the course of our engagements, we are often asked for guidance about how collaboration platforms can be deployed to align with regulatory, privacy, and cybersecurity requirements, including FINRA's recordkeeping, supervision, and business conduct rules. In particular, questions about obligations to capture and retain the dynamic communication capabilities of these platforms as well as related oversight mandates are common.

While we have developed an internal set of best practices and recommendations based on guidance from FINRA, SEC, FCA, and other regulators, we feel that additional clarity regarding member firm obligations relating to collaboration platforms in the form of a Regulatory Notice or Frequently Asked Questions ("FAQs") would provide certainty and improve customer protection.

We are submitting this letter to provide background about the unique capabilities of collaboration tools that have fostered a productive remote work environment as well as general feedback about how FINRA may consider providing additional guidance related to its capture, retention, and supervision obligations outlined in Rules 2210, 3110, and 4510, allowing member firms to leverage the full suite of collaboration features to create a more connected and frictionless virtual office. Collaboration tools are the backbone of the modern workplace, providing clear advantages in communicating and sharing information with customers, and are in demand by consumers. In the area of digital communications, specific regulatory guidance that supports the straightforward, full-featured implementation of tools like Zoom, Webex, Slack, RingCentral, and Microsoft Teams, while strengthening investor protection is critical.

We submit this letter to collectively respond to the following questions FINRA posed in Reg. Notice 20-42:

11. What methods has your firm used to supervise personnel working remotely? What business changes have you made in order to comply with supervision requirements?
12. Has your firm experienced any challenges supervising personnel working remotely? If so, in what particular areas?
24. Have firms implemented new or additional investor protection measures during the pandemic?

## **II. Collaboration Application Features**

The dynamic communication capabilities of collaboration platforms have transformed the way that organizations are working during the pandemic. When collaboration screensharing, whiteboards, webcams, chat, and integrated voice calling features are fully enabled, they make communications more effective and meaningful. However, as has been apparent during the pandemic, many firms disable or otherwise curtail the use of these features because of concerns about regulatory requirements.

Starting with some positive examples of the possibilities, here are a few public facing items:

- This commercial demonstrates an advisor sharing planning and projection tools with clients: <https://www.youtube.com/watch?v=KctiVykDQZs>
- This article outlines best practices for using collaboration tools, including the electronic communications features: <https://www.kiplinger.com/retirement/retirement-planning/601209/get-the-most-from-a-zoom-meeting-with-your-financial-adviser>
- This terrific program allows more flexible electronic communications through the use of collaboration tools: <https://www.edwardjones.com/client-resources/business-with-us/web-conferencing.html>

Building from those cases, below we provide a quick overview of the unique capabilities of collaboration systems to demonstrate their critical business value, including examples of how they can be used in the financial services context.

- Screen Sharing. Screen sharing allows users of collaboration tools to share single applications or entire computer desktops to effortlessly display presentations, marketing materials, client onboarding data, and trade recommendations, among other types of content. Screen sharing is used for activities ranging from collective brainstorming sessions to interactive financial planning—it replicates the personalization and engagement that, to date, were only possible through in-person meetings. A few specific examples of how screen sharing could be used are:
  - o Financial professionals sharing planning tools to gather details like age, investment goals, and risk tolerance from investors to generate investment analysis, comparative statements about investment options, and related hypothetical planning examples
  - o Providing, and proving provision of, disclaimers and disclosures that may be required for professional designations and control relationships, or specific products like 529 plans, variable life insurance, variable annuities, and cryptocurrencies
  - o Displaying market research and marketing materials for investment products and services
  - o Troubleshooting technical issues with cloud-based account management tools
- Webcam. Webcams are key elements of collaboration applications that allow users to approximate face-to-face conversations. Webcams allow users to see each other's faces and share information like documents, images, logos, and their physical setting during a session.

- Virtual whiteboard. Collaboration applications contain virtual whiteboards where one or more participants in a conversation can exchange text, create images, and co-annotate content. Like their physical counterparts, virtual whiteboards allow for the addition, removal, and modification of text as well as highlighting and other actions that change during the course of meeting as ideas are refined in real time.
- Chat. Long a familiar component of enterprise communication tools, collaboration applications include native chat capabilities that enable one-to-one and one-to-many discussions. Collaboration chat is a powerful supplement to the other visual features of a conference, allowing for direct communications between meeting participants.
- File transfer. File transfer mechanisms are included in collaboration tools, often as part of the chat interface. Participants can share account opening PDFs, financial planning documents, images, advertising presentations, research, and other information quickly and efficiently. The ability to instantaneously send and receive files means they can be easily accessed and discussed simultaneously during a session.
- Voice calls. Another critical component of collaboration tools are the audio capabilities that supplant landline or mobile phone calls and allow meeting participants to engage in conversations with a basic internet or cellular connection. These audio capabilities are a core collaboration functionality—coupled with the features described above, they allow collaboration tools to transcend traditional conference call bridges and create virtual forums for true group participation.

Given the diverse and powerful capabilities described above, it is no surprise that collaboration tools have been the engine driving remote work during the pandemic. However, we have frequently seen broker-dealers and others actively disable some or all of these features because of either a perception that they cannot capture, retain, and supervise the conversations that take place on them, or because they feel there is a lack of clarity regarding their compliance obligations when using these systems.

### **III. Modern Compliance Tools**

Modern supervision tools like those developed by Theta Lake have matured to the point where capture and retention of each of the collaboration features discussed above are possible. Advanced oversight modules use machine learning and natural language processing to analyze what was spoken, shown, and shared during collaboration sessions to identify potential regulatory compliance, privacy, and cybersecurity risks.

By way of example, modern tools can detect visual risks like the display of Form CRS in a screenshare or through a webcam as well as discussions about the document, or its distribution through a file transfer. These advanced applications also identify links to shadow IT systems like Dropbox and Box in chat, the discussion of or display of confidential data or MNPI, and the display of sensitive information like Social Security Numbers, birthdates, or email addresses through screen shares or webcams.

As a knock-on effect, many tools such as Theta Lake's improve the compliance reviewer user experience drawing on innovations in data integration and capture processes. For example, chat conversations from applications like Microsoft Teams, Zoom, and Slack can be preserved in fully native format, including reactions, animated gifs, and emojis in archived messages as well as permitting firms to redact or remediate sensitive data to prevent further proliferation among employees and review teams. From a feasibility perspective, RegTech applications allow broker-dealers to fully capture, retain, and supervise every aspect of a collaboration session.

#### **IV. FINRA Guidance**

With respect to guidance, the evolution of FINRA’s rules as they pertain to electronic communications and supervision has historically advanced to encompass new technologies. FINRA’s FAQs about the use of social media provide an excellent example of how regulatory interpretation adapted to emerging technologies. In this case, FINRA provided essential initial perspective on the use of collaboration tools in its COVID-19 FAQs on Advertising Regulation, which state:

However, if a registered representative during the video or audio conference uses the chat or instant messaging feature of the platform or presents slides or other written (including electronic) communications, the member must keep records of these written communications in accordance with Securities Exchange Act Rule 17a-4 and FINRA Rules 3110.09 (Supervision) and 4511 (General Requirements), and their content must be consistent with applicable standards such as FINRA Rule 2210 (Communications with the Public) and 3110(b) (Supervision).

While the answer above is helpful, it effectively bifurcates collaboration communications into two categories—written communications, and everything else. It is this “everything else” category that includes interactions through screen shares, webcams, file transfers, audio, and non-text usage of the whiteboard, which provide the most value to firms, but also cause the most friction during deployments. This dual approach to regulated communications results in situations where firms disable the bulk of these extremely useful and revenue-enabling features because of a lack of regulatory clarity, despite the fact these capabilities drastically improve working efficiency and a firm’s ability to effectively communicate with its employees and clients.

Further guidance on collaboration platform use would provide regulatory certainty and allow firms to confidently and decisively deploy collaboration tools with the full complement of feature sets discussed above to increase workforce efficiency and improve communications with employees, customers, and others.

Given that compliance solutions now allow for the capture, retention, and supervision of the multifaceted nature of modern collaboration tools, we urge FINRA to consider interpretive guidance in the form of FAQs or a Notice to articulate that the capture and retention of the audio, video, and text elements of business communications on collaboration tools are required. Brightline guidance would eliminate regulatory uncertainty, streamline collaboration platform implementation, and boost investor safeguards. We would note that, at a minimum, guidance regarding employees subject to heightened supervision, should be refined to include the capture, retention and oversight of collaboration conversations.

#### **V. Investor Protection**

The capture and retention of collaboration communications would provide direct and tangible evidence of conversations with retail investors in the event of issues related to the provision of investment advice, trade disputes, and compliance with communications with the public rule. Since collaboration tools can be used to interact with retail investors of all types—senior and vulnerable investors, beginners consuming data from social media and apps like Robinhood, and more technologically savvy investors discussing cryptocurrencies—understanding how investment recommendations are discussed and provided through collaboration platforms would provide full transparency into such practices and protect investors.

**VI. Conclusion**

Supplemental guidance would provide clarity regarding the use of collaboration platforms—firms could deploy these tools with all features enabled, in a simple and direct manner, allowing them to take full advantage of the benefits of the modern work environment. Collaboration interactions would be subject to the same scrutiny as existing communications systems like email and instant messaging, including monitoring for potential issues related to customer complaints, instructions, funds and securities, and other relevant risks. The existence of new, low cost information management and oversight tools to support compliance eliminates prior capture and retention hurdles and would allow firms to unlock the power of collaboration tools and while meeting relevant rulesets and achieving FINRA’s investor protection goals.

We hope that this background and observations will help FINRA consider appropriate regulatory responses to the challenges encountered by its member firms during the pandemic. FINRA has demonstrated ingenuity and resilience in its efforts to adeptly respond to significant market and operational uncertainties. We would welcome the opportunity to discuss these issues further with FINRA staff.

Respectfully yours,

*Marc Gilman*

Marc Gilman  
General Counsel and VP of Compliance, Theta Lake, Inc.