



SECURITIES INDUSTRY PRACTICE

ALERT

FINRA'S ENFORCEMENT PROCESS STEPS UP IN 2010

Last year's FINRA guidance on its enforcement program was a harbinger for things to come in 2010.

FINRA's announcement covered eight areas: (1) enforcement of procedures and managerial oversight; (2) conducting investigations; (3) sufficiency of evidence reviews; (4) the Wells process; (5) Disciplinary Advisory Committee (DAC) reviews; (6) litigation group consultation process; (7) the Office of Disciplinary Affairs (ODA); and (8) the Office of Hearing Officers (OHO). See FINRA Regulatory Notice 09-17. FINRA's attempt at guidance as to its enforcement processes investigations, charging reviews and hearings panels parallels the SEC's approach when it published its Enforcement Manual in the fall of 2008.

In any event, FINRA described its enforcement procedures and managerial oversight and the conduct of its investigations. Many of the procedures are well-known to practitioners in this area, including the multilayered managerial reviews as well as the non-public and confidential nature of these investigations. Further, FINRA reiterated its use of FINRA Rule 8210 to require firms and associated persons to produce information to FINRA, as well as the potential bar applicable for the failure to do so. FINRA also disclosed that the information it collects may potentially be shared with other agencies, including but not limited to the SEC, if requested.

After the conclusion of its investigations, FINRA has made it clear that its staff will analyze the evidence and the applicable laws to determine if a violation has

occurred, all completed under the supervision of senior managers. FINRA has termed this process the Sufficiency of Evidence Review. If the potential violation is minor, the FINRA staff may consider an informal disciplinary route such as issuing a Cautionary Action. This form of sanction does not constitute a formal discipline item requiring a report to the FINRA CRD system or to the Form BD.

However, if the FINRA staff decides to recommend formal disciplinary action, it will contact a potential respondent or counsel to inform them of this action. This contact begins what is known as the Wells Process. The Wells Process begins with the Wells Call to either the potential respondent or counsel, where the potential respondent or counsel discuss with the FINRA staff the facts and applicable law used as the basis for the allegations. The FINRA staff will then confirm the Wells Call in writing, and, upon receipt of this written Wells Notice, the associated person who receives it must then report it on their Form U4. This information and any Wells Submissions information received from the potential respondent (notified person or entity) are reviewed by FINRA's senior managers. Similarly, other FINRA departments, including ODA, review all Wells Submissions. Further, a closing order is sent to each individual who received a Wells Notice where the matter was closed without formal disciplinary action.

FINRA also announced that its DAC would review all significant cases for novel, legal or factual issues. The DAC consists of senior managers from the

Enforcement and Market Regulation Departments who consider the evidence supporting each recommended charge to ensure consistency and proportionality. The DAC also considers credit for extraordinary cooperation. Nonetheless, no settlement may be finalized unless it is approved by the ODA.

Additionally, all proposed settlements will be reviewed by a FINRA trial lawyer in the litigation group so that there is sufficient evidence to support the charges. This review includes ODA, an independent department from Enforcement and not involved in the investigation or litigation. As stated above, ODA will review each proposed settlement or complaint, including any Wells Submission, to provide an independent review, as well as consistency with the sanctions guidelines and FINRA precedent. ODA approval is required before any settlement or complaint is issued.

Finally, FINRA's OHO presides over the hearing of all disciplinary matters. OHO is independent of

Enforcement and not involved in the investigation process. Members of the OHO are protected by certain employment protections to ensure independence. OHO hearing officers conduct hearings along with two industry panelists who are drawn from a pool of current and former securities industry members of FINRA's District Committees as well as its Market Regulation Committees, former members of FINRA's National Adjudicatory Council (NAC) and former FINRA Governors. All appeals from hearing decisions are made to the NAC, and further appeals to the SEC and various United States Courts of Appeals.

In sum, although the procedures and policies discussed by FINRA do not represent a change in FINRA's conduct, Fox Rothschild's Securities Industry Group attorneys are ready to assist those who find themselves at any stage of this process.

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