

COVID-19 NEWS OF INTEREST

FINRA Observations on Transition to and Supervision of Remote Working Environments

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As part of its ongoing effort to provide guidance, updates and other information to help its member firms stay informed of regulatory developments relating to COVID-19, the Financial Industry Regulatory Authority, Inc. (“FINRA”) published a Regulatory Notice entitled, “Transition to Remote Work and Remote Supervision”¹ on May 28, 2020 (“Notice”) to share common themes FINRA has observed through its interactions with small, midsize and large firms about steps they have taken to transition their associated persons and supervisory procedures to ongoing operations conducted through a remote working environment. Although not styled as a comprehensive inventory or a compilation of exam findings or best practices, the observations included in the Notice provide useful information to firms about practices among peer firms and offer, to the extent relevant and useful, details that could potentially enhance their own supervisory systems and compliance practices. Notwithstanding FINRA’s disclaimer, the practices outlined in the Notice are likely to inform its examinations of how member firms have conducted and supervised remote operations during this protracted period and whether their efforts were reasonably designed.² Following is a summary of the Notice’s highlights.

¹ FINRA Regulatory Notice 20-16 (May 28, 2020) available [here](#). FINRA maintains a more comprehensive information site covering its COVID-19-related guidance, available [here](#).

² Among other considerations, these observations seem likely to inform FINRA examiner assessments of the design and execution (and modification where necessary) of firm business continuity plans mandated under FINRA Rule 4370.

FINRA Observations on Transition to and Supervision of Remote Working Environments

Remote Work Location Transition

The Notice first describes certain challenges firms have faced in transitioning to remote work environments, implementing business continuity plans (“BCPs”), closing branches and supporting customers through these changes. Not surprisingly, the Notice suggests that firms that have relied on web-based tools, electronic document management systems and cloud-based services, and that have regularly tested remote access had fewer challenges in making the transition. Likewise, firms that have regularly updated their BCPs and maintained “hot” disaster recovery sites had a smoother transition. The Notice highlights certain efforts undertaken by firms related to office space and remote work, including:

- providing backup contact information and redirecting calls as necessary to address branch office closures and cancelled in-person appointments;
- implementing remote work protocols related to approval of staff relocation and contact information;
- providing additional support and communication to facilitate remote work and minimize the likelihood that their employees will use personal or unapproved systems and technology to conduct firm business; and
- reminding staff of their confidentiality obligations and maintaining vigilance in preventing the potential exploitation of cybersecurity vulnerabilities and other potential fraud risks.

Implicit in this discussion of transition practices is the suggestion that FINRA may focus on these elements as its examiners assess how well firms managed the transition into operating remotely upon the commencement of the COVID-19 threat and the steps taken by state and local authorities that necessitated remote work. The observations underscore the importance of good documentation. To the extent practicable, firms should review this list and evaluate how they handled the transition, whether they made (or still need to make) any adjustments, and how well they have created and maintained associated records. To the extent they have not followed some of these enumerated practices, firms may wish to document why this did not affect the provision of services to customers or otherwise inhibit the fulfillment of any regulatory requirements or note other steps taken in lieu of the listed practices.

Remote Work Supervision

The Notice provides a more extensive summary of the steps taken by observed firms to address challenges related to remote supervision. In particular, FINRA emphasizes how existing methods of supervision, such as supervisory checklists, surveillance tools, incident trackers, email review and trade exception reports, have positioned certain broker-dealers to remotely supervise their associated persons. The Notice then highlights a number of remote supervisory practices.

FINRA Observations on Transition to and Supervision of Remote Working Environments

In particular, the Notice observes that some firms conducted additional testing of remote supervision ahead of shelter-at-home orders going into effect and performed gap analyses between normal and remote supervision operations and documentation requirements. Likewise, the Notice describes practices around providing additional support and communication to supervisors to prepare and assist them in performing their roles remotely, including “over-escalating” potential issues and convening meetings and conducting further analysis in circumstances where firms observed an increased number of alerts or complaints, and providing feedback to address emergent issues related to remote work. Once again, these observations seem likely to inform how FINRA may review firm efforts to prepare for and execute on remote supervisory practices that are in keeping with regulatory expectations and the practices of their peer firms.

The Notice pays particular attention to trading supervision, describing that some firms have found that their existing systems enabled them to perform remote supervision, monitoring and surveillance successfully, while others have implemented new or enhanced tools to provide traders and their supervisors better capabilities for the execution of their work. These enhancements include establishing prescreening and heightened supervisory requirements, as well as increasing the review of trade reports and alerts and the deployment of other communication tools (cameras, chatrooms, conference lines and check-ins) to enable oversight that more closely resembles traditional “line of sight” supervision.

While the Notice suggests that firms generally seem to be relying on established methods to supervise their associated persons’ interactions with customers, FINRA describes certain “extra measures” being deployed by broker-dealers to reinforce that only firm-provided and approved communication methods and tools (e.g., firm email platforms and phones with appropriate recording capabilities) should be used. Likewise, the Notice notes that some firms have increased the volume and frequency of their email review, as well as instituting enhancements to keyword surveillance capabilities, monitoring of recorded lines for traders, and restrictions on chat and video conference functions.

Finally, the Notice notes that, during the pandemic, on-site branch inspections have been largely replaced for the time being by fully remote inspection plans that use video conferencing, electronic document review and other tools to fulfill this element of supervision. Of note, the Notice calls these plans “temporary” and adds that firms should expect to complete on-site inspections “in the future” with priority placed on “high risk branches.” This observation suggests that, at least presently, FINRA does not anticipate that supervisory adaptations made during the COVID-19 outbreak will serve as a permanent replacement for the expectation of regular on-site reviews once safety considerations are no longer paramount. We expect that some firms may want to revisit this issue with FINRA as we emerge from the COVID pandemic and members are able to more fully relate how their adaptations to current conditions have (or have not) affected the quality and thoroughness of how they fulfill their supervisory responsibilities. Firms may also want to consider adjusting their on-site inspection calendar (rather than simply picking up where they left off) to ensure that the inspections of any higher-risk branches are not unduly delayed due to the inability to conduct such inspections for the duration of the COVID-19 outbreak.

FINRA Observations on Transition to and Supervision of Remote Working Environments

More generally, FINRA's Notice reminds firms that they must continue to implement a reasonably designed supervisory system appropriate to their size and business model and that any adjustments to firm policies and supervisory procedures introduced as a result of COVID-19 must be appropriately memorialized. FINRA also encourages firms to contact their designated Risk Monitoring Analyst with any questions about practices described in the Notice.

Willkie has multidisciplinary teams working with clients to address coronavirus-related matters, including, for example, contractual analysis, litigation, restructuring, financing, employee benefits, SEC and other corporate-related matters, and CFTC and bank regulation. Please click [here](#) to access our publications addressing issues raised by the coronavirus. For advice regarding the coronavirus, please do not hesitate to reach out to your primary Willkie contacts.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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