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Via Email Only @ rule-comments@sec.gov

Ms. Vanessa Countryman
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

File Number SR–FINRA–2023–006– Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Proposed Rule Change, as Modified by Amendment No. 1, to Adopt Supplementary Material .19 (Residential Supervisory Location) Under FINRA Rule 3110 (Supervision)

Dear Ms. Countryman:

I write on behalf of the Public Investors Advocate Bar Association ("PIABA"), an international bar association comprised of attorneys who represent investors in securities litigation. Since its formation in 1990, PIABA has promoted the interests of the public investor in all securities and commodities arbitration forums, while also advocating for public education regarding investment fraud and industry misconduct. Our members and their clients have a strong interest in rules promulgated by the Securities and Exchange Commission ("SEC") relating to both investor protection and disclosure.

Pursuant to Rule of Practice 192(a) of the Securities and Exchange Commission, PIABA submits this comment to the SEC concerning FINRA's recently submitted Amendment No. 1 to proposed rule change to amend FINRA Rule 3110 (Supervision). FINRA's proposed amendment seeks to add new Supplementary Material as section .19 (3110.19 – Residential Supervisory Location). The proposed rules change would allow a home office to be considered a residential supervisory location ("RSL") and then create rules and procedures for the supervision of same.

FINRA first filed this proposed rule change on March 29, 2023.[1] PIABA submitted a response letter to the rule proposal on April 26, 2023, urging the SEC to reject the rule proposal.[2] On July

[1] The proposed rule is also substantially similar to the rule proposal FINRA filed with the SEC in July 2022, (SR-FINRA-2022-019) which was twice published for comment on August 2, 2022 and November 4, 2022. PIABA published two separate comment letters on August 23, 2022 and November 22, 2022 in response to that rule proposal asking the SEC to reject the rule proposal.
[2] *See* PIABA Comment Letter to Vanessa Countryman, File No. SR-FINRA-006 (April 26, 2023) ("PIABA Initial Comment Letter").

3, 2023, FINRA filed Amendment No. 1 to the rule proposal. As discussed below, PIABA again asks the SEC to reject the latest iteration of the proposal.

PIABA submits this comment because the bar association believes the rule proposal runs counter to FINRA's stated objective of investor protection. While it is understood that FINRA is attempting to change with the increased use of virtual technology, it leaves considerable opportunity for advisors working from home to skirt the rules. Moreover, multiple aspects of Amendment No. 1 ***weaken***, rather than strengthen investor protection.

Background

As a result of the Covid pandemic, regulators eased regulatory requirements to accommodate brokerage firm employees working at home. This effort included the introduction of new technologies to permit remote supervision. As part of the rationale for this proposal, FINRA states that it "believes that this [work from home] model will endure" and that there is a "growing expectation for workplace flexibility."[3] FINRA further states that this was an opportunity to "consider aspects of Rule 3110 that may benefit from modernization."[4]

While PIABA appreciates FINRA's desire to accommodate new ways of working, those accommodations cannot come at the expense of investor protection: the stated purpose of FINRA, the SEC and the securities laws themselves. As such, any sort of "work from home" accommodation must ensure that investor protection is not reduced in any regard. Such accommodations are a privilege, not a right, and should only be permitted with sufficient safeguards, restrictions and limitations as to ensure that the brokerage industry and FINRA's investor protection ability is not degraded at all.

Following intense criticism from both PIABA and NASAA, FINRA withdrew its prior 2022 rules proposal (SR-FINRA-2022-019) concerning the establishment of residential supervisory locations. FINRA's current rule proposal was filed in March as a substantially similar rule proposal for RSLs, with certain revisions made in an attempt to address stakeholder concerns. Amendment No. 1 contains further proposed revisions. However, none of those revisions can remedy this fundamentally flawed rule proposal that at heart fails to adequately protect investors and should therefore be rejected by the SEC.

Supervisory Experience at an Affiliate or Subsidiary Should Not Count Toward One Year Minimum Experience to be Eligible as an RSL

Proposed Rule 3110.19(c)(1) originally provided that an office of location would be ineligible to qualify as a RSL where one or more associated persons designated as a supervisor at such location had less than one year direct supervisory experience with the member. In response to comments from SIFMA and other industry insiders, FINRA's Amendment No. 1 relaxes this requirement by permitting time spent supervising at an affiliate or subsidiary (who is registered as a broker-dealer or investment advisor) of the member to count toward the one year minimum. FINRA states it

[3] 88 Fed. Reg. 20568, 20569 (April 6, 2023).
[4] *Id.*

believes that "the proposed adjustment would reflect a more balanced approach" to addressing concerns about supervisory experience "by recognizing that [affiliates and subsidiaries] ***may*** share systems and have similar compliance cultures to meet their obligations under federal securities laws."[5]

PIABA believes that FINRA's adjustment is not a more "balanced" approach, but a more lax one that opens up yet more supervisory gaps in FINRA's ill-conceived RSL proposal. While some firms may share systems and have similar compliance cultures with affiliates and subsidiaries, many others don't, especially given the size and complexity of numerous financial firms. Yet, FINRA's adjustment permits disparate entities to combine supervisory experience for meeting the one year minimum and contains no minimum time requirement at all for the member itself. As such, an associated person who spent a year supervising at a lax investment advisor, could walk into an affiliated member firm and satisfy the one year direct supervisory experience requirement under revised proposed Rule 3110.19(c)(1) the day he or she arrives. FINRA's willingness to turn a blind eye and hope that the affiliate's culture and supervisory rules are sufficiently similar to allow that person to qualify as a supervisor in the new office is not a welcome change that promotes investor protection. While PIABA urges the SEC to reject outright the revised version of Rule 3110.19(c)(1), if the SEC *does* decide to approve a version of the rule, it should only consider the text contained in the original Rule proposal.

Exclusions for Associated Persons with Multiple Customer Complaints or Arbitrations and Other Risk Factors

In our letter to FINRA's original Rule Proposal, PIABA noted its "support for the expansion of the ineligibility criteria to preclude associated persons had been subject to failure to supervise complaints or investigations by securities regulators," but proposed that FINRA "should have expanded the ineligibility criteria even further to preclude associated persons who have been the subject of multiple customer complaints, consumer-initiated, investment-related arbitrations or civil litigation."[6]

PIABA noted that "customer complaints and/or consumer-initiated, investment-related arbitration and/or civil litigation claims are often the 'canary in the coalmine' that are the first sign of problematic associated persons" and there was "no reason to wait for formal regulatory action to prohibit associated persons with multiple complaints, arbitration or litigation claims from operating at a residential supervisory location."[7] In Amendment No. 1, FINRA acknowledged PIABA's comments regarding adding customer complaints, investment-related arbitration and civil litigation claims as ineligibility criteria,[8] but rather than add them as ineligibility criteria, FINRA proposes to include them in a new Risk Assessment rule, proposed Rule 3110.19(e).

While PIABA appreciates FINRA's acknowledgement that customer complaints, investment-related arbitration and litigation are risk factors to the supervision of associated persons, its

[5] FINRA Amendment No. 1 to SR-FINRA-2003-006 (July 3, 2023), p. 5 (emphasis added).
[6] PIABA Initial Comment Letter, pgs. 3-4.
[7] *Id.*
[8] FINRA Amendment No. 1, p. 6.

proposal is insufficient and inadequate. Rather than trusting member firms to conduct and document a risk assessment, that includes examining the "volume and nature of customer complaints," multiple customer complaints should be a specific ineligibility criterion as PIABA proposed. Moreover, FINRA provides no guidance whatsoever as to how firms should weigh the volume and nature of customer complaints. There is an obvious concern that, absent bright-line criteria, FINRA members with already lax supervisory systems and enforcement will have yet another opportunity to fail to exercise the requisite supervision.

Further, many of the other factors identified in the Risk Assessment Rule should similarly be bars to working at an RSL. Incredibly, the new Risk Assessment Rule instructs member firms to review "red flags" that occur "in determining whether it is reasonable to maintain the RSL designation of such office or location ... and the member should ***consider*** evidencing steps taken to address those red flags ***where appropriate***."[9] FINRA's language suggests that it considers it permissible to ignore red flags, and that its members need not document any steps taken to address them. Such a proposal is completely inadequate. By definition "red flags" must always be addressed and it is never appropriate to ignore them. In short, red flags should not merely be "taken into account," but instead should be an automatic bar to maintaining a RSL.

FINRA states that the proposed risk assessment rule "would strengthen supervisory controls to further protect investors by requiring firms to ***consider*** higher risk criteria in determining whether to designate an office or location as an RSL."[10] But requiring firms to "consider" higher risk criteria is plainly not enough and FINRA's complete lack of guidance as to how to weigh and assess the various risk criteria is a dereliction of its regulatory function and investor protection mandate.

In short, the ability to operate at a residential supervisory location should be a privilege, not a right. As such, any supervisory or compliance doubts concerning an associated person must be resolved in favor of investor protection by precluding such individuals from operating at a residential supervisory location. Accordingly, the Commission should deny FINRA's Rule Proposal, as modified by Amendment No. 1.

PIABA thanks the Commission and FINRA for the opportunity to comment on this proposal.

Very Truly Yours,

Hugh Berkson
President, Public Investors Advocate Bar Association

[9] FINRA Amendment No. 1, pgs. 12-13 (emphasis added).
[10] *Id.* at p. 8.