June 28, 2021

Jennifer Piorko Mitchell
Office of the Corporate Secretary
Financial Industry Regulatory Authority
1735 K Street, NW
Washington, DC 20006-1506

Re: Regulatory Notice 21-17, "Diversity and Inclusion in the Broker-Dealer Industry"

Submitted via pubcom@finra.org

Dear Ms. Mitchell:

I am pleased to provide these comments in response to Regulatory Notice 21-17 regarding "Supporting Diversity and Inclusion in the Broker-Dealer Industry."[1]

Summary

(1) Diversity and inclusion in the sense of not discriminating on the basis of race, color, religion, sex, national origin or ethnicity and seeking to modify rules that may have an unintentional disparate impact based on these categories is an honorable goal consistent with the principles of the Civil Rights Act and constitutional guarantees of equal protection of the law.

Diversity and inclusion in the sense of requiring affirmative discrimination on the basis of race, color, sex, sexual orientation, national origin or ethnicity (as another self-regulatory organization -- Nasdaq -- is now proposing)[2] is a marked step back backwards morally. This kind of "diversity and inclusion" is a rejection of the principle that people should be judged on the content of their character and their individual achievement rather than their sex, race, national origin, ethnicity or sexual orientation. It is rejection of the principle that people should be judged as individuals rather than as members of a racial or sexual group. It is a rejection of the principle of equal protection under the law (or, in FINRA's case, rules promulgated under law). It is a rejection of the principle that we are all created equal. Legal discrimination or quotas on the basis of race, color, sex, national origin, ethnicity or religion should be a relic of the past. They are immoral and promote division and discord. FINRA should not go down this path.

The two conceptions of "diversity and inclusion" are not allied concepts but are diametrically opposed to one another. One stands in opposition to discrimination and division and for equality, equal protection of the law and individual rights. The other actively promotes racism, racial distinctions, group identity and racial, ethnic and sex-based discrimination and division.

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[1] "FINRA Seeks Comment on Supporting Diversity and Inclusion in the Broker-Dealer Industry," Regulatory Notice 21-17, April 29, 2021
https://www.finra.org/rules-guidance/notices/21-17#notice.

[2] "Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Adopt Listing Rules Related to Board Diversity," *Federal Register*, Vol. 85, No. 239, December 11, 2020, pp. 80472-80505 [Release No. 34–90574; File No. SR–NASDAQ–2020–081]
https://www.govinfo.gov/content/pkg/FR-2020-12-11/pdf/2020-27091.pdf.

(2) FINRA rules and practices pose a serious barrier to entry and have a disproportionate adverse impact on small broker-dealers, entrepreneurs and those without prior school, social or familial connections to the industry. Remedial action is warranted.

(3) FINRA should stay focused on its important core mission. It should protect investors and police the securities industry. It should not devote resources to pursue rules and enforcement actions unrelated to its mission. Doing so will detract from that mission and affirmatively harm investors. It has no authority to do so under the Securities Exchange Act or its own governing documents.

The Meaning of "Diversity and Inclusion"

Many, perhaps most, of the proponents of diversity, inclusion, social justice, critical race theory, multiculturism and identity politics reject, in their words, "the very foundations of the liberal order, including equality theory, legal reasoning, Enlightenment rationalism, and neutral principles of constitutional law."[3] They are engaged in a systematic and sustained effort to effectively change our national ethos from *E Pluribus Unum* to *De Uno, Multis*.[4] They seek to alter the "narrative" and to make sex, race, ethnicity and sexual orientation central to law, public policy and our self-understanding instead of individual achievement, merit, talent and the content of our character. They actively seek to discriminate on the basis of sex, race, ethnicity or sexual orientation rather than achieve a society in which such discrimination is unlawful and rare. They seek a faux diversity measured by group identity determined largely by immutable characteristics rather than true diversity that accounts for the rich tapestry of human experience. They seek to subordinate individual merit to group identity. FINRA should not go down this dubious path. It is immoral and destructive. It would be way outside of FINRA's lane and does nothing to advance FINRA's important mission.

One the other hand, to the extent that "diversity and inclusion" is understood to mean promoting equal protection of the law, civil rights and equal opportunity, it is an honorable pursuit consistent with the principles of the Constitution and the Civil Rights Act.

The two conceptions of "diversity and inclusion" are not allied concepts but are diametrically opposed to one another. The former actively promotes racism, racial distinctions, group identity, and racial, ethnic and sex-based discrimination and division. The latter stands in opposition to discrimination and division and for equality, equal protection of the law and individual rights.

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[3] Richard Delgado and Jean Stefancic, *Critical Race Theory: An Introduction*, Third Edition (New York: New York University Press, 2017) under the heading "What is Critical Race Theory," p. 3; Kevin R. Johnson, "Richard Delgado's Quest for Justice for All," *Law & Inequality: A Journal of Theory and Practice*, Vol. 33, No. 2 (2015) https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1213&context=lawineq ("A brief, simple commentary cannot do justice to Delgado's pioneering legal scholarship -- he is nothing less than a legend, a sort of LeBron James or Michael Jordan among legal academics."). See also Jonathan Butcher and Mike Gonzalez, "Critical Race Theory, the New Intolerance, and Its Grip on America," Heritage Foundation Backgrounder No. 3567, December 7, 2020 https://www.heritage.org/sites/default/files/2020-12/BG3567.pdf.

[4] For this formulation of the problem, see Mike Gonzalez, *The Plot to Change America: How Identity Politics is Dividing the Land of the Free* (New York: Encounter Books, 2020).

The Principles of the Constitution and the Civil Rights Act

This section does not pretend to be an exhaustive or authoritative discussion of the complex labyrinth of Supreme Court jurisprudence regarding equal protection under the 5th and14th amendments, disparate impact and the Civil Rights Act. It should, however, give FINRA pause regarding three things. The legal issues raised by rules such as Nasdaq's proposed board diversity rule and any potential analogous FINRA rule are far outside the FINRA's technical competence. The ethical issues raised by the proposed rule are profound. The proposed rule may well be successfully challenged in court on both constitutional and Civil Rights Act grounds.

The Civil Rights Act of 1964 makes it an unlawful employment practice for an employer to "limit, segregate, or classify his employees or applicants for employment" … "because of such individual's race, color, religion, sex, or national origin." Specifically, it reads as follows;

> Unlawful employment practices
>
> (a) Employer practices. It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[5]

It is, of course, not clear what FINRA has in mind. But presumably FINRA is seeking public comments because it is contemplating *some action*. To the extent that FINRA is contemplating rules that would govern either its own or its members employment practices, this statute would be relevant.[6] Whether or not the Civil Rights Act applies to a particular action that FINRA may be contemplating, its principles should govern any FINRA action.

FINRA as a regulator may very well be deemed a state actor.[7] Courts have so held for some purposes. In that case, the equal protection provisions of the constitution are applicable.

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[5] 42 U.S. Code Sec. 2000e-2. [Section 703 of the Civil Rights Act of 1964]

[6] Classifying a worker as an employee or independent contractor can be notoriously difficult and different standards are used for different purposes at the federal and state level. The Civil Rights Act statutory definition is effectively circular. See David R. Burton, A Guide to Labor and Employment Law Reforms, Heritage Foundation Backgrounder No. 3535, October 9, 2020 https://www.heritage.org/sites/default/files/2020-10/BG3535.pdf (See especially "Independent Contractors" section).

[7] For a discussion of when SROs may be deemed state actors, see David R. Burton, "Reforming FINRA," Heritage Foundation Backgrounder No. 3181, February 1, 2017 https://www.heritage.org/sites/default/files/2017-02/BG3181.pdf; Comment Letter of David R. Burton Regarding Proposed Nasdaq Rule Change to Adopt Listing Rules Related to Board Diversity, January 4, 2021 https://www.sec.gov/comments/sr-nasdaq-2020-081/srnasdaq2020081-8204282-227462.pdf.

Certainly, the Commission in its capacity as a government agency approving FINRA's rules is subject to those constitutional provisions. Equal protection principles apply to federal agencies because they have been incorporated into the due process clause of the 5th amendment.[8]

The Supreme Court has held that "A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification."[9] "Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."[10] "Laws that explicitly distinguish between individuals on racial grounds fall within the core of the Equal Protection Clause's prohibition against race-based decision-making."[11] "Racial and ethnic distinctions of any sort are inherently suspect, and thus call for the most exacting judicial examination. … There is no principled basis for deciding which groups would merit "heightened judicial solicitude" and which would not. Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups."[12] "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[13]

Similar decisions generally prohibit discrimination on the basis of sex on equal protection grounds.[14] The Supreme Court has held that "the reviewing court must determine whether the proffered justification is 'exceedingly persuasive.' … The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."[15] The Supreme Court recently extended Title VII protections to gay and transgender persons by holding that discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex.[16]

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[8] *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). See also *Buckley v. Valeo*, 424 U.S. 1 (1976).
[9] *Shaw v. Reno*, 509 U.S. 630, 643-644 (1993). See also *Brown v. Board of Education of Topeka*, 347 U. S. 483 (1954); *Loving v. Virginia*, 388 U. S. 1 (1967); *Personnel Administrator of Mass. v. Feeney*, 442 U. S. 256, 272 (1979).
[10] *Richmond v. J. A. Croson Co.*, 488 U. S. 469, 493 (1989).
[11] *Miller v. Johnson*, 515 U.S. 900, 905 (1995).
[12] *Regents of Univ. of California v. Bakke*, 438 U.S. 265 at 291, 296 (1978).
[13] *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 748 (2007).
[14] *Reed v. Reed*, 404 U.S. 71 (1971); *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) ("… classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny."); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Craig v. Boren*, 429 U.S. 190 (1976); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Kirchberg v. Feenstra*, 450 U. S. 455 (1981); *United States v. Virginia*, 518 U.S. 515 (1996); *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003).
[15] *United States v. Virginia*, 518 U.S. 515, 533 (1996).
[16] *Bostock v. Clayton County*, 590 U.S. __ (2020) https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf ("discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex ... In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. … We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law.")

SRO Rules Requiring Discrimination Represent a Marked Step Backwards Morally

> *I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.*[17]
>
> Martin Luther King, Jr.

> *Sex, like race, is a visible, immutable characteristic bearing no necessary relationship to ability.*[18]
>
> Ruth Bader Ginsburg (in oral argument as an attorney in *Frontiero v. Richardson* (1973))

> *The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all. Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society.*[19]
>
> Justice Clarence Thomas (*Grutter v. Bollinger)*

> Racism: A belief that race is a fundamental determinant of human traits and capacities.[20]

> Sexism: Prejudice or discrimination based on sex; behavior, conditions, or attitudes that foster stereotypes of social roles based on sex.[21]

FINRA should not emulate Nasdaq. The Nasdaq proposed board diversity rule[22] is racist and sexist in that it mandates that firms establish quotas and discriminate based on sex, skin color, ethnicity or sexual orientation rather than making determinations based on individual achievement, talent, experience or competence.[23] It defines diversity entirely in terms of these

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[17] Martin Luther King, Jr., "I Have a Dream" Address Delivered at the March on Washington for Jobs and Freedom, August 28, 1963, Washington, D.C. https://kinginstitute.stanford.edu/king-papers/documents/i-have-dream-address-delivered-march-washington-jobs-and-freedom.

[18] Katherine Franke, "Symposium: The Liberal, Yet Powerful, Feminism of Ruth Bader Ginsburg," October 9, 2020 https://www.scotusblog.com/2020/10/symposium-the-liberal-yet-powerful-feminism-of-ruth-bader-ginsburg/; Robert Cohen and Laura J. Dull, "Supplemental Online Material for "Teaching About the Feminist Rights Revolution: Ruth Bader Ginsburg as 'The Thurgood Marshall of Women's Rights,'" https://tah.oah.org/november-2017/supplemental-online-material-for-teaching-about-the-feminist-rights-revolution-ruth-bader-ginsburg-as-the-thurgood-marshall-of/.

[19] *Grutter v. Bollinger*, 539 U. S. 306, 353 (2003) Thomas opinion (concurring in part and dissenting in part) https://www.supremecourt.gov/opinions/boundvolumes/539bv.pdf.

[20] Merriam-Webster online.

[21] Ibid.

[22] "Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Adopt Listing Rules Related to Board Diversity," *Federal Register*, Vol. 85, No. 239, December 11, 2020, pp. 80472-80505 [Release No. 34–90574; File No. SR–NASDAQ–2020–081] https://www.govinfo.gov/content/pkg/FR-2020-12-11/pdf/2020-27091.pdf.

[23] Comment Letter of David R. Burton Regarding Proposed Nasdaq Rule Change to Adopt Listing Rules Related to Board Diversity, January 4, 2021 https://www.sec.gov/comments/sr-nasdaq-2020-081/srnasdaq2020081-8204282-227462.pdf.

immutable characteristics instead of the myriad of other kinds of diversity such as a director's achievement, expertise, experience, approach to business or business philosophy, educational background, socio-economic background, ethical views, political views, integrity, geographic location, and so on.

Morally, it represents a marked step backwards. It is rejection of the principle that people should be judged on the content of their character and their individual achievement rather than their sex, race, national origin, ethnicity or sexual orientation. It is rejection of the principle that people should be judged as individuals rather than as members of a racial or sexual group. It is a rejection of the principle of equal protection under the law (or, in FINRA's case, regulations promulgated under law). It is a rejection of the principle that we are all created equal. Legal discrimination or quotas on the basis of race or sex should be a relic of the past.

Faux Diversity

The type of diversity created by rules such as the Nasdaq proposed board diversity rule will be faux diversity — skin deep, if you will. It is a rejection of the kind of diversity that is most likely to enable a business to understand the true diversity of the American people and actually be relevant to business profitability such as a director's achievement, expertise, experience, approach to business or business philosophy, educational background, socio-economic background, ethical views, political views,[24] integrity, geographic location There is also strong reason to believe that those chosen under such a rule but who "self-identify" as women, a designated minority or LGBTQ+ will have been educated in the same handful of schools and come from the same coastal urban centers as most existing directors.

The Disparate Impact of FINRA's Rules and Practices

The number of FINRA member firms has been in relentless decline since at least 2006. The number has declined from 5,026 in 2006 to 3,435 in 2020, a decline of 32 percent.[25] Two hundred to three hundred firms have been lost each year for a decade and a half.[26] Over the same period, the number of registered representatives has declined only six percent.[27] More and more registered representatives are working for larger firms. In contrast, over the same period, the Gross Domestic Product (GDP) has increased by about 24 percent in real terms and the population has increased by about 11 percent.

The primary reason for the decline in the number of FINRA members is the decline in the number of small broker-dealers. The primary reason for the decline in the number of small firms is the ever-increasing regulatory burden imposed on them by FINRA (and FinCEN and, to a

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[24] It is probably not advisable to require reporting on the political ideology or the party affiliation of board members and management. The country is politicized enough. But the one study that I found on the subject appears to show a strong, statistically robust positive impact of political heterogeneity of boards on firm performance. Incheol Kim, Christos Pantzalis and Jung Chul Park, "Corporate Boards' Political Ideology Diversity and Firm Performance, *Journal of Empirical Finance*, Vol. 21, 2013 https://ssrn.com/abstract=2055800.

[25] Statistics, Member Firm Statistical Review 2006 - 2020 https://www.finra.org/media-center/statistics.

[26] Ibid.

[27] Statistics, Registered Representatives Statistical Review 2006 - 2020 https://www.finra.org/media-center/statistics.

lesser extent, the SEC).[28] The regulatory costs and regulatory risks are such that small broker-dealers have difficulty competing and remaining profitable. Regulatory costs do not increase linearly with size. There are massive regulatory-induced barriers to entry and economies of scale.

This harms entrepreneurs because small broker-dealers are much more likely to take an interest in raising a small amount of capital for a local entrepreneur than is a large New York investment bank. This harms people, disproportionately minorities and residents of small communities, who do not have school, social or family connections with those in the investment banking communities in a few large cities.[29] These effects are clear, profound and large but difficult to quantify. Honest conversations with almost any small broker-dealer will verify the causes and the effects. Frankly, FINRA has done very little to address these problems. The carnage among small broker-dealers continues unbated.

Some tentative, and admittedly relatively small, suggestions about how to address this problem are offered below.

FINRA Exams. I have heard dozens of times from broker-dealers and their lawyers that FINRA examiners are hostile and have an attitude (sometimes called tone issues), that their focus has moved from remediation to punishment and that examinations are overly long and seek much too much information. FINRA examiners are often compared unfavorably to the SEC or the IRS. FINRA examiners are often discussed as knowing the rules but not understanding how firms actually operate. Admittedly, I have heard somewhat less of this kind of criticism during the past two or three years.

Provision of Information and Testimony and Inspection and Copying of Books (Rule 8210). To some extent, this is related to the first item. But I have heard quite a few stories about being summoned to faraway district offices imposing unnecessary costs or of massive and intrusive multiple document requests.

Frequency and Cost of OTRs. Related to the above. There is concern about the frequency and cost of OTRs [On the Record interviews]. The cost of the transcript, counsel and traveling are high. There is a general sense that informal processes were used more in the past. This is part of the theme that FINRA has moved from a remedial posture to a punishment posture. There is also criticism that inadequate notice is given about what is going to be discussed at OTRs, that

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[28] The Commission has done its own damage to small public companies. FINRA is the primary culprit with respect to broker-dealers because FINRA is the primary regulator of broker-dealers.

[29] The Commission's irresponsible two decade long unwillingness to deal with the issue of finders has accentuated this problem. See The American Bar Association Task Force on Private Placement Broker-Dealers. American Bar Association, "Report and Recommendations of the Task Force on Private Placement Broker–Dealers," June 20, 2005, http://www.sec.gov/info/smallbus/2009gbforum/abareport062005.pdf; "Notice of Proposed Exemptive Order Granting Conditional Exemption From the Broker Registration Requirements of Section 15(a) of the Securities Exchange Act of 1934 for Certain Activities of Finders," Notice of Proposed Exemptive Order; Request for Comments, Federal Register, Vol. 85, No. 198, October 13, 2020, pp. 64542-64551 (Release No. 34-90112) https://www.govinfo.gov/content/pkg/FR-2020-10-13/pdf/2020-22565.pdf (now unlikely to be adopted); David R. Burton, "Let Entrepreneurs Raise Capital Using Finders and Private Placement Brokers," Heritage Foundation Backgrounder No. 3328, July 10, 2018 https://www.heritage.org/sites/default/files/2018-07/BG3328.pdf; Comment Letter of David R. Burton regarding the Proposed Exemptive Order for Certain Activities of Finders, November12, 2020 https://www.sec.gov/comments/s7-13-20/s71320-8011714-225387.pdf.

broker-dealers are blindsided with unanticipated questions and that OTRs are used for fishing expeditions. A few have expressed concerns about their practical inability to invoke the 5th Amendment privilege against self-incrimination without "automatically" losing their FINRA membership and, therefore, their business.

Membership Application Process. Both the new membership application process and the continuing member application (CMA) process have been described as complicated, time consuming and opaque as to timing and potential issues. This is, I think, an important contributing factor to the decline in the number of small broker-dealers. Complaints have also been made about how much delay and expense is involved in a firm selling to another broker-dealer.

Market Makers. It is my understanding that it is becoming more and more difficult to find firms willing to make markets for small issuers and that one of the reasons is regulatory costs. This involves both FINRA related issues and SEC related issues. One specific suggestion that makes sense to me is to allow issuers to pay broker-dealers to make a market in their stock provided that this is disclosed.

FINRA Trading Activity Fee. Because the fee is per share rather than by dollar value, it has a disproportionate impact on small companies whose shares trade at lower prices. I realize that there are some changes in the works but I have not evaluated them.

FINRA Form 211. The listing process is considered too complicated and expensive.

Wells Notices and the CRD. Wells notices must be reported on CRD but sometimes Wells Notices remain open for a very long time, reportedly as long as two years. It has been recommended that Wells Notices be closed after a time certain (e.g. 90 days). They, of course, could be reopened if circumstances so dictated.

There are undoubtedly many other issues that I have not discussed.

The ideas expressed in the comment letters of Robert Muh[30] and James J. Angel[31] to allow students at community colleges and four-year colleges to take examinations without first becoming associated with a FINRA member have merit. This would enable students without school, social or familial ties to a FINRA member firm to demonstrate their competence and increase the desirability of hiring them. It would, in Professor Angel's words, enable "outsiders to break into the industry."

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[30] Comment Letter of Robert Muh, May 10, 2021 https://www.finra.org/rules-guidance/notices/21-17/comment/robert-muh-comment-regulatory-notice-21-17.

[31] Comment Letter of James J. Angel, May 18, 2021 https://www.finra.org/sites/default/files/NoticeComment/Georgetown%20University%20%5BJames%20J.%20Angel%5D_21-17%20-%20Comments%20by%20Professor%20James%20J%20Angel%20CFP%20CFA%20on%20FINRA%2021-17.pdf.

FINRA's Mission

As the primary regulator of broker-dealers and their employees, FINRA's mission of investor protection is extremely important. It should remain focused on this mission. It should not, and is not authorized to, engage in mission creep. Devoting resources to rules and enforcement actions that do not promote its core mission will detract from that mission and affirmatively harm investors.

FINRA's articles of incorporation define is purpose as follows:

> Objects or Purposes
>
> Third: The nature of the business or purposes to be conducted or promoted is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of the State of Delaware, and, without limiting the generality of the foregoing, the business or purposes to be conducted or promoted shall include the following:
>
> (1) To promote through cooperative effort the investment banking and securities business, to standardize its principles and practices, to promote therein high standards of commercial honor, and to encourage and promote among members observance of federal and state securities laws;
> (2) To provide a medium through which its membership may be enabled to confer, consult, and cooperate with governmental and other agencies in the solution of problems affecting investors, the public, and the investment banking and securities business;
> (3) To adopt, administer, and enforce rules of fair practice and rules to prevent fraudulent and manipulative acts and practices, and in general to promote just and equitable principles of trade for the protection of investors;
> (4) To promote self-discipline among members, and to investigate and adjust grievances between the public and members and between members;
> (5) To establish, and to register with the Securities and Exchange Commission as, a national securities association pursuant to Section 15A of the Securities Exchange Act of 1934, as amended, and thereby to provide a medium for effectuating the purposes of said Section; and
> (6) To transact business and to purchase, hold, own, lease, mortgage, sell, and convey any and all property, real and personal, necessary, convenient, or useful for the purposes of the Corporation.[32]

Even the fairly open phrase "just and equitable principles of trade" is qualified by "for the protection of investors." FINRA cannot simply pick a new mission of "diversity and inclusion" any more than it can redefine its mission as protecting the environment or protecting the right to bear arms. As worthy as these goals may be, they are not FINRA's mission.

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[32] Restated Certificate of Incorporation of Financial Industry Regulatory Authority, Inc. https://www.finra.org/rules-guidance/rulebooks/corporate-organization/restated-certificate-incorporation-financial.

As a national securities association, FINRA is subject to Securities Exchange Act section 15A(b)(6) which requires that:

> The rules of the association are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; *and are not designed* to permit unfair discrimination between customers, issuers, brokers, or dealers, to fix minimum profits, to impose any schedule or fix rates of commissions, allowances, discounts, or other fees to be charged by its members, or *to regulate by virtue of any authority conferred by this title matters not related to the purposes of this title or the administration of the association*.

The first part of the statutory language sets forth FINRA's affirmative mission. The italicized portions explicitly prohibit FINRA from pursuing rules that are not related to its core mission.

Diversity Statistical Reporting

If the Commission decides to mandate or to allow SROs such as FINRA to mandate diversity reporting greater than what is currently required, then the Commission or FINRA should require reporting on the many kinds of diversity that are important to business success and to investors not merely the race, ethnic origin, sex and sexual orientation of people in the reporting category.

Diversity reporting should include:

(1) experience (job titles, responsibilities and functions, notable achievements);
(2) other positions held (in the past and currently);
(3) industries worked in;
(4) education (degrees conferred, subject matter studied, schools attended and school location);
(5) professional certifications, accreditations and awards;
(6) relevant cultural, charitable, policy, public service or similar activities;
(7) geographic location of residence and business (country, state or region and city); and
(8) other relevant factors (e.g. disciplinary history).

Specific Requests for Comment and Responses

FINRA requests comment, and if possible, descriptive information, on the following questions:

Request for Comment 1. What, if any, FINRA rules or market practices have a disparate impact on individuals in the broker-dealer industry (on the basis of national origin, language, age, gender, race, color, ethnicity, socioeconomic status, religion or spiritual practice, disability, sexual orientation, gender identity, family structure or veteran status) or discourage participation in the broker-dealer industry?

Response 1. See the discussion above under the heading "The Disparate Impact of FINRA's Rules and Practices."

Request for Comment 2. Are there circumstances where FINRA's application of our rules have a disparate impact on individuals in the broker-dealer industry (on the basis of national origin, language, age, gender, race, color, ethnicity, socioeconomic status, religion or spiritual practice, disability, sexual orientation, gender identity, family structure or veteran status) or discourage participation in the broker-dealer industry?

Response 2. See the discussion above under the heading "The Disparate Impact of FINRA's Rules and Practices."

Request for Comment 3. What, if any, FINRA operations and administrative processes have a disparate impact on individuals in the broker-dealer industry (on the basis of national origin, language, age, gender, race, color, ethnicity, socioeconomic status, religion or spiritual practice, disability, sexual orientation, gender identity, family structure or veteran status) or discourage participation in the broker-dealer industry?

Response 3. See the discussion above under the heading "The Disparate Impact of FINRA's Rules and Practices."

Request for Comment 4. Does the current collection and publication of registered representative background data, including that which relates to education, employment status, tenure, and complaints and grievances, create an unintended barrier to greater diversity in the broker-dealer industry?

Response 4. See the discussion above under the heading "Diversity Statistical Reporting."

Request for Comment 5. Are there additional changes that FINRA could make to its rules, consistent with the scope and limitations of its statutory mandate, to affirmatively foster diversity, inclusion and equal opportunity in the broker-dealer industry?

Response 5. See the discussion above under the headings "FINRA's Mission," "The Meaning of 'Diversity and Inclusion'," "SRO Rules Requiring Discrimination Represent a Marked Step Backwards Morally," and "The Principles of the Constitution and the Civil Rights Act."

Sincerely,

David R. Burton
Senior Fellow in Economic Policy
The Heritage Foundation
[redacted]