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## Above and Beyond: FINRA Clarifies Its Approach to Assessing Extraordinary Cooperation

FINRA yesterday issued long-anticipated guidance concerning credit for extraordinary cooperation in the context of enforcement investigations. Like its government counterparts, FINRA hopes to incentivize member firms that go above and beyond their regulatory requirements to identify and self-report misconduct, make restitution to victims, and remediate through correction of deficient systems, procedures and controls. In Regulatory Notice 19-23 (the "Notice"), FINRA describes for its members the distinction between required cooperation and extraordinary cooperation, and the expected impact extraordinary cooperation might have on an enforcement investigation.

### WHAT IS EXTRAORDINARY COOPERATION?

The Notice begins by describing several real-life examples in which firms received substantial credit based upon extraordinary cooperation. Substantial credit in each of these examples resulted from corrective measures and cooperation that were both timely and broad in scope.

The Notice goes on to discuss the four specific action areas in which timeliness and breadth of response will weigh in favor of FINRA giving credit for extraordinary cooperation:

1. Steps Taken to Correct Deficient Procedures and Systems;
2. Restitution to Customers;
3. Self-Reporting of Violations; and
4. Providing Substantial Assistance to FINRA Investigations



## STEPS TAKEN TO CORRECT DEFICIENT PROCEDURES AND SYSTEMS

FINRA will consider a firm to have gone above and beyond its baseline requirements if the firm promptly, upon identifying deficient supervisory systems, procedures, and controls: conducts a far-reaching independent audit or investigation that goes beyond the scope of the immediate issue or misconduct identified, and where appropriate, remediates deficiencies discovered through the broader assessment in departments or product lines. The Notice further suggests that firms that hire independent consultants to ensure adoption and implementation of improved systems, procedures and controls may qualify for extraordinary cooperation.

FINRA encourages firms to *promptly* self-report systemic deficiencies upon detection by offering the possibility of credit for extraordinary cooperation when corrective measures are expeditiously taken after the firm reports the misconduct.

## RESTITUTION TO CUSTOMERS

FINRA expects firms to make prompt and full restitution when there is customer harm. However, the mere payment of restitution will not itself result in credit for extraordinary cooperation. A firm or associated person may receive credit if extraordinary measures are taken to make any harmed customers whole through restitution as quickly as possible. For example, in the case of widespread systemic failures, a firm might accelerate the restitution process by implementing a statistical approach to efficiently identify customers for restitution. In the case of deficient procedures and systems, FINRA encourages member firms to maintain open lines of communication with itself and other regulators as those firms consider the proper methodology to identify and remediate harmed customers. FINRA further notes that it may award extraordinary credit when restitution remediates all *potential* customer harm and was paid promptly at the initiative of the firm (prior to an order by FINRA or another regulator).

## SELF-REPORTING OF VIOLATIONS

FINRA Rule 4530 requires firms to self-report internal conclusions regarding violations of certain laws, rules, regulations or industry standards of conduct. In order to receive credit for extraordinary cooperation, member firms must go beyond Rule 4530's requirements and do so in a prompt and proactive manner. FINRA will consider giving credit if: a firm reports more information than is required under the rule; proactively and voluntarily requests a meeting with FINRA staff to discuss the relevant facts and documents; and/or identifies misconduct through compliance, audits or other surveillance as opposed to via a customer complaint or notification from a regulator.

## PROVIDING SUBSTANTIAL ASSISTANCE TO FINRA INVESTIGATIONS

FINRA recognizes that there is no one-size-fits-all approach to defining what amounts to substantial assistance. Rather, it will evaluate the degree of assistance that might be expected given a firm's size and resources, as well as the scope of the misconduct within the organization and the steps taken to address systemic deficiencies. FINRA will only consider offering extraordinary credit when firms provide assistance "in ways that go far beyond merely responding to requests made under Rule 8210," by proactively volunteering and explaining information relevant to the underlying misconduct either before receiving the request or that is not included in the request. Extraordinary credit may also be granted where a firm conducts a thorough investigation into the misconduct, using counsel or consultants where appropriate, and fully discloses its findings to FINRA.

## WHAT CREDIT CAN FIRMS AND ASSOCIATED PERSONS RECEIVE FOR EXTRAORDINARY COOPERATION?

Credit for extraordinary cooperation may take many forms, ranging from FINRA closing an investigation with no further action, to issuing a cautionary action letter, permitting a reduced fine or zero fine in the case of formal discipline, or declining to require an undertaking when one might otherwise be required.



### INCREASED TRANSPARENCY ABOUT EXTRAORDINARY CREDIT FOR COOPERATION

FINRA also committed to taking specific steps to make its extraordinary cooperation calculus more transparent. First, FINRA will include within its settlement documents a new section titled “Credit for Extraordinary Cooperation.” This section will describe the factors that led credit to be given and the type of credit given. Second, when FINRA issues press releases in connection with notable matters that result in credit for extraordinary cooperation, it will similarly identify the factors that led the respondent to receive credit, as well as the type of credit. Third, when FINRA gives credit for extraordinary cooperation to such a degree that no formal action is taken against a firm or associated person, it may publish information describing the factors that led to its decision when publication of that information would provide useful guidance for its members.

### TAKEAWAYS FOR MEMBER FIRMS AND ASSOCIATED PERSONS

FINRA will not give credit for extraordinary cooperation simply because a firm or associated person complies with reporting and remediation requirements, or adequately responds to requests for information pursuant to FINRA Rule 8210. Instead, member cooperation must exceed the regulatory requirements in scale, scope and speed. Members will be more likely to receive extraordinary credit by fully sharing information with FINRA – at the earliest juncture possible – and maintaining a dialogue with FINRA staff throughout the course of any internal investigation and remediation process.

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