[37]*See, e.g., In re Banco Bradesco S.A. Securities Litigation*, 277 F. Supp. 3d 600, 659, Fed. Sec. L. Rep. (CCH) P 99897 (S.D. N.Y. 2017) (statements in code of ethics may have been aspirational but "the context in which the statements about Bradesco's Code of Ethical Conduct and its other anti-corruption statements were made persuades the Court that they are not to be treated as immaterial as a matter of law at this stage of the litigation").

[38]*See* Jeff Montgomery, *Investor Sues Victoria's Secret Parent Over "Toxic Culture,"* Law 360, https://www.law360.com/delaware/articles/1280141/investor-sues-victoria-s-secret-parent-over-toxic-culture-?nl_pk=d8e8e675-b3ae-488e-b86a-15d04b0b8d13&utm_source=newsletter&utm_medium=email&utm_campaign=delaware (June 4, 2020) (seeking corporate records relating to "alleged 'toxic culture' of sexual harassment and intimidation").

MEANS OF DEALING WITH FINRA ENFORCEMENT ACTIONS

On June 17, 2020, ***Wall Street Lawyer*** *spoke with Andrew St. Laurent, a partner at Harris St. Laurent LLP in New York, on the topic of how counsel could better prepare when dealing with FINRA enforcement actions.*

Wall Street Lawyer*: To begin with, are some lawyers still relatively unaware of what separates a FINRA enforcement case from, say, a typical civil or criminal case?*

Andrew St. Laurent: One thing to note is that FINRA actions are still relatively uncommon. As per their website, there were 26 published decisions in 2019: that tracks roughly to 26 cases that went to hearings in that year.

By contrast, if we're just talking about the New York criminal courts alone, in an average year, you'd expect anywhere from 150 to 200 jury trials in Manhattan in one year. And that's still just one county in one state in the U.S. Whereas FINRA is covering the whole country.

In addition to that, in 2019 there were 472 acceptance, waiver, and consent ("AWC") letters. AWC is the type of plea bargaining in FINRA [these are letters in response to a FINRA complaint in which the accused accepts a finding of violation, consents to sanctions, and waives the right to a hearing/appeal.]

So a FINRA litigation case that goes all the way to hearing is still relatively uncommon for many lawyers that are otherwise active in securities litigation practices. They tend to have far more cases dealing with the SEC, the CFTC, and state regulators than they do with FINRA. It's in part because FINRA has a narrow jurisdiction but also that there are a lot of incentives for respondents to settle, as opposed to having contested hearings, as you can see from the fact that there are so many more dispositions by AWC than through a hearing.

Also, there's a difference in that FINRA applies nationwide, from retail broker-dealers in Ohio to registered reps in South Dakota—they're all subject to the same basic [issues] that FINRA addresses: unauthorized trading, outside business activities, misleading or false filings, people failing to report bankruptcies and so forth. It's the same thing in Georgia as it is in a financial center like New York and Chicago. So, there are going to be a number of general practitioners who may be unfamiliar but will have to try to do their best to defend a FINRA case.

WSL*: What are some of the key differences between a FINRA case and a typical civil or criminal case?*

St. Laurent: In a way, FINRA is neither fish nor fowl: its cases have civil penalties but they often can seem more like criminal cases, in terms of how cases are developed and how information given to the defense except that you don't have the right to invoke the Fifth Amendment. That's one of the biggest differences from a criminal case.

FINRA enforcement has much better access to documents and to witnesses, by virtue of its role as a regulator. All FINRA members, all licensed broker-dealers, have to live with FINRA day-in day-out, and so complying with a FINRA request can be an everyday occurrence. You'll do it for all kinds of reasons. And yet none of that information is available to the respondent until relatively late

in the proceedings. One big reason for that is Rule 8210 requests. FINRA can serve it for any reason or for really no stated reason, and can compel a person in their jurisdiction—for example, any registered rep, or anyone who used to be a registered rep for two years afterward—and ask them questions under oath, without having indicated what they're looking into. In a way, this makes the respondent commit to a theory of the case before they really know anything about the case. That's a huge structural advantage for FINRA.

Also, [in a FINRA case] those who decide the case also work for FINRA. While the Department of Enforcement is separate from the Office of Hearing Officers, the people who decide the cases, they all work under the big umbrella that is FINRA. So the department of enforcement has a lot of credibility coming out of the gate with the hearing panelists and hearing officers that will preside over them. They have a lot of experience and it's a lot of the same types of cases over and over. And FINRA really does try hard to resolve cases pre-hearing, if there's a basis to resolve them. You can meet with the line attorney or with the director a number of times before charges are brought, in an effort to steer the ship to somewhere that your respondent can safely land.

So in short, the defense is on its backfoot, informationally and reputationally, before they even walk in the front door.

In that, it's like a criminal case. But on the other hand, you have to deal with 8210 requests directed at your client, generally at the very beginning of the case, that your client has to answer or risk being barred for not answering. For a criminal defense practitioner, coping with those 8210 requests could be surprising or off-putting.

WSL: *And FINRA cases typically move much faster than your average civil or criminal case?*

St. Laurent: There's a long period of investigation in many cases. But once the wheels are in motion for enforcement proceedings, things move pretty quickly. I'd say the typical timeframe, from the time of complaint, from the serving of the Wells notice [a notification that the regulator intends to recommend that enforcement proceedings be commenced], is about 30 to 60 days. Then the time from the complaint being filed to the hearing is generally six months, for a case with reasonable number of documents. Then you have the hearing, maybe some post-hearing submissions, and then a ruling, which usually takes about 60 days from the last post-hearing submission.

So it's often nine months in total from when a respondent gets the official notice that charges are being considered to a ruling on the merits. That's quite fast. A criminal case, even in a "rocket docket," takes up to a year. And a criminal case in many other districts will go for a couple of years.

WSL*: What are some of the best strategies a defense could use, given these circumstances?*

St. Laurent: The first thing is to have reasonable expectations as to what is going to happen if, say, you're terminated from a broker-dealer for any reason that approaches a violation of internal policy, or if you were terminated pursuant to an investigation. In those cases it's virtually certain FINRA will investigate that. So if you are likely to be a respondent, you want to get an early start. You can't be in the position where you're thinking "this is going to go away." Making an investment of time and resources could be incredibly important. FINRA has a two-year window and they may give a Wells notice on day 722. They want to spend as much time before that with their documents. So that's a period during which a respondent can be out gathering their own documents, looking through their own personal email as opposed to waiting for the blow to come.

Another thing to consider is collateral litigation. People have contracts which may have a provision that provided different benefits, depending on whether a termination from employment it's by cause or not. By litigating that question a person may be able to take depositions and that may be material to a FINRA proceeding. It's something to think about. You can bring a defamation action for a statement, if it fits all of the ele-

 © 2020 Thomson Reuters

ments of common law. These are some things that a respondent can consider, in terms of litigation, which may put the respondent in a better position to defend themselves.

***WSL**: Do you have the sense that FINRA is getting more aggressive in terms of pursuing cases in the past year or so?*

St. Laurent: Yes, we seem to be in a period of greater emphasis on enforcement, where FINRA has become more aggressive and is more likely to press for more serious sanctions, bigger penalties, more months of suspension. That is not new, they're settling into their role as a regulatory enforcer. There can be a lot of overlap between FINRA and the SEC, and within the broker/dealer context FINRA is sometimes the more likely one to investigate an issue.

NEW RULES ON USE AND FORGIVENESS OF PPP LOANS

By Gail Weinstein, Michael T. Gershberg, William J. Breslin, and Suzanne deVries Decker

Gail Weinstein is a senior counsel, and Suzanne deVries Decker is a partner, in the New York office of Fried, Frank, Harris, Shriver & Jacobson LLP. Michael Gershberg and William Breslin are partners in Fried Frank's Washington D.C. office. Contact: gail.weinstein@friedfrank.com or michael.gershberg@friedfrank.com or william.breslin@friedfrank.com or suzanne.decker@friedfrank.com.

On June 5, 2020, the "Paycheck Protection Program Flexibility Act of 2020"[1] was enacted. The Flexibility Act modifies the CARES Act provisions relating to the Paycheck Protection Program ("PPP"), particularly by affording borrowers additional flexibility with respect to eligibility for the forgiveness of PPP loans.

According to the U.S. Treasury Department, as of June 6, 2020, about $130 billion of funds remain available for PPP loans. Reportedly, demand for PPP loans has declined dramatically since the inception of the program due to concerns by some businesses that, because they have remained closed in accordance with governmental shut-down orders, they would not be able to comply with the requirements for use and forgiveness of the loans. It remains to be seen whether the additional flexibility provided by the Flexibility Act will be sufficient to spark a renewal in demand for PPP loans.

The changes effected by the Flexibility Act apply to PPP loans issued before or after enactment of the Flexibility Act (except as otherwise described below). The key changes are as follows.

Forgiveness of PPP Loans

Reduction of the requirement that borrowers use 75% of the loan proceeds for payroll costs. Prior to enactment of the Flexibility Act, under the CARES Act, to be eligible for forgiveness of a PPP loan, the borrower was required to use at least 75% of the loan proceeds for payroll purposes and could use only up to 25% for the other permitted purposes (rent, mortgage interest, and utilities). In addition, regulations issued by the SBA under the CARES Act have required that, irrespective of forgiveness, a PPP borrower has to use at least 75% of the proceeds for payroll costs and can use only up to 25% for the other permitted purposes. Now, under the Flexibility Act, to be eligible for loan forgiveness, the borrower must use at least 60% (rather than 75%) of the proceeds for payroll costs and can use up to 40% (rather than 25%) for the other permitted purposes. In addition, a statement issued by the SBA on June 8, 2020 indicates that the SBA will issue new regulations to provide that, irrespective of forgiveness, a borrower must use at least 60% of the proceeds on payroll costs and only up to 40% on the other permitted purposes. The June 8 statement also clarifies that if a borrower uses less than 60% of the proceeds for payroll costs, partial forgiveness of the loan will still be available.

Extension of the eight-week period for use of the loan proceeds. Prior to enactment of the Flexibility Act, to be eligible for forgiveness of a PPP loan, the borrower had to use the proceeds within eight weeks following the date of disbursement of the loan. Under the Flexibility