

June 21, 2010

Ms. Elizabeth M. Murphy  
Secretary  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549-1090

**Re: SR-FINRA-2010-012 – Proposed Rule Change to Amend FINRA Rule 8312 (FINRA BrokerCheck Disclosure) – Response to Comments**

Dear Ms. Murphy:

The Financial Industry Regulatory Authority, Inc. (“FINRA<sup>®</sup>”) hereby responds to comment letters received by the Securities and Exchange Commission (“Commission” or “SEC”) in response to the publication in the Federal Register of Notice of Filing of SR-FINRA-2010-012. The purpose of the proposed rule change is to amend FINRA Rule 8312 (FINRA BrokerCheck Disclosure) to (1) expand the information released through BrokerCheck<sup>®</sup>, both in terms of scope and time disclosed; and (2) establish a process to dispute the accuracy of (or update) information disclosed through BrokerCheck.

### ***Proposed Rule Change***

Currently, as described in FINRA Rule 8312, BrokerCheck provides information regarding current and former members, as well as current associated persons and persons who were associated with a member within the preceding two years. In addition, BrokerCheck provides certain information about former associated persons, regardless of when they were associated with a member, if they were the subject of any final regulatory action as defined in Form U4 that has been reported to the Central Registration Depository (“CRD<sup>®</sup>”) via a uniform registration form.<sup>1</sup> The proposed rule change would amend FINRA Rule 8312 to (1) expand the BrokerCheck disclosure period for former associated persons of a member to ten years from two years; (2) permanently make publicly available in BrokerCheck certain information about former associated persons of a member if any of the following applies, as reported to CRD on a uniform

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<sup>1</sup> The uniform registration forms are Form U4 (Uniform Application for Securities Industry Registration or Transfer), Form U5 (Uniform Termination Notice for Securities Industry Registration), Form U6 (Uniform Disciplinary Action Reporting Form), Form BD (Uniform Application for Broker-Dealer Registration), Form BDW (Uniform Request for Broker-Dealer Withdrawal), and Form BR (Uniform Branch Office Registration Form).

registration form: (i) the person was convicted of or pled guilty or nolo contendere to a crime; (ii) the person was the subject of a civil injunction in connection with investment-related activity or a civil court finding of involvement in a violation of any investment-related statute or regulation; or (iii) the person was named as a respondent or defendant in an investment-related, consumer-initiated arbitration or civil litigation which alleged that the person was involved in a sales practice violation and which resulted in an arbitration award or civil judgment against the person; (3) make publicly available in BrokerCheck all historic customer complaints that became non-reportable after the implementation of Web CRD; and (4) codify FINRA's current process for disputing the accuracy of (or updating) information disclosed through BrokerCheck.

### ***Response to Comments***

The Commission received 14 comment letters on SR-FINRA-2010-012.<sup>2</sup> A majority of the commenters explicitly support the proposal with respect to the expansion of the BrokerCheck disclosure period for former associated persons and the permanent inclusion of certain information about former associated persons.<sup>3</sup> Most of the commenters, however, express concerns about, or request changes to, those portions of the proposal involving Historic Complaints<sup>4</sup> and the BrokerCheck dispute process. Additionally, some commenters suggest changes to the scope and length of time for the release of information through BrokerCheck and the format of BrokerCheck reports. A summary of the issues raised in the comment letters and FINRA's responses are set forth below.

### ***Historic Complaints***

Three commenters request that the BrokerCheck report format be revised to allow investors to easily identify those customer complaints that were closed with no action or otherwise resolved with no payment being made to the customer.<sup>5</sup> One of these commenters believes that this revision will allow investors to place these customer complaints in the appropriate context with respect to other information in a person's BrokerCheck report.<sup>6</sup> This commenter also suggests

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<sup>2</sup> See Exhibit A for a list of comment letters received.

<sup>3</sup> MWA opposes the expansion of BrokerCheck, while Oster, NASAA, Janney and Caruso do not express an opinion regarding this issue. All other commenters support the expansion.

<sup>4</sup> Historic Complaints are customer complaints that were reported on a uniform registration form that are more than two years old and that have not been settled or adjudicated and customer complaints, arbitrations, or litigations that have been settled for an amount less than the specified dollar amount (identified on the customer complaint question) and are therefore no longer reportable on a uniform registration form.

<sup>5</sup> See comment letters from MWA, NAIBD and Janney.

<sup>6</sup> See comment letter from MWA.

that customer complaints be displayed separately from disciplinary or regulatory events.<sup>7</sup> FINRA agrees in principle with these commenters that customer complaint information should be clearly identifiable and notes that it is in the process of revising the customer dispute disclosure section of the BrokerCheck report to provide further clarity for investors. Specifically, FINRA will be adding a new heading in this section which will clearly identify those customer disputes that were reported by the member firm as closed with no action, withdrawn, dismissed or denied. Additionally, BrokerCheck will continue to provide the status of every customer complaint and to clearly separate the display of various categories of disclosure events (*e.g.*, criminal events, customer disputes, civil events) from each other to help investors evaluate an individual's BrokerCheck record.

A number of commenters further suggest that the BrokerCheck report format be amended to clarify that customer complaints are only allegations made by customers and that the merits of such allegations have not been determined in an adjudicatory proceeding.<sup>8</sup> In response, FINRA notes that each BrokerCheck report currently contains clarifying language in various locations regarding the fact that certain disclosures may involve allegations that have not been resolved or proven. In fact, the first paragraph of the section that sets forth the details of all of a report's disclosure events specifically instructs the reader to be mindful when evaluating the information that certain events "may be based on allegations that have not been resolved or proven" and further specifies that some events may be "withdrawn, dismissed, resolved in favor of the associated person, or concluded through a negotiated settlement for certain business reasons (*e.g.*, to maintain customer relationships or to limit the litigation costs associated with disputing the allegations) with no admission or finding of wrongdoing." Therefore, FINRA does not believe that the suggested changes are necessary.

Two commenters suggest that member firms and registered representatives be allowed to add comments to the Historic Complaints that will be displayed on BrokerCheck.<sup>9</sup> These commenters assert that member firms and registered representatives need to be able to provide comments because they did not anticipate that Historic Complaints would be disclosed to the public. As a preliminary matter, FINRA notes that the premise underlying the commenters' suggestion may be misplaced. In this regard, FINRA notes that since 1998, member firms have been required to report on a uniform registration form certain pending customer complaints, as well as customer complaints, arbitrations, or litigations that were settled for an amount less than the specified dollar amount.<sup>10</sup> Although such matters currently are disclosed for only 24 months from the date the customer complaint, arbitration or civil litigation is reported to the CRD

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<sup>7</sup> *Id.*

<sup>8</sup> *See* comment letters from NAIBD, Cutter, SIFMA, Janney and FSI.

<sup>9</sup> *See* comment letters from Janney and FSI.

<sup>10</sup> *See* Securities Exchange Act Release No. 39562 (January 20, 1998), 63 FR 3942 (January 27, 1998) (Order Approving SR-NASD-97-78).

system, these matters have been publicly disclosed via BrokerCheck (and its predecessor, NASD's Public Disclosure Program) since that time. Additionally, FINRA notes that Historic Complaints are displayed under certain circumstances enumerated in current FINRA Rule 8312.<sup>11</sup> Therefore, FINRA believes that member firms have been on notice for the past several years that Historic Complaints may be publicly disclosed.

Moreover, FINRA notes that member firms and registered representatives currently may add comments to a Historic Complaint, although FINRA plans to simplify the process by which member firms may add or revise comments to, or otherwise update information pertaining to, Historic Complaints. Currently, a member firm must contact FINRA staff and request that a Historic Complaint be "un-archived" if the member firm wishes to make any changes to the information that it has reported with respect to that Historic Complaint. After the member firm makes the necessary changes, the Historic Complaint is once again "archived," if appropriate. FINRA recognizes that, should the proposal be approved, member firms may wish to provide greater context to or otherwise update such Historic Complaints. Therefore, FINRA is making changes to the CRD system that will allow member firms to amend "archived" Historic Complaints without the need to first contact FINRA staff.<sup>12</sup>

As proposed, FINRA would disclose all Historic Complaints that became non-reportable after the implementation of Web CRD on August 16, 1999. Two commenters recommend changing this disclosure date to March 18, 2002, the date that the Investment Adviser Public Disclosure Individual (IAPD-I) database will use to determine which Historic Complaints will be eligible for display.<sup>13</sup> The commenters assert that such a change will provide investors with consistent information regarding individuals who are dually registered as brokers and investment advisers. FINRA respectfully disagrees with this suggestion. FINRA notes that this date will provide less information to investors than under the current proposal, and believes that investors will not be confused by the different dates used by the two systems since each system will disclose its

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<sup>11</sup> Currently, FINRA Rule 8312 provides that Historic Complaints be displayed in BrokerCheck after the following conditions have been met: (1) a matter became a Historic Complaint on or after March 19, 2007; (2) the most recent Historic Complaint or currently reported customer complaint, arbitration or litigation is less than ten years old; and (3) the person has a total of three or more currently disclosable regulatory actions, currently reported customer complaints, arbitrations or litigations, or Historic Complaints (subject to the limitation that they became Historic Complaints on or after March 19, 2007) or any combination thereof.

<sup>12</sup> FINRA staff will continue to review all changes made to Historic Complaints to determine if further action is warranted.

<sup>13</sup> See comment letters from FSI and NAIBD. When IAPD-I is deployed in June 2010, it will disclose all Historic Complaints that became Historic Complaints on or after March 18, 2002.

respective time frame, and any differences in disclosure for dually registered individuals will be limited.

One commenter further suggests that FINRA require that all customer complaints received after the implementation of the proposal be reported via BrokerCheck “under the current two-year period and then start running for a 10-year period after the Proposed Rule is approved.”<sup>14</sup> FINRA understands the comment and related example to be recommending that FINRA adopt a 10-year disclosure period for Historic Complaints going forward, but to limit disclosure of Historic Complaints existing prior to implementation of the proposal to a two-year period. According to this commenter, limiting disclosure in this way will provide the industry notice that customer complaints will be made publicly available, afford member firms an opportunity to take further action regarding a customer complaint knowing that the results will be displayed in BrokerCheck, and mitigate confusion on the part of the public. FINRA does not find merit in this suggestion. Such an approach will result in many fewer Historic Complaints being disclosed than currently proposed, and will in fact have the effect of reducing the number of Historic Complaints currently disclosed for those individuals who are subject to the “three or more” standard under FINRA Rule 8312.<sup>15</sup> In addition, FINRA believes that using the commenter’s suggested dates will not necessarily achieve its stated goals, since, as noted above, member firms are already on notice that customer complaints may be made publicly available, and investors will not be confused by the display of additional customer complaints.

One commenter contends that displaying Historic Complaints as proposed (*i.e.*, those that became non-reportable after the implementation of Web CRD in August 1999) unfairly benefits individuals whose Historic Complaints became non-reportable prior to that date.<sup>16</sup> FINRA acknowledges that, under the proposal, only those Historic Complaints that became non-reportable after the implementation of Web CRD will be eligible for display in BrokerCheck, as discussed in more detail in the proposed rule change.<sup>17</sup> Despite this limitation, FINRA believes that the proposal represents a reasonable and practical approach to the display of Historic Complaints in BrokerCheck.

Three commenters oppose the proposed expansion of BrokerCheck with respect to Historic Complaints more generally.<sup>18</sup> One of these commenters believes that only “current” information should be displayed in BrokerCheck and that the investing public is not served by having access

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<sup>14</sup> See comment letter from FSI.

<sup>15</sup> See *supra* note 11.

<sup>16</sup> See comment letter from Oster.

<sup>17</sup> A discussion regarding the reasons that earlier Historic Complaints cannot be displayed in BrokerCheck is set forth in the proposed rule change.

<sup>18</sup> See comment letters from MWA, FSI and Oster.

to information that is ten years old.<sup>19</sup> Another commenter believes that the expanded display of Historic Complaints will confuse investors because these complaints contain inaccurate information and impede an investor's ability to distinguishing meritless complaints from those that have merit.<sup>20</sup> A third commenter asserts that the proposal may cause firms to restrict the types of products and services they offer to clients through their registered individuals or may cause registered individuals not to provide otherwise approved products and services for fear of having meritless complaints disclosed via BrokerCheck. The commenter suggests that any customer complaint that is found to be without merit and closed without compensation to the investor should "continue to be subject to the current two year rule."<sup>21</sup>

FINRA respectfully disagrees with these comments. Although the first commenter does not define the term "current," FINRA believes that displaying information involving only recent events may deprive investors and other users of BrokerCheck of important information that they would consider relevant. With respect to the second commenter's suggestion that Historic Complaints contain inaccurate information, FINRA, as previously mentioned, is in the process of making changes to the CRD system to allow firms to more easily update or otherwise provide context to Historic Complaints. Additionally, FINRA believes that investors will be able to make an accurate assessment of the customer dispute information disclosed through BrokerCheck, including the Historic Complaints contained in an individual's record, particularly in light of the clarifying language currently set forth in the BrokerCheck report and the upcoming changes to the customer dispute disclosure section described above. Accordingly, with respect to the third commenter's suggestion, FINRA notes that the customer complaint, its disposition (including, when appropriate, that it was closed without compensation to the investor), and the registered representative's comments on the matter, if any (including, for example, an opinion on whether the customer complaint is meritorious), will be displayed via BrokerCheck. As noted in the proposed rule change, FINRA believes that this approach to display of customer dispute information, including Historic Complaints, will allow investors and other users of BrokerCheck to determine for themselves the significance, if any, they should attach to information in an individual's record based on all available customer complaint information and to put such complaints in the appropriate context based on the entire BrokerCheck record for the individual.

Lastly, two commenters oppose what they interpret to be the permanent disclosure of Historic Complaints.<sup>22</sup> In response, FINRA notes that under the current proposal, Historic Complaints will be displayed for ten years following the termination of an individual's registration rather than on a permanent basis.

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<sup>19</sup> See comment letter from MWA.

<sup>20</sup> See comment letter from FSI.

<sup>21</sup> See comment letter from Oster.

<sup>22</sup> See comment letters from NAIBD and Cutter.

*Dispute Process*

Two commenters suggest that the dispute process contain time limitations within which FINRA must process disputes.<sup>23</sup> One of these commenters requests a 30-day time frame for FINRA to determine the eligibility of a dispute<sup>24</sup> and the other commenter requests a 30-day time frame for FINRA to complete the processing of a dispute.<sup>25</sup> While acknowledging these commenters' desire to ensure that disputes are processed quickly, FINRA does not believe that mandating time limitations is warranted or helpful. FINRA will work diligently to process all disputes as expeditiously as possible and anticipates, based on its experience, that it will be able to make a determination regarding the eligibility and merits of a dispute within a reasonable time frame. FINRA notes, however, that in some circumstances, the evaluation of a dispute will be outside of its control, *e.g.*, if it must wait for further information from the party initiating the dispute or for a reporting entity to respond to an inquiry regarding the accuracy of the information reported. In such circumstances, the time limitation will have no effect on the processing of the dispute. In addition to working diligently to process all disputes in a timely manner, FINRA will, as noted in the rule filing, place a notation in a firm or individual's BrokerCheck report stating that the individual or firm has disputed certain information included in the report.

One commenter suggests that FINRA establish a standing national BrokerCheck Record Review Committee to make determinations regarding the eligibility of disputes and whether the information subject to the dispute is accurate or should be updated, modified or deleted from BrokerCheck.<sup>26</sup> FINRA does not believe that the establishment of such a committee is warranted. Based on its experience with the current BrokerCheck dispute process, FINRA has found that the vast majority of disputes regarding the accuracy of information disclosed via BrokerCheck are very straightforward. As described in the rule filing, the processing of a dispute requires only that a determination be made regarding whether a matter is eligible for investigation based on the guidelines set forth in the rule and, if eligible, that FINRA make the appropriate change or contact the entity that reported the information for verification. FINRA believes that requiring a committee comprised of industry and non-industry members to regularly review such routine and generally unambiguous matters would not be warranted and would unnecessarily increase the amount of time needed to process disputes.

One commenter requests clarification on whether the prohibition on false filings would apply to the dispute process.<sup>27</sup> In response, FINRA notes that submissions involving the BrokerCheck

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<sup>23</sup> See comment letters from NAIBD and FSI.

<sup>24</sup> See comment letter from FSI.

<sup>25</sup> See comment letter from NAIBD.

<sup>26</sup> See comment letter from SIFMA.

<sup>27</sup> See comment letter from NASAA.

dispute process would be subject to FINRA rules, including FINRA Rule 2010, which requires members to observe just and equitable principles of trade and high standards of commercial honor. Accordingly, FINRA would consider disciplinary action against an individual or firm that, for example, made a false or misleading statement in connection with a dispute.

One commenter suggests that the matters eligible for investigation in the dispute process be expanded to include requests that would provide a clearer description of an incident.<sup>28</sup> In response, FINRA notes that such expansion of the dispute process is unnecessary as individuals already have the opportunity to provide context to a disclosure matter, including via the submission of Forms U4 or U5.

One commenter expresses concern that the dispute process will somehow be used to expunge customer complaints.<sup>29</sup> FINRA reiterates, as it noted in the proposed rule change, that a dispute that constitutes a collateral attack on or otherwise challenges the allegations underlying a previously reported matter, including a customer complaint, would be deemed ineligible for investigation.

Finally, one commenter expresses concern that FINRA does not currently have, and does not have plans to implement, a system to remove erroneous, invalid or unfounded information from BrokerCheck.<sup>30</sup> In response, FINRA notes that it currently reviews and makes determinations regarding alleged factual inaccuracies in BrokerCheck that are brought to its attention and that the proposed dispute process, which codifies this existing process, will allow for the removal of erroneous or invalid information from BrokerCheck, if warranted.

#### *Further Expansion of Information Disclosed through BrokerCheck*

Six commenters express concern regarding the amount of information and/or the length of time that such information is displayed on BrokerCheck.<sup>31</sup> Most of these commenters suggest that BrokerCheck display additional information from CRD and/or that BrokerCheck display all information on a permanent basis.<sup>32</sup> FINRA recognizes that BrokerCheck provides an important investor protection service. Since establishing the BrokerCheck program in 1988, FINRA has expanded the amount of information disclosed through the program and made that information more accessible and understandable to investors. While FINRA appreciates the commenters' suggestions regarding the disclosure of further information through BrokerCheck, FINRA

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<sup>28</sup> See comment letter from NAIBD.

<sup>29</sup> See comment letter from PIABA.

<sup>30</sup> See comment letter from LPL.

<sup>31</sup> See comment letters from NASAA, PIABA, St. John's, Cornell, Syracuse and Caruso.

<sup>32</sup> See comment letters from NASAA, PIABA, St. John's, Cornell, Syracuse and Caruso.

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believes that the proposed rule change strikes the appropriate balance at this time. In this regard, FINRA notes that these events, like final regulatory actions (which are already included permanently in BrokerCheck), constitute final dispositions. In addition, in most circumstances, these disclosure events allow the subject person an opportunity to present arguments to an impartial fact-finder about the allegations prior to such final disposition. Furthermore, much of the information that would be subject to release pursuant to the proposal may be available to the public through other sources. For example, information regarding arbitration awards is available on FINRA's Arbitration Awards Online database,<sup>33</sup> and information regarding civil and criminal proceedings is provided to the public via numerous state Web sites. Of course, FINRA will continue to evaluate all aspects of the BrokerCheck program and consider whether future circumstances argue for greater disclosure of information through BrokerCheck.

*Format of BrokerCheck Reports*

In addition to the formatting changes involving the customer dispute section of the BrokerCheck report mentioned above, two commenters suggest that the entire BrokerCheck report format be changed to make it easier to read and understand.<sup>34</sup> In response, FINRA notes that it regularly assesses all aspects of the BrokerCheck program and will consider these suggestions at a later date.

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FINRA believes that the foregoing fully responds to the issues raised by the commenters to the rule filing. Please contact me at (240) 386-4821 if you have any questions.

Very truly yours,

Richard E. Pullano  
Associate Vice President and Chief Counsel  
Registration and Disclosure

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<sup>33</sup> See <http://finraawardsonline.finra.org/>.

<sup>34</sup> See comment letters from MWA and FSI.

**Comments on FINRA Rulemaking**

**Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change to Amend FINRA Rule 8312 (FINRA BrokerCheck Disclosure)**

**(Release No. 34-61927; File No. SR-FINRA-2010-012)**

**Total Number of Comment Letters Received – 14**

1. Andrew E. Oster, President and CEO, Oster Financial Group, LLC, dated May 4, 2010 (“Oster”)
2. Pamela Fritz, Chief Compliance Officer, MWA Financial Services, Inc., received May 6, 2010 (“MWA”)
3. Lisa Roth, NAIBD Member Advocacy Committee Chair, Keystone Capital Corporation, CEO/CCO, dated May 6, 2010 (“NAIBD”)
4. Melanie Senter Lubin, Maryland Securities Commissioner and Chair, NASAA CRD/IARD Stealing Committee, dated May 11, 2010 (“NASAA”)
5. Scott R. Shewan, President, Public Investors Arbitration Bar Association, dated May 11, 2010 (“PIABA”)
6. Kelly R. Welker, Branch Manager, LPL Financial, received May 11, 2010 (“LPL”)
7. Deborah M. Castiglioni, CEO, CCO, Cutter Company, Inc., dated May 12, 2010 (“Cutter”)
8. Lisa A. Catalano, Director, Associate Professor of Clinical Legal Education, and Christine Lazaro, Supervising Attorney, Securities Arbitration Clinic, St. John's University School of Law, dated May 13, 2010 (“St. John's”)
9. William A. Jacobson, Esq., Associate Clinical Professor of Law, Director, Cornell Securities Law Clinic, and Adisada Dudie, dated May 13, 2010 (“Cornell”)
10. E. John Moloney, President and CEO, Moloney Securities Company, Inc., Chairman, Securities Industry and Financial Markets Association Small Firms Committee, dated May 13, 2010 (“SIFMA”)

11. Joelle B. Franc, Student Attorney, Jonathan P. Terracciano, Student Attorney, and Birgitta K. Siegel, Esq., Visiting Assistant Professor, Securities Arbitration & Consumer Law Clinic, Syracuse University College of Law, dated May 13, 2010 (“Syracuse”)
12. John M. Ivan, General Counsel, Janney Montgomery Scott, LLC, dated May 14, 2010 (“Janney”)
13. Dale E. Brown, President & CEO, Financial Services Institute, dated May 19, 2010 (“FSI”)
14. Steven B. Caruso, Maddox Hargett Caruso, P.C., dated May 25, 2010 (“Caruso”)