

June 28, 2021

By email to pubcom@finra.org

FINRA
1735 K St. NW
Washington, DC 20006

Re: FINRA Regulatory Notice 21-17 Diversity and Inclusion

To the FINRA Staff:

We write this letter in response to Regulatory Notice 21-17. We appreciate FINRA's decision to seek comment on these issues. While the securities industry has made some progress toward diversity and inclusion issues in the past several decades, minority group members, women and immigrants remain significantly under-represented in the industry, and this under-representation gets worse at the more senior levels one examines within the industry. Women and minority investors report feeling under-represented in and under-served by the securities industry, a fact which can deter them from seeking needed investment services to save for important goals such as home ownership, family education, and retirement.¹ And women and minority entrants to the job market similarly report finding the industry forbidding and unwelcoming as a place to start a career.² FINRA is correct to perceive that some of its own rules and practices contribute to these barriers to diversity. This letter suggests some limited but concrete rule changes that we believe could help address these long-standing issues.

The authors of this letter are a partner and an associate at a large international law firm that represents many FINRA members (of all sizes and business models) and frequently practices before FINRA. We write this letter solely on our own behalf, not on behalf of our law firm, our colleagues within the law firm, or on behalf of any clients of our law firm.

Form U4 Criminal Charge Disclosures

Some questions on the Form U4 discriminate against minority group members and should be eliminated or modified. Every potential applicant for a position in a broker-dealer above a clerical or ministerial position must complete the Form U4, and the information provided in the

¹ Elisa Trovato, *Building a Wealth Proposition Around Women*, Prof'l Wealth Mgmt. (Dec. 20, 2017), <https://www.pwmnet.com/Wealth-Management/Private-Banking/Building-a-wealth-proposition-around-women>; *Most Women Feel Misunderstood by Investment Industry*, PLANADVISER (Mar. 23, 2016), <https://www.planadviser.com/most-women-feel-misunderstood-by-investment-industry/>.

² Rod Copeland, *At Hedge Funds, Where Are the Women?*, Wall St. J. (Aug. 23, 2018), <https://www.wsj.com/articles/at-hedge-funds-where-are-the-women-1535030899>; *The Gender Punishment Gap*, WSJ Pro Central Banking (Aug. 15, 2018), <https://www.wsj.com/articles/the-gender-punishment-gap-1534326407>; Steve Garmhausen, *Challenges Facing Female Financial Advisors*, Barron's (June 4, 2016), <https://www.barrons.com/articles/challenges-facing-female-financial-advisors-1465025353>.

Form U4 is publicly provided (through FINRA’s CRD system) to all investors. In particular, Questions 14A and 14B require information about whether the individual has ever been convicted, pled guilty or nolo contendere, or charged with any felony or many misdemeanors. The criminal charge disclosures require information about whether the individual has ever been charged with a long list of misdemeanors, including alleged false statements (for example, falsely denying having done anything wrong to a law enforcement official) or alleged wrongful taking of property (for example, supposed shoplifting). Notably, both questions require a “yes” answer despite mitigating circumstances, including even if the charge was made in a juvenile proceeding (even one that is confidential by statute), the charge was dismissed or resulted in pretrial diversion; the charge resulted in a “not guilty” finding, or was a result of law enforcement acting without probable cause; the conviction was overturned on appeal or through habeas corpus relief, or on the basis of prosecutorial misconduct or actual innocence; the conviction was expunged or the individual was pardoned; and/or for conduct that is no longer illegal, for example marijuana possession offenses in many states, or consensual same-gender sexual conduct. Quite simply, there is no justification for disclosure in any of these situations.

Academic studies amply demonstrate beyond any reasonable doubt that minority group and LGBTQ members, and especially minority group and LGBTQ+ youth, are disproportionately subject to arrests and charges when compared to the remainder of the population.³ Throughout the country, there has long existed a “white privilege” that allows white youth to be released with a police warning in situations in which Black, Latinx, Asia-Pacific or immigrant youth would be criminally charged. In New York City, home of the U.S. securities industry, a federal court enjoined the New York City Police Department for its wildly discriminatory “stop and frisk” policy targeting the Black and Latinx populations.⁴ Far too many Black Americans have experience with being unjustifiably targeted by police or “driving while Black”, and every minority group member can share stories of being followed and harassed by security guards in retail stores.⁵ Many of these incidents result in criminal charges, in situations where non-minority individuals would never have been surveilled in the first place, much less arrested or charged.⁶ Indeed, in some states with racially discriminatory felony disenfranchisement laws dating from the Jim Crow era, some law enforcement members deliberately charged minority group members to prevent them from being able to vote – and the effects of those practices persist today. Also, research has shown that those with a criminal background are no more likely

³ Meghana Kakade et al., *Adolescent Substance Use and Other Illegal Behaviors and Racial Disparities in Criminal Justice System Involvement: Findings from a US National Survey*, 107 Am. J. Pub. Health 1307 (2012); Sarah Cusworth Walker et al., *Deploying Street Outreach Workers to Reduce Failure to Appear in Juvenile Court for Youth of Color: A Randomized Study*, 65 Crime & Delinq. 1740 (2019); Ashlin Oglesby-Neal & Bryce Peterson, *Influence of Race in the Deep End of the Juvenile Justice System*, 19 Youth Violence & Juv. Just. 186 (2021).

⁴ *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

⁵ David A. Harris, *Driving While Black: Racial Profiling on Our Nation’s Highways*, Am. C.L. Union (June 1999), <https://www.aclu.org/report/driving-while-black-racial-profiling-our-nations-highways>; Editorial, ‘Walking While Black’ Gives Way to a Different Crime—‘Driving While Black,’ Chi. Sun-Times (Dec. 20, 2019), <https://chicago.suntimes.com/2019/12/20/21031714/stop-frisk-driving-while-black-cpd-chicago-police-department-traffic-stops-editorial-lori-lightfoot>.

⁶ See *id.*; see also *Measuring Racial Bias in Police Forces*, The Economist (June 24, 2017), <https://www.economist.com/united-states/2017/06/22/measuring-racial-bias-in-police-forces>

to commit a crime in the workplace – in other words, the fundamental premise of the Form U4 criminal disclosure requirements lack a sound evidentiary basis.⁷

For these reasons, many jurisdictions have adopted “ban the box” laws or ordinances that prohibit potential employers from asking about arrests and convictions during the hiring process.⁸ Many argue that the “ban the box” laws or ordinances reduce recidivism through facilitating gainful employment, such as being able to work at a broker-dealer.⁹ Our understanding is that FINRA’s view has been that because FINRA rules are approved by the SEC and thus have the force and effect of federal law, FINRA rules preempt all of these state and local laws and require firms in the securities industry to ask the Form U4 questions. Many securities industry firms will not consider anyone for employment who has a “yes” answer to the criminal charge disclosures, because of the fear that the firm will be expected to provide extra surveillance of those brokers, or that potential customers will avoid brokers with “yes” disclosures. Moreover, it is common for individuals to believe erroneously that because a juvenile proceeding was confidential, or because a dismissed or expunged charge no longer exists as a matter of law, they do not have to disclose it on the Form U4. This “trap for unwary” results in many individuals being disqualified from obtaining jobs in the securities industry, when fingerprint searches disclose the existence of these charges.

FINRA’s Form U4 questions, particularly Questions 14A and 14B, have the effect of perpetuating racial discrimination and should be eliminated or substantially reformed. At a minimum, the Form U4 should not inquire about any juvenile offenses, nor should it inquire about charges that were dismissed or did not result in convictions, or convictions that were overturned, expunged, pardoned, are more than 10 years old, or which relate to conduct that is no longer a criminal offense. We recognize that FINRA administers the CRD system in part on behalf of the states – however, if there are some states that refuse to agree to these common-sense changes so as to prevent the perpetuation of racial and ethnic discrimination, then we respectfully submit that FINRA should not agree to operate the system on those states’ behalf.

Form U4 Financial Disclosures

The Form U4 also asks questions (14K–M) about financial condition, such as compromises with creditors, bankruptcies, or liens. While these questions are more limited in time (e.g., compromises with creditors or bankruptcies within the past 10 years), they still have a disproportionate impact on minority communities. Minority group members are disproportionately likely to suffer the sort of financial crises (such as medical emergencies or job

⁷ Timothy Williams & Tanzina Vega, *A Plan to Cut Costs and Crime: End Hurdle to Job After Prison*, N.Y. Times (Oct. 23, 2014), <https://www.nytimes.com/2014/10/24/us/a-plan-to-cut-costs-and-crime-curb-bias-against-ex-convicts.html>.

⁸ Stephanie Leacock, *To Actually Give a Fair Chance: “Ban the Box” Laws and the “Rational Relationship” Standard*, 7 Am. U. Bus. L. Rev. 383 (2018); Daniel Shoag & Stan Veuger, *Ban-the-Box Measures Help High-Crime Neighborhoods*, 64 J.L. & Econ. 85 (2021); Terry-Ann Craigie, *Ban the Box, Convictions, and Public Employment*, 58 Econ. Inquiry 425 (2020).

⁹ Leacock, *supra* note 7, at 391–92.

losses) that lead to answering affirmatively questions in the financial disclosure section. In substantial part because of the current effects of historic economic discrimination, minority group families have far less familial wealth than the remainder of the population. Academic estimates find that median Black families, for example, have as little as 10% of the familial wealth of a median White family.¹⁰ Academic estimates find that as many as 40% of US families could not raise \$400 in the event of a family emergency – and disproportionately, these families are in minority communities.¹¹ Minority communities are also disproportionately targeted by payday lenders, subprime lenders, “rent-to-own” schemes, high-interest credit cards, reverse-mortgage providers and other similar financial predators (not to mention Ponzi schemes, affinity frauds and other types of out-and-out financial crimes), which can drive individuals and families into bankruptcy.¹² Minority group young adults often are burdened with large amounts of high-interest student debt, because they did not have family members who could help subsidize their educations – which makes them more vulnerable to bankruptcy or compromises with creditors at or near the beginning of their work careers.¹³

In short, the Form U4 financial disclosures primarily measure family wealth and financial resiliency in the face of economic setbacks and they are not important measures of fitness for employment in the securities industry. To the extent that some of these disclosures (such as current liens) may be relevant to a firm’s supervision of an employee, they do not need to result in stigmatizing public disclosures that make it difficult for entry-level employees to find customers. These financial disclosures perpetuate and reinforce the nation’s long history of economic discrimination against minority and immigrant communities.

Exam Requalification Requirements

We applaud FINRA’s recent decision to allow students and other individuals to take the SIE licensing exam without being sponsored by a securities industry firm – this step makes it easier for everyone, including diverse candidates, to take the first step toward entry into the securities industry. It would be an even better step to allow individuals to take the Series 6, 7, and 63

¹⁰ Neil Bhutta et al., *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, FEDS Notes (Sept. 28, 2020), <https://doi.org/10.17016/2380-7172.2797>; Kriston McIntosh et al., *Examining the Black-White Wealth Gap*, Brookings Inst. (Feb. 27, 2020), <https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap/>.

¹¹ Bd. of Governors of the Fed. Rsrv. Sys., *Report on the Economic Well-Being of U.S. Households in 2018*, at 21–23 (May 2019), <https://www.federalreserve.gov/publications/files/2018-report-economic-well-being-us-households-201905.pdf>; Annie Nova, *Many Americans Who Can’t Afford a \$400 Emergency Blame Debt*, CNBC (July 20, 2019), <https://www.cnbc.com/2019/07/20/heres-why-so-many-americans-cant-handle-a-400-unexpected-expense.html>.

¹² William C. Apgar, Jr. & Christopher E. Herbert, *Subprime Lending and Alternative Financial Service Providers: A Literature Review and Empirical Analysis* (Off. of Pol’y Dev. & Resch., U.S. Dep’t of Hous. & Urb. Dev., Feb. 2006), <https://www.huduser.gov/publications/pdf/sublending.pdf>; Michael A. Satz, *How the Payday Predator Hides Among Us: The Predatory Nature of the Payday Loan Industry and Its Use of Consumer Arbitration to Further Discriminatory Lending Practices*, 20 Temp. Pol. & C.R. L. Rev. 123 (2010).

¹³ Judith Scott-Clayton & Jing Li, *Black-White Disparity in Student Loan Debt More Than Triples After Graduation*, Brookings Inst. (Evidence Speaks Reports, Vol. 2, No. 3, Oct. 20, 2016), <https://www.brookings.edu/research/black-white-disparity-in-student-loan-debt-more-than-triples-after-graduation/>.

exams without being sponsored by a firm, so that when the industry is hiring, entry-level candidates (including diverse candidates) can step right into available jobs. We also applaud FINRA's recent decision to allow individuals to keep their licenses while working at non-broker-dealer affiliates within a financial services family of companies; this step allows for broader career paths. However, FINRA has always required that all securities industry licenses lapse two years after an individual leaves the securities industry.

This relicensing requirement has a severe discriminatory effect on women and minority group members. Academic studies demonstrate that in America it is disproportionately women who have to take time off from work to care for those family members, when faced with a difficult family situation, such as multiple young children, a sick child or a declining elderly relative.¹⁴ And for the reasons discussed in the preceding section, minority group members in particular (including men but especially women) are less likely to have the family wealth that allows the hiring of private caregivers in these situations. The result is that the relicensing requirement makes it difficult, expensive and time-consuming for women and minority group members who must pause their careers later to re-enter the securities industry – and this fact deters many people in these populations from joining the securities industry in the first place.

We recognize that FINRA has a valid interest in assuring that individuals remain current about industry rules and developments. But this goal could be accomplished through continuing education programs, perhaps provided by FINRA itself. Other professions such as law, medicine and accounting, do not require individuals to take relicensing exams simply because they were not employed in the industry for a period of time, so long as they maintain as current their continuing education status. FINRA's relicensing requirements discriminate against women and minority group members, and serve no valid public policy purpose that would justify this discriminatory impact.

¹⁴ Nat'l P'ship for Women & Fams., *Paid Family and Medical Leave: A Racial Justice Issue – and Opportunity* (Aug. 2018), <https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-leave/paid-family-and-medical-leave-racial-justice-issue-and-opportunity.pdf>; Ann P. Bartel et al., *Racial and Ethnic Disparities in Access to and Use of Paid Family and Medical Leave: Evidence from Four Nationally Representative Datasets*, *Monthly Lab. Rev.*, Jan. 2019, <https://www.bls.gov/opub/mlr/2019/article/racial-and-ethnic-disparities-in-access-to-and-use-of-paid-family-and-medical-leave.htm>.

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Conclusion

By taking steps to limit the discriminatory impact of the rules discussed above, FINRA could make a modest but concrete difference to further diversity in the securities industry. While we recognize that changing established ways of doing business can be difficult, the events of the past two years in America demonstrate that it is time for powerful institutions like FINRA to reconsider their practices. We appreciate FINRA's willingness to reexamine its rules and would be happy to discuss these issues further with the FINRA staff.

Sincerely,

A handwritten signature in black ink, appearing to read "W. Hardy Callcott". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

W. Hardy Callcott

/s/ James A. Bowden Jr.
James Bowden, Jr.

WHC:cl