charles SCHWAB

Compliance
101 Montgomery Street San Francisco CA 94104
(415) 636 7000

January 16, 2009

BY EMAIL TO: pubcom@finra.org

Ms. Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 L Street, NY
Washington, DC 20006-1506

RE: FINRA Regulatory Notice 08-71
Reporting Requirements

Dear Ms. Asquith:

Charles Schwab & Co., Inc. ("Schwab") appreciates the opportunity to comment on FINRA's proposals relating to the FINRA Reporting Requirements Rule 4530. We support FINRA's goal of obtaining information that assists FINRA in its ability to identify and investigate firms, offices and associated persons that may pose a regulatory risk and view this as a critical function and responsibility of self regulation. Further, we support and endorse FINRA's efforts to simplify, clarify and seek consistency in reporting requirements via the Rule Proposal, most notably:

- **Statutory Disqualifications Reporting** – We agree with FINRA that Proposed Rule 4530(a)(1)(H) provides greater clarity by specifying that a member is required to report only if the firm or an associated person of the firm "...is involved in the sale of any financial instrument, the provision of investment advice or the financing of any such activities with any person who is subject to a "statutory disqualification"..." Schwab believes this may remove ambiguity associated with current NASD Rule 3070(a)(9).

- **Reporting Deadline** – We applaud FINRA for proposing to extend the reporting deadline to 30 calendar days via Proposed Rule 4530(a). This achieves consistency with other Uniform Forms filing requirements.

- **Meaning of Found** – We are encouraged by the FINRA proposal, via Supplementary Material .03, to define "found" in the Proposed Rule in a manner generally consistent with the definition of the term in the Uniform Forms. Once again, this achieves meaningful and important consistency in the interpretation and application of reporting rules.

While Schwab supports many of the proposed changes, as discussed below, several increase complexity, promote inconsistency or require duplicative regulatory filings. Schwab does not believe certain of these changes are warranted and that the relevant rule proposals require additional clarification, and requests that FINRA consider the following comments.

4530(a)(3) and Supplementary Material .01 and .03

Proposed Rule 4530(a)(3) requires a firm to report whenever the firm has concluded on its own that an associated person of the firm has violated any securities, insurance, commodities, financial or investment-related laws, rules, regulations or standards of conduct of any domestic or foreign regulatory body or SRO.

Schwab believes reporting pursuant to Proposed Rules 4530(a)(1) and (2) to be sufficient and generally consistent with current NASD Rule 3070. For example, proposed Rule 4530(a)(2) would continue to require a member firm to report certain internal, firm initiated disciplinary actions against its associated persons. Schwab believes that internal findings of violative conduct of meaningful interest to FINRA would typically meet the thresholds of and be reported pursuant to Proposed Rule 4530(a)(2), mitigating the necessity for proposed Rule 4530(a)(3).

FINRA does not provide specific reasons for proposing Rule 4530(a)(3) other than to state that "The proposal generally incorporates the requirement under NYSE Rule 351(a)(1)."[1] Schwab believes it is important for FINRA to conduct a quantitative and qualitative assessment of reporting pursuant to existing NYSE Rule 351(a)(1), to determine whether such reporting of internal findings identified unique reporting of violations that were not otherwise reported pursuant to NYSE Rule 351 or Forms BD, U4 or U5, and to establish that the Proposed Rule meets FINRA's expressed goal of identifying and investigating "...firms, offices and associated persons that may pose a regulatory risk." Without such analysis, Schwab is concerned that reporting under Proposed Rule 4530(a)(3) would create unnecessary administrative burdens and costs for both member firms and FINRA.

While Schwab appreciates FINRA's willingness to limit the scope of Proposed Rule 4530(a)(3) and provide guidance, Schwab is concerned with the lack of defined terms used in Proposed Supplementary Material .01. Because of the lack of definition, application of the Proposed Rule would require subjective, individual determinations made by firms, which may result in inconsistent application across the industry and by examination and enforcement units within FINRA. For example, the term "ministerial" is not defined and has traditionally been used in regulatory nomenclature to refer to job functions or responsibilities. What would "ministerial" mean in the context of a rule violation? Schwab has similar concerns with respect to use of the terms "isolated" and "conclude."

[1] FINRA Regulatory Notice 08-71.

Schwab is also concerned that reporting pursuant to Proposed Rule 4530(a)(3) may be more expansive than reporting of **external** findings pursuant to Proposed Rule 4530(a)(1)(A), creating further complexity. Proposed Supplementary Material .03 – Meaning of "Found" - excludes from reporting a violation of a SRO rule that has been designated as "minor" pursuant to a plan approved by the SEC, the sanction imposed consists of a fine of $2,500 or less, and the sanctioned person does not contest the fine. Would such **internal** conclusions related to a SRO rule designated as "minor" and with similar conditions also be excluded from reporting pursuant to Proposed Rule 4530(a)(3)? If not, what would be the regulatory basis for requiring the reporting of such **internal** conclusions while excluding similar SRO findings?

Proposed Supplementary Material .01 would also appear to require reporting more expansive than contemplated by NYSE Rule 351(a)(1), further creating confusion and complexity. NYSE Information Memo 06-11 appears to set relatively stringent conditions for reporting internal conclusions of violative conduct appearing to require filings pursuant to NYSE 351(a)(1) for individuals for "...any recidivist or ongoing violative conduct." and member firms for "...systemic firm failures involving numerous customers, multiple errors or significant dollar amounts..."

Schwab is also concerned that such regulatory filings may be the basis for defamation or other such claims from aggrieved employees and that such regulatory filings may lack the established protections (e.g. total or qualified immunity) inherent in other regulatory filings such as the Forms U4 and U5.

Schwab believes Proposed Rule 4530(a)(3) should be withdrawn and that violative conduct of meaningful interest to FINRA would typically meet the thresholds of Proposed Rule 4530(a)(2). The requirements of Proposed Rule 4530(a)(2) reduce complexity, ensure consistency in interpretation and application and are generally consistent with NASD Rule 3070. If FINRA chooses to proceed with Proposed Rule 4530(a)(3), Schwab requests that the strictures articulated in NYSE IM 06-11 be considered and proposed.

4530(a)(1)(G)

Proposed Rule 4530(a)(1)(G) represents an expansion of firms' civil litigation, arbitration and "other claim for damages" reporting requirements via the inclusion of the non-defined term "insurance." Firms that conduct insurance business activities that do not require registration as a broker-dealer are subject to regulation of other regulatory authorities (e.g., state regulators and state insurance commissioners) with appropriate jurisdiction over such business and such activities and would not be subject to regulatory oversight by FINRA. Schwab is uncertain why FINRA would expressly require the reporting of such insurance related matters as FINRA would not have jurisdiction over such matters. Moreover, as used in the proposed rule the term "insurance" is expansive, and could have the unintended consequence of requiring the reporting of property damage or personal injury claims where insurance coverage may be at issue.

In addition, Schwab finds Proposed Rule 4530(a)(1)(G) inherently inconsistent with Proposed Rule 4530(c). Proposed Rule 4530(c) would continue to exclude the reporting of customer complaints related to non-securities products, including insurance, by expressly defining customer to include "...any person...whom the member has engaged, or has sought to engage, in securities activities..." In addition, NASD Notice to Members 96-85 – Customer Complaint Reporting Rule Update – regarding NASD Rule 3070(c) states:

> **Question #6:** Are insurance affiliated broker/dealers (IABD), or broker/dealers who also maintain insurance operations in the same corporate entity, required to include in their quarterly customer complaint statistical reports customer complaints involving persons who are both registered representative and insurance agents who receive customer complaints regarding the sale of insurance-related non securities products (e.g., fixed insurance products)?
>
> **Answer: No.** Subsection (c) of the Rule defines "customer" as any person other than a broker/dealer with whom the member has engaged, or has sought to engage, in **securities activities**, therefore, it was intended to exclude non-securities products. All affected members must report all customer complaints involving securities products that involve persons who are both registered representatives and insurance agents, but should **not** report complaints that relate to non-securities activities (such as fixed insurance products) from the member's quarterly customer complaint submission.

Schwab believes the rationale and reporting requirements pursuant to NASD Rule 3070(c), the interpretation articulated in NASD NTM 86-85 and Proposed Rule 4530 (c) to be the appropriate approach and reporting standard for non-securities products, including insurance, and believes this rationale should be applied to Proposed Rule 4530(a)(1)(G).

Therefore, Schwab believes the requirement to report insurance related civil litigations, arbitrations or other claim for damages be withdrawn.

4530(d)

While FINRA notes in Regulatory Notice 08-71 that "...it will work toward the goal of eliminating duplicative reporting of information disclosed on the Uniform Forms." Proposed Rule 4530(d) continues to promote duplicative regulatory filings by stating "...members are required to comply with the reporting obligations under paragraphs (a) and (c) of this Rule, regardless of whether the information is reported or disclosed pursuant to any other rule or requirement, including the requirements of the Forms BD, U4 and U5." Schwab believes this duplicative filing requirement creates additional complexity, serves no obvious benefit to the investing public and is an unnecessary burden on member firms, particularly since Proposed Rule 4530(a) extends the reporting period to 30 days, harmonizing such with the reporting period for the noted Uniform Forms filings. Schwab believes that if a matter is required to be reported via Forms BD, U4 or U5, the matter should not be required to be reported pursuant to Proposed Rule 4530.

Supplementary Material .06

Proposed Supplementary Material .06 - Calculation of Monetary Thresholds - indicates that for the purposes of Proposed Rule (a)(1)(G), when determining the dollar amount that would require a report, members must include any attorneys' fees and interest in the total amount. Often the amount of attorneys' fees and interest is not specifically stated in the complaint, but is accounted for in any settlement reached between the parties or in connection with a judgment or arbitration award. Schwab believes attorney fees are relatively arbitrary, dependent upon a set of facts and circumstances that may not be directly related to the claim for damages (e.g. geographic location of the attorney, fees and/or expense arrangement with the attorney, whether in-house or external counsel was used, expertise of the attorney, etc.). Likewise, the proposed requirement to aggregate and report joint and several liability can result in confusion and the inflation of monetary thresholds. The joint and several liability concept is that one amount is paid, but can be satisfied by any of the parties found responsible. The proposed rule makes it appear that each party has paid the full amount, which is not accurate. In addition, the amount of contribution of each party can be discerned by the Form U4 or U5 filing.

In addition, Proposed Supplementary Material .06 would create significant inconsistencies with the reporting requirements for arbitrations, civil litigations and complaint settlements pursuant to Forms U4 and U5. As noted in question 10 of FINRA's "Form U4 and Form U5 Interpretative Questions:"

> **Q #10:** For purposes of reporting an arbitration (14I(1)(c)) or customer complaint (14I(2)) that settles for $10,000 or more, should the attorney fees be included in the threshold total?
>
> **A: No**. The attorney fees are not included in the settlement amount for purposes of reporting a customer complaint/arbitration that settles for $10,000 or more. (Originally posted 08/05/05)

As a result, Schwab believes that attorney fees and interest should be excluded from calculation of the monetary threshold and that joint and several liability should not be aggregated. If FINRA chooses to proceed with the Rule Proposal, Schwab requests that FINRA reassess and increase the reportable thresholds.

We appreciate the opportunity to provide comments and thank you for your consideration of the points we have raised in this letter. Please feel free to contact me at (415) 636-3540 to discuss them in more detail.

Sincerely,

Bari Havlik
SVP and Chief Compliance Officer
Charles Schwab & Co., Inc.