

October 15, 2009

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

**Re: SR-FINRA-2009-050 – Proposed Rule Change Relating to FINRA Rule 8312
(FINRA BrokerCheck Disclosure) – Response to Comments**

Dear Ms. Murphy:

The Financial Industry Regulatory Authority, Inc. (“FINRA[®]”) 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-2009-050. The purpose of the proposed rule change is to amend FINRA Rule 8312 (FINRA BrokerCheck Disclosure) to retain and make publicly available in BrokerCheck[®] certain information about former associated persons of a member who were the subject of a final regulatory action as defined in Form U4 that has been reported to the Central Registration Depository (“CRD[®]”) via a uniform registration form.¹

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. The proposed rule change would expand BrokerCheck with respect to former associated persons to provide public access to certain information about such 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 CRD via a uniform registration form. For purposes of the proposed rule change, a final regulatory action as defined in Form U4 may include any final action, including any action that is on appeal, by the SEC, Commodity Futures Trading

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

Commission, a federal banking agency, the National Credit Union Administration, another federal regulatory agency, a state regulatory agency, a foreign financial regulatory authority, or a self-regulatory organization (as those terms are used in From U4).

Response to Comments

The Commission received 52 comment letters on SR-FINRA-2009-050.² Most of the comments received focus on the following two issues (1) the current provision of FINRA Rule 8312 that provides for the release of information for two years after the termination of an individual's registration with FINRA, and (2) the expansion of access to disclosure information, other than final regulatory actions, pertaining to individuals who have not been registered with a member for more than two years. FINRA's response to the issues raised in the comment letters is set forth below.

Two-Year BrokerCheck Disclosure Period for Individuals Who are no Longer Registered with FINRA

Forty commenters³ to FINRA's proposal express concern regarding the current provision in FINRA Rule 8312 that provides for the disclosure of information through BrokerCheck for individuals who were registered with FINRA within the preceding two years.⁴ While all of these commenters suggest that, for investor protection purposes, the time frame for disclosure be increased, they vary as to the appropriate length of such a disclosure period. The recommended disclosure period ranges from five years to perpetuity, with 12 commenters⁵ advising a six-year disclosure period, which they note corresponds to FINRA's

² See Exhibit A for a list of comment letters received.

³ See comment letters from Lipner, Van Kampen, Sigler, Pounds, Steiner, Neuman, Bleacher, Estell, Layne, PIABA, Schultz 1, Shewan, Port, Graham, Speyer, AARP, Griffin, Sherman, Cornell, Evans/Edmiston, St. John's, Rosenfield, Ilgenfritz, Buchwalter, Miller, Rosca, Guiliano, Greco, Sonn, Haigney, Sutherland, Davis, Mougey, Claxton, DeVita, Ledbetter, Gladden, McCauley, Malarney, and Willcutts.

⁴ Some commenters incorrectly stated that information regarding an individual is "purged" from BrokerCheck once that individual ceases to be registered with FINRA for a period of two years. See, e.g., comment letters from Lipner, Van Kampen, Sigler, Speyer, and Claxton. In actuality, as noted in the rule proposal, the information is retained in the CRD system even though it is not displayed through BrokerCheck. Thus, the information would be available for display through BrokerCheck should the individual reregister with FINRA or otherwise become covered by BrokerCheck.

⁵ See comment letters from Pounds, Steiner, Estell, PIABA, Schultz 1, Graham, Rosenfield, Ilgenfritz, Miller, Greco, Sonn, and Haigney.

rule pertaining to the time limit for the submission of arbitration claims involving public customers ("eligibility rule").⁶

As an initial matter, FINRA believes that these comments are outside the scope of the rule proposal as FINRA is not proposing to change for all individuals the two-year disclosure period currently set forth in Rule 8312. Rather, as previously mentioned, the proposed rule change expands BrokerCheck only with respect to those former associated individuals who are subject to a final regulatory action.⁷

Nevertheless, FINRA notes that the current BrokerCheck two-year disclosure period has been in effect for over nine years.⁸ At the time that the two-year time frame was proposed, FINRA stated that it was inappropriate to continue public disclosure indefinitely for an individual who had chosen to leave the securities industry and that the two-year time frame struck the appropriate balance between an investor's interest in being easily able to obtain information about a former registered person and a person's desire for privacy once he has left the securities industry.⁹ Additionally, FINRA noted that the two-year disclosure period coincided with the period in which an individual can return to the industry without being required to requalify by examination and the initial period in which an individual remains subject to FINRA's jurisdiction.¹⁰

FINRA continues to believe that the two-year disclosure period provides the appropriate balance between an investor's interest in being easily able to obtain information about a former registered person and a person's desire for privacy once he has left the securities industry.¹¹ Furthermore, as described in more detail below, FINRA believes that the proposed measured expansion of BrokerCheck likewise maintains the balance between investors' interests and personal privacy. Lastly, FINRA respectfully disagrees with the commenters – all of whom have identified themselves as attorneys (or associations of attorneys) who represent investors in securities litigation cases – who suggest a six-year

⁶ See FINRA Rule 12206.

⁷ Four commenters erroneously stated that the proposal will limit the time frame during which information on former registered persons will be available through BrokerCheck. See Comment letters from Lipner, Neuman, AARP, and Malarney.

⁸ See Exchange Act Release No. 42402 (February 7, 2000), 65 FR 7582 (February 15, 2000) (Order Approving SR-NASD-99-45).

⁹ See Exchange Act Release No. 42240 (December 16, 1999), 64 FR 72125 (December 23, 1999) (Notice of Filing SR-NASD-99-45).

¹⁰ *Id.*

¹¹ FINRA notes that the Commission received no comments when FINRA proposed establishing the two-year disclosure period for BrokerCheck. See *supra* note 8.

disclosure period in order to make it easier for them to conduct research on former registered persons.¹² In this regard, FINRA notes that the BrokerCheck system was established principally to help members of the public to determine whether or not to conduct or continue to conduct business with a FINRA member or any of the member's associated persons¹³ and not for the purpose suggested by these commenters. Additionally, the commenters' attempt to link the time limitation on the submission of claims provided for under the eligibility rule and the time frame for BrokerCheck disclosure is misplaced as the time limitation under the eligibility rule is determined by the date of the occurrence or event giving rise to the claim and has no relationship whatsoever to the termination of an individual's registration with FINRA. Therefore, the commenters' suggested change is not only outside the scope of the rule proposal, but it also would not necessarily address the commenters' concerns.

Access to Disclosure Information, Other than Final Regulatory Actions, Pertaining to Individuals who have not been Registered with FINRA for More than Two Years

Eighteen commenters express concern regarding FINRA's proposal to expand BrokerCheck only with respect to those former registered persons who are the subject of a final regulatory action.¹⁴ Specifically, a number of these commenters suggest that BrokerCheck be expanded to include other disclosure information, such as criminal matters, arbitration claims, and bankruptcies and liens.¹⁵ These commenters contend that such other categories of disclosure information are just as relevant to investors as final regulatory actions.

FINRA believes that these comments, like those pertaining to the two-year BrokerCheck disclosure period, are outside the scope of the rule proposal as they pertain to categories of disclosure that are not the subject of the current rule proposal.

¹² See, e.g., comment letters from PIABA, Rosca, Greco, Sonn, and Haigney.

¹³ See, e.g., Exchange Act Release No. 32473 (June 16, 1993), 58 FR 33962 (June 22, 1993) (Order Approving SR-NASD-93-26); Exchange Act Release No. 39442 (December 11, 1997), 62 FR 66706 (December 19, 1997) (Order Granting Partial Accelerated Approval of SR-NASD-97-78).

¹⁴ See comment letters from Caruso, Bleacher, PIABA, Schultz 1, Feldman, Sherman, Lewins, Cornell, Bakhtiari, Evans/Edmiston, St. John's, Rosenfield, NASAA, Guiliano, Sonn, Meyer, Haigney, and Amato. Two commenters stated that FINRA's proposed rule change would apply only to those former registered persons who are the subject of a final regulatory action and who work in other investment-related industries or positions of trust. See comment letters from Schultz 1 and Sonn. This is not a correct portrayal of FINRA's proposal. The proposal will, in fact, apply to all former registered persons who are the subject of a final regulatory action regardless of their current occupation, if any.

¹⁵ See, e.g., comment letters from PIABA, Schultz 1, Cornell, Evans/Edmiston, St. John's, and Rosenfield.

Notwithstanding the fact that the comments are outside the scope of the rule proposal, FINRA notes that, as stated in its rule filing, FINRA is not proposing to expand access to other information that may be part of the CRD system regarding former registered persons who have not been registered with a member for more than two years, such as arbitration claims, criminal matters, and bankruptcies and liens, in an attempt to strike a balance between personal privacy and investor protection concerns.¹⁶ FINRA believes that these other categories of information are more relevant to an investor or potential customer when the individual is registered or was recently registered (i.e., within two years). FINRA also notes that, unlike final regulatory actions, arbitration claims may not be subject to procedures that allow an opportunity for the subject person to present arguments to a fact-finder about the allegations prior to final disposition (including, e.g., arbitration claims filed at or near the time the subject person left the industry). Further, a firm may choose to settle an arbitration claim (e.g., for business reasons) notwithstanding the desire of a subject person to contest the claim. In addition, both criminal charges and convictions that are reported subsequently may have a different disposition, which may significantly change the meaning of the matter as originally reported (for example, such charges or convictions may be dismissed or expunged). Finally, FINRA does not view reportable financial matters (e.g., bankruptcies and liens) as having the same degree of materiality as final regulatory actions such that they should continue to be disclosed on a permanent basis.

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 believes that the proposed rule change strikes the appropriate balance at this time. FINRA will continue to evaluate all aspects of the BrokerCheck program and consider whether future circumstances argue for greater disclosure of information through BrokerCheck.

Matters Significantly Beyond the Scope of the Proposed Rule Change

Some commenters raise matters that are clearly beyond the scope of the proposed rule change. In particular, seven commenters express concern regarding the information that is currently displayed through BrokerCheck pursuant to Rule 8312.¹⁷ Most of these commenters recommend that additional information from the CRD system be disclosed for all individuals subject to BrokerCheck.¹⁸ In addition, three commenters opine on FINRA's

¹⁶ See Exchange Act Release No. 60462 (August 7, 2009), 74 FR 41470 (August 17, 2009) (Notice of Filing SR-FINRA-2009-050).

¹⁷ See comment letters from Roberts, Layne, Canning, NASAA, Mougey, DeVita, and Ledbetter.

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dispute resolution program.¹⁹ Since, as mentioned, these matters are clearly beyond the scope of FINRA's proposed rule change, they are not addressed herein.

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

Very truly yours,

A handwritten signature in black ink, appearing to read "R. Pullano", written in a cursive style.

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

¹⁸ See comment letters from Layne, Canning, NASAA, Mougey, DeVita, and Ledbetter.

¹⁹ See comment letters from Estell, Sherman, and Willcutts.

Comments on FINRA Rulemaking

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

(Release No. 34-60462; File No. SR-FINRA-2009-050)

Total Number of Comment Letters Received - 52

1. Daniel W. Roberts, President/CEO, Roberts & Ryan Investments Inc., dated August 21, 2009 ("Roberts")
2. Seth E. Lipner, Professor of Law, Zicklin School of Business, Baruch College, CUNY, dated August 27, 2009 ("Lipner")
3. Al Van Kampen, Attorney at Law, dated August 31, 2009 ("Van Kampen")
4. James A. Sigler, Esq., dated August 31, 2009 ("Sigler")
5. Herb Pounds, dated August 31, 2009 ("Pounds")
6. Leonard Steiner, Lawyer, dated August 31, 2009 ("Steiner")
7. David P. Neuman, Stoltmann Law Offices, PC, dated August 31, 2009 ("Neuman")
8. Steven B. Caruso, Esq., Maddox Hargett & Caruso, P.C., dated September 1, 2009 ("Caruso")
9. Rob Bleacher, Attorney, dated September 1, 2009 ("Bleacher")
10. Barry D. Estell, Esq., dated September 1, 2009 ("Estell")
11. Richard M. Layne, Esq., Law Office of Richard M. Layne, dated September 1, 2009 ("Layne")
12. Brian N. Smiley, President, Public Investors Arbitration Bar Association, dated September 4, 2009 ("PIABA")
13. Laurence S. Schultz, Driggers, Schultz & Herbst, P.C., dated September 4, 2009 ("Schultz 1")
14. Scott R. Shewan, Pape Shewan LLP, dated September 4, 2009 ("Shewan")
15. Robert C. Port, Esq., dated September 4, 2009 ("Port")

16. Jan Graham, Graham Law Offices, dated September 4, 2009 ("Graham")
17. Jeffrey A. Feldman, dated September 7, 2009 ("Feldman")
18. Debra G. Speyer, Esq., Law Offices of Debra G. Speyer, dated September 7, 2009 ("Speyer")
19. Tim Canning, Law Offices of Timothy A. Canning, dated September 8, 2009 ("Canning")
20. David Certner, Legislative Counsel and Legislative Policy Director, AARP, dated September 8, 2009 ("AARP")
21. Keith L. Griffin, Griffin Law Firm, LLC, dated September 8, 2009 ("Griffin")
22. Steven M. Sherman, Sherman Business Law, received September 8, 2009 ("Sherman")
23. Richard A. Lewins, Esq., dated September 8, 2009 ("Lewins")
24. William A. Jacobson, Esq., Associate Clinical Professor of Law, Director, Cornell Securities Law Clinic, dated September 8, 2009 ("Cornell")
25. Ryan K. Bakhtiari, Aidikoff, Uhl and Bakhtiari, dated September 8, 2009 ("Bakhtiari")
26. Jonathan W. Evans and Michael S. Edmiston, dated September 8, 2009 ("Evans/Edmiston")
27. Christine Lazaro, Supervising Attorney, Lisa A. Catalano, Director, Peter J. Harrington, Legal Intern, Securities Arbitration Clinic, St. John's University School of Law, dated September 8, 2009 ("St. John's")
28. William S. Shepherd, Managing Partner, Shepherd Smith Edwards Kantas, LLP, dated September 8, 2009 ("Shepherd")
29. Howard Rosenfield, Law Offices of Howard Rosenfield, received September 8, 2009 ("Rosenfield")
30. Rex Staples, General Counsel, North American Securities Administrators Association, dated September 8, 2009 ("NASAA")
31. Scott C. Ilgenfritz, Johnson, Pope, Bokor, Ruppel & Burns, LLP, dated September 8, 2009 ("Ilgenfritz")
32. Steve A. Buchwalter, Esq., dated September 8, 2009 ("Buchwalter")

33. John Miller, Attorney, Swanson Midgley, LLC, dated September 9, 2009 ("Miller")
34. Alin L. Rosca, Attorney at Law, John S. Chapman & Associates, LLC, received September 9, 2009 ("Rosca")
35. Nicholas J. Guiliano, The Guiliano Law Firm, received September 9, 2009 ("Guiliano")
36. W. Scott Greco, Greco Greco, P.C., dated September 9, 2009 ("Greco")
37. Jeffrey Sonn, Esq., Sonn & Erez, PLC, dated September 9, 2009 ("Sonn")
38. Stephen P. Meyer, Esq., Meyer, Ford & Glasser, dated September 10, 2009 ("Meyer")
39. Dayton P. Haigney, III, Attorney at Law, dated September 10, 2009 ("Haigney")
40. John E. Sutherland, Brickley, Sears & Sorett, P.A., dated September 11, 2009 ("Sutherland")
41. Theodore M. Davis, Esq., dated September 11, 2009 ("Davis")
42. Peter J. Mougey, Esq., dated September 14, 2009 ("Mougey")
43. Roger F. Claxton, Law Office of Roger F. Claxton, dated September 15, 2009 ("Claxton")
44. Richard D. DeVita, Esq., dated September 15, 2009 ("DeVita")
45. Dale Ledbetter, Ledbetter & Associates, P.A., dated September 16, 2009 ("Ledbetter")
46. William J. Gladden, JD, CFP, dated September 16, 2009 ("Gladden")
47. Steven M. McCauley, Esq., dated September 16, 2009 ("McCauley")
48. Michael W. Malarney, Esq., The Pearl Law Firm, P.A., dated September 17, 2009 ("Malarney")
49. Ronald M. Amato, Esq., Shaheen, Novoselsky, Staat, Filipowski Eccleston, PC, dated September 18, 2009 ("Amato")
50. Thomas P. Willcutts, Willcutts Law Group, LLC, dated September 21, 2009 ("Willcutts")

51. Scot D. Bernstein, Law Offices of Scot D. Bernstein, dated September 24, 2009
("Bernstein")
52. Laurence S. Schultz, Driggers, Schultz & Herbst, P.C., dated September 30, 2009
("Schultz 2")