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April 27, 2012

Via Email Only
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Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

RE: Regulatory Notice 12-10, FINRA BrokerCheck

Dear Ms. Asquith:

Thank you for the opportunity to address ways for investors to better use the information available on BrokerCheck as well as improve investor awareness that such information is available for their use.

Investors Recovery Service has been in the business of representing investors in securities arbitration since 1991. In those 20 plus years, we have represented several thousand public customers with claims against their brokers.

As currently constituted, there is little correlation between the disclosures on BrokerCheck and broker misconduct. If the purpose of BrokerCheck is to warn investors about "problematic brokers / financial advisors", then it fails miserably.

As you know, a great many brokers who have claims made against them by public customers have those claims expunged. Many brokers have had multiple claims expunged. Expungements are so pervasive that it is impossible for a customer who is looking at BrokerCheck to actually know if the broker they are looking at has ever been the subject of a claim.

Most customers, seeing no claims on BrokerCheck, falsely believe that this necessarily means that no claims have ever been made.

As you may recall, the rationale for allowing expungements was that the brokers were the subject of frivolous claims. There was never any reality behind that assertion. We don't file frivolous claims. Most of the other practitioners who frequent the FINRA arbitration forum don't file frivolous claims either.

So, it appears that the "tail is wagging the dog" here because only a minute percentage of claims filed are frivolous, certainly in or opinion not enough to justify expungement. Just a simple statement from the arbitrators contained in their award, stating their rational for denying the customer's claim, should cover the issue of "alleged" frivolous complaints.

And, just so we are perfectly clear on this subject, most states don't even recognize the term "frivolous complaint" when dealing with claims filed in arbitration. Simply put, it is the benefit of the bargain the industry makes with the public when inserting the arbitration clause in the customer agreement, forcing (actually coercing) them to take their dispute with their financial advisor to FINRA.

If the securities industry really has a problem with so-called frivolous complaints, then let the customer go to court and let the judicial system deal with it. If the industry wants the informality and significantly reduced cost of going through its arbitration forum, then the industry also has to accept the shortcomings associated with FINRA arbitration. And, again, just so we are clear, we are not saying that the FINRA arbitration process is unfair, we are only suggesting that one generally gets what one pays for. And, if FINRA wants a low cost expeditious alternative to going to court, which its forum clearly does provide, they have to accept the limitations associated with such a system of resolving customer disputes.

To put this in a different light, if a FINRA member or associated person truly believes the claim filed against them is frivolous, or for that matter even suggests such a complaint is frivolous in their answer, then the "solution" should be that whenever a respondent asserts the "frivolous defense" argument, then the claimant shall have the right to take the matter to court. That would probably put the "frivolous complaint" argument to bed for good. And, since the courts have to grant an expungement request in any event, it would seem that is precisely where an aggrieved industry firm or associated person should have the matter adjudicated.

Notwithstanding all the above, we have repeatedly agreed not to oppose a broker seeking expungement as a way of getting claims settled. We have done so a great many times. Other practitioners representing customers in FINRA arbitrations certainly have had similar experiences.

There are literally hundreds, if not thousands of brokers who have had their records "expunged" by arbitration panels. We personally know of one financial advisor in particular that has had over 20 customer complaints expunged. So, an investor using that particular broker might believe they were dealing with a broker with a clean record, when in fact nothing could be farther from the truth.

What FINRA has created with these extensive expungements is a system that fails to do exactly what it was designed to do, allow public customers to know the record of the person to whom they are entrusting their funds.

FINRA's focus on sales practice abuses and egregious conduct is also misplaced. Consumers today are better educated and more accustomed to searching for any information, positive or negative, about the professionals with whom they deal, especially from other customers of those professionals. Just look at the millions of consumers who use *Yelp* and *Angie's List.* Under FINRA's present system, you can find out more pertinent information about a plumber you are considering hiring to fix your sink through *Yelp*, than you can about a stockbroker to whom you are considering turning over your life's savings through FINRA.

Customers want to know every complaint and every blemish. If 3 customers report, "he didn't return my phone calls", a plumber has a hard time getting new business. If a broker has 100 customer complaints that said the same, FINRA would consider them "non-reportable events". Frankly, this is unfair not only to customers but also to the many conscientious brokers who work hard for their customers to maintain their trust. And, sometime down the road, in the not too distant future, a broker with a few complaints will actually look good, rather than perceived as bad, when compared to the broker with dozens of customer complaints.

FINRA would do a tremendous service by creating an *Angie's List* type website where customers could post comments about their brokers, both good and bad. All brokers are happy to have recommendations from their customers. Those who earn negative comments would have the opportunity to fix them. It would be a win/win for all concerned.

This is an industry that is based upon "full disclosure of the material facts" more than any other industry in America. Notwithstanding, FINRA has always had the industry's back in keeping the disclosure of facts that might dissuade customers from choosing any particular broker.

We constantly see brokers whose business card announces them as "Retirement Specialists", or whose websites tout other expertise. A great many of the claims we have filed over the past 20 years have involved some of the best educated and trained brokers out there, with scores of professional designations after their name.

Simply put, an impressive resume translates to heightened trust.

Many of these "experts" are not expert in solving customers' problems, but are experts in selling one particular type of product. Customers generally begin with the idea that a broker will recommend investments that are suitable and appropriate for *them*.

In reality, a great many brokers sell one type of product to a high percentage of their customers. More importantly, they do so without setting out the basic facts that, if known, would cause customers to look elsewhere.

The first fact most customers might want to know is whether the broker specializes in products that pay 1% commission, 5% commission or 10% commission. We know that this suggestion is a non-starter, but please tell us why? When we have our car repaired, there is a sign on the wall that tells us how much the mechanic charges for an hour of his labor. How would it not benefit the public from knowing in advance of selecting their broker how much the broker expects to earn from their investment? Most brokers, when asked by the customer how much they are paying in commissions will say, "*you pay nothing, our fees our covered by the sponsor or the insurance company*" etc.

We would recommend that brokers whose business is concentrated (more than 40% of trailing 12 month commissions) in certain products be required to say so on their websites and printed brochures, and include the following disclosures about those products.

1) Variable annuities- We are told that these may constitute as much as 25% of the commission income for the entire retail brokerage industry. Where would banks be without their salesmen selling variable annuities or structured products, whose commissions are far higher than most mutual funds. Disclosures should include: "*Variable annuities are relatively high commission products that include a number of internal fees that may adversely affect performance. To offset those fees, managers frequently take higher than average risks, which, of course, may lead to higher than average losses.*"

2) Wrap accounts- a great many brokers at the larger firms "collect assets" from customers that they forward on to so called "professional money managers". Disclosures should include: *We only earn our fees if you stay fully invested. So we will rarely, if ever (read never) counsel you to liquidate your equity holdings and sit on the sidelines, even if market conditions increase your portfolio risk beyond your comfort level." "Further, in order to provide investment performance greater than the "benchmark" and overcome the various fees you will be charged, we will generally invest in securities whose volatility is greater than the those equities comprised within the benchmark*".

3) Individual investment advisor accounts- While the days of the broker as stock-picker may be over for many; some brokers still manage accounts for customers on a discretionary basis. Disclosures should include: "*I have been unable to avoid losses in my customers' accounts during market corrections such as the "tech wreck" in 2001 and the "credit meltdown" in 2008. My track record shows significant losses during these periods. If you are not prepared to accept significant losses to your portfolio, take your money elsewhere." (Of* course, they would only have to make these disclosures if they were true).

4) Alternative investments (private placements) – Many billions of dollars were invested and lost in private placements in the last 10 years. We are certain that FINRA would be "shocked" to learn that a great many were sold to retirees and investors whose new account forms specifically denote that they are "conservative" or "moderate" risk investors. Disclosures should include: *"Private placements pay a higher commission than most investments. They are almost always speculative investments and should only be purchased by investors who stand ready, willing, and able to lose their entire investment."*

To summarize, we offer 3 suggestions:

1) Get rid of the idea that arbitration claims by public customers can be expunged. Expungement corrupts the entire system. It places the broker and the client at odds with one another and prevents the parties from engaging in meaningful dialogue, because as everyone actively engaged in this business of securities arbitration understands, it is all about the apportionment of responsibility. How can one own up to their actions (be honest) if it also has the potential to destroy their careers. If forces industry personnel to lie, both in their answers and under oath when giving testimony. That is another reason why we say that expungement corrupts the system.

2) Set up a system where consumers can get information about their brokers that is important to them. Instead of tweaking a system that doesn't work, or actually makes a problematic broker appear to have a clean record, step up to the 21st Century and provide investors a website to air their grievances.

3) Require brokers to disclose facts that are important to consumers, especially facts about the broker's compensation, performance and product concentration.

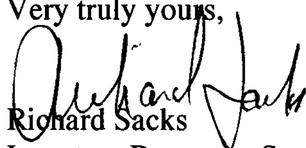
In closing, we are confident that FINRA will likely ignore all of this, because it is all considered "bad for business" and we have rarely seen FINRA take a position that would actually help consumers to the industry's detriment. It appears to be endemic to the system, and when you really think about it, where would defense counsel along with claimants' counsel be, without securities arbitration claims to file or defend against.

But, under close examination, isn't the securities industry simply too important to every one of us, whether everyone fully appreciates that fact or not, too politicize. FINRA tells all its new registered personnel "***You have a legal and moral obligation to place the interests of your customers above all else, particularly, your own financial interests". " The key to your long-term success is integrity and service***".

No one has all the answers on how to improve the securities industry, or the securities arbitration process. But if those in control of the securities industry would take their own words to heart, and ask themselves if this new rule or other action takes the interests of the customers into consideration, above all else, that appears to me as the perfect place to start again, in restoring investors confidence in the securities markets and those firms that service it. The past is the past. Let's deal with the future.

Thank you for the opportunity to make suggestions on how to improve FINRA BrokerCheck and the public's awareness of it.

Very truly yours,



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