

VIA ELECTRONIC MAIL

December 11, 2013

Elizabeth M. Murphy
Secretary
Securities Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File No. SR-FINRA-2013-048, Proposed Rule Change to Amend FINRA Rule 8312 (FINRA BrokerCheck Disclosure) to Expand the Categories of Civil Judicial Disclosures that are Permanently Available in BrokerCheck

Dear Ms. Murphy:

On November 11, 2013, the Financial Industry Regulatory Authority (FINRA) filed a notice of proposed rule change (Proposed Rule)¹ to amend FINRA Rule 8312 to permanently make publicly available in BrokerCheck information about former associated persons of a member firm, who have not been associated with a member within the preceding ten years, who have been the subject of an investment-related civil action brought by a state or foreign financial regulatory authority that has been dismissed pursuant to a settlement agreement.

The Financial Services Institute² (FSI) appreciates the opportunity to provide comment on this important proposal. As an investor protection tool, BrokerCheck continues to serve an important purpose in the securities industry. FSI and its members are strong supporters of BrokerCheck and its role in providing important information to investors. While the Proposed Rule is aimed at providing investors with additional information about the disciplinary history of certain former associated persons of member firms, the rule as currently written may needlessly implicate former associated persons not directly involved with the investment related civil action but who were included as a named party in the original regulatory action. Often, parties choose to settle rather than proceed through litigation; however, some individuals who may be named in the regulatory action but were not involved with the alleged conduct will not have the opportunity for dismissal during a later phase of litigation. As a result, these individuals who were erroneously named in the regulatory action will have a record in BrokerCheck that does not accurately reflect their history. In our comments, we provide additional language that may resolve this

¹ File No. SR-FINRA-2013-048, Proposed Rule Change to Amend FINRA Rule 8312 (FINRA BrokerCheck Disclosure) to Expand the Categories of Civil Judicial Disclosures that are Permanently Available in BrokerCheck, 78 Fed. Reg. 69,728 (November 20, 2013).

² The Financial Services Institute, Voice of Independent Broker-Dealers and Independent Financial Advisors, was formed on January 1, 2004. Our members are broker-dealers, often dually registered as federal investment advisers, and their independent contractor registered representatives. FSI has 100 Broker-Dealer member firms that have more than 138,000 affiliated registered representatives serving more than 14 million American households. FSI also has more than 35,000 Financial Advisor members.

concern while maintaining the purpose for making settled regulatory actions made available in BrokerCheck for formerly associated persons.

Background on FSI Members

The independent broker-dealer (IBD) community has been an important and active part of the lives of American investors for more than 30 years. The IBD business model focuses on comprehensive financial planning services and unbiased investment advice. IBD firms also share a number of other similar business characteristics. They generally clear their securities business on a fully disclosed basis; primarily engage in the sale of packaged products, such as mutual funds and variable insurance products; take a comprehensive approach to their clients' financial goals and objectives; and provide investment advisory services through either affiliated registered investment adviser firms or such firms owned by their registered representatives. Due to their unique business model, IBDs and their affiliated financial advisers are especially well positioned to provide middle-class Americans with the financial advice, products, and services necessary to achieve their financial goals and objectives.

In the U.S., approximately 201,000 independent financial advisers – or approximately 64 percent of all practicing registered representatives – operate in the IBD channel.³ These financial advisers are self-employed independent contractors, rather than employees of the IBD firms. These financial advisers provide comprehensive and affordable financial services that help millions of individuals, families, small businesses, associations, organizations, and retirement plans with financial education, planning, implementation, and investment monitoring. Clients of independent financial advisers are typically “main street America” – it is, in fact, almost part of the “charter” of the independent channel. The core market of advisers affiliated with IBDs is comprised of clients who have tens and hundreds of thousands as opposed to millions of dollars to invest. Independent financial advisers are entrepreneurial business owners who typically have strong ties, visibility, and individual name recognition within their communities and client base. Most of their new clients come through referrals from existing clients or other centers of influence.⁴ Independent financial advisers get to know their clients personally and provide them investment advice in face-to-face meetings. Due to their close ties to the communities in which they operate their small businesses, we believe these financial advisers have a strong incentive to make the achievement of their clients' investment objectives their primary goal.

FSI is the advocacy organization for IBDs and independent financial advisers. Member firms formed FSI to improve their compliance efforts and promote the IBD business model. FSI is committed to preserving the valuable role that IBDs and independent advisers play in helping Americans plan for and achieve their financial goals. FSI's primary goal is to ensure our members operate in a regulatory environment that is fair and balanced. FSI's advocacy efforts on behalf of our members include industry surveys, research, and outreach to legislators, regulators, and policymakers. FSI also provides our members with an appropriate forum to share best practices in an effort to improve their compliance, operations, and marketing efforts.

³ Cerulli Associates at <http://www.cerulli.com/>.

⁴ These “centers of influence” may include lawyers, accountants, human resources managers, or other trusted advisers.

Comments

FSI appreciates the opportunity to provide a response to the Proposed Rule. FSI continues to support efforts by FINRA to encourage additional investor awareness through the use of BrokerCheck. However, we have concerns that the permanent inclusion of an investment-related civil action brought by a state or foreign financial regulatory authority that was dismissed pursuant to a settlement agreement may lead to individuals uninvolved in the alleged violations having a permanent record on BrokerCheck when no such violation actually occurred. We provide the following comments:

- Under current FINRA Rule 8312(c)(1), formerly associated persons who are initially included as a named party in civil litigation or arbitration do not have this information included in their BrokerCheck profile if they are dismissed from being a party to the litigation. This often occurs in the pre-hearing phase of litigation when associated persons demonstrate that they are not associated with the accounts, securities, or conduct at issue. FINRA has proposed changes that will require a record in BrokerCheck for these formerly associated persons. It is not uncommon for officers to be named in a regulatory complaint alleging failure to supervise; however, these officers are often dismissed by demonstrating that they were not involved in the alleged violation and there is no supervisory liability. In fact, in civil litigation naming uninvolved officers is often used to increase settlement value and create leverage. Because settlements remove the option for demonstrating a lack of supervisory liability, the proposed rule may capture individuals who were named in the regulatory action but were without the opportunity to be dismissed from the litigation due to the settlement agreement. Although named individuals can choose not to settle, this option is often too burdensome to pursue individually and is more likely handled in settlement negotiations between the regulatory agency and the firm. For this reason, FSI believes individuals who do not participate in the settlement negotiations but were named in the complaint should not be subject to this proposal. FINRA can resolve the issue by making clear that an individual named in a regulatory action that is dismissed pursuant to a settlement agreement will not have this information included in BrokerCheck if they are not named individually in the settlement agreement as a party. We provide the following amended language to the proposed changes to FINRA Rule 8312(c)(1)(B)(ii) to accomplish this:

“was the subject of a civil injunction in connection with the investment related activity, [or] a civil court finding of involvement in a violation of any investment-related statute or regulation, or an investment-related civil action brought by a state or foreign financial regulatory authority that was dismissed pursuant to a settlement agreement unless the settlement agreement determines that the individual was uninvolved in the alleged violation or is not included as an individually named party in the settlement agreement.”

Conclusion

We are committed to constructive engagement in the regulatory process and, therefore, welcome the opportunity to work with FINRA and the SEC on this and other important regulatory efforts.

Thank you for your consideration of our comments. Should you have any questions, please contact me at (202) 803-6061.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. T. Bellaire". The signature is fluid and cursive, with a large initial "D" and "T" followed by "Bellaire".

David T. Bellaire, Esq.
Executive Vice President & General Counsel