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WACHOVIA SECURITIES

July 18, 2005

Jonathan Katz, Secretary  
Securities and Exchange Commission  
450 Fifth Street, NW (6-9)  
Washington, DC 20549

Re: NASD, Inc.'s Filing of Proposed Rule Change and Amendment Nos. 1, 2, and 3  
thereto Relating to the Release of Information Through the Public Disclosure Program  
(File No. SR-NASD-2003-168) (hereinafter the "Proposed Rule")

Dear Mr. Katz:

Wachovia Securities, LLC ("Wachovia Securities") appreciates the opportunity to comment on the above-referenced Proposed Rule filed by NASD to make changes to its "Broker Check" program. Wachovia Securities is generally supportive of efforts by NASD to enhance investor protection through the dissemination to the investing public of relevant, meaningful and digestible information. Thus, provisions in the Proposed Rule discussing the dissemination of disciplinary information can assist NASD in its investor protection role. Wachovia Securities nonetheless must oppose the Proposed Rule because overall, it fails to meet the three standards mentioned above, and it imposes undue burdens on the ability of investors and brokers to transact securities business. Investors will probably face a more litigious industry and brokers will face the real possibility of severe limitations on their ability to earn a living as the result of baseless, aged or otherwise non-meritorious claims.

This comment letter will address these concerns and others while urging that the SEC disapprove this Proposed Rule. Should there still remain a desire to approve the Proposed Rule, we will suggest alternatives that may allow NASD to accomplish much of what it wishes while lessening the potential harm the changes would generate.

## **I. Introduction and Overview**

Wachovia Securities is a full service brokerage firm serving clients in 49 states. It assists its 5.7 million active retail accounts by offering clients a suite of financial services, and it employs over 11,000 registered representatives. The firm assists these licensees advisers in updating and maintaining their disclosures eventually used in NASD's "BrokerCheck" program.

## **II. The Proposed Rule Fails to Enhance Investor Protection**

NASD proposes to enhance investor protection by expanding the types of information distributed through its BrokerCheck program. A key change is a requirement that NASD release information:

(7) . . .last reported on Registration forms relating to customer complaints that are more than two (2) years old and that have not been settled or adjudicated, and customer complaints, arbitrations or litigations that have been settled for an amount less than \$10,000 (collectively, "Historic Complaints"), if the most recent Historic Complaint or currently reported customer complaint, arbitration or litigation is: less than ten (10) years old and the person has a total of three (3) or more currently disclosable regulatory action; currently reported customer complaints, arbitrations or litigations; Historic Complaints; or any combination thereof;

Stated another way, NASD intends to make disclosures to the public of Historic Complaints and additional otherwise unreportable information if in the past 10 years, the registered person has three or more currently disclosable items. The threshold of three matters in 10 years is an unreasonably low standard for providing to investors through the BrokerCheck program all historic information for a registered representative. Nothing in this proposal has explained the manner in which such additional information is at all meaningful or relevant to an investor. For example, customer complaints that "have not been settled or adjudicated" are often matters abandoned because they lack merit. It is not meaningful to an investor today to learn that years' earlier complaints were either resolved via by the Firm giving an investor a satisfactory explanation or by the investor simply abandoning the claim. Such a list of unexplained matters not only lacks relevance or meaning, but it is certainly not furnished to investors in a manner that allows them to digest the information and use it to make informed decisions.

### **A. The Proposed Rule Creates Incentives to Litigate**

The Proposed Rule will change the BrokerCheck program to allow disclosure of Historic Complaints, but its wording provides a specific exclusion from disclosure of complaints that are older than two years and that have been adjudicated in favor of a registered representative or the firm. This scenario creates the unintended consequence of actually causing fewer settlements of modest amounts in the interest of client relations. To the contrary, a modest settlement has the potential of staying on a broker's record forever, but a litigated win in favor of the broker disappears after the elapsed time. Thus, the Proposed Rule will likely increase or almost require that dollars are expended until there is a "win" that removes the matter from the broker's record eventually. Brokers simply will not be able to run the risk that comes with modest settlements under \$10,000, often taken in the interests of client relations.

In a related fashion, the Proposed Rule may actually force brokers to sue clients who abandon what were originally frivolous or otherwise non-meritorious claims. Since a customer complaint that is abandoned by the investor remains "unadjudicated", the broker has a tremendous incentive to sue the investor to "clear" the broker's name. More importantly, an adjudicated win against an investor who has abandoned the claim will remove the complaint from the definition of "Historic Complaint". In pursuit of investor protection, NASD may create a system where thousands are spent to vindicate versus paying hundreds to serve as a business accommodation

## **B. The Potential Harm of Continuous Disclosure**

Presently, a customer claim need not be factually accurate nor supported by current law in order to trigger a disclosure obligation for brokers and their firms. All that is needed is a complaint that is: 1) in writing; 2) alleges a sales practice offense; and 3) claims damages of \$5,000 or points to an event or events that the firm believes resulted in \$5,000 of damages. Under the current system, reporting these claims for a two-year period, even if the claims prove non-meritorious, seems a reasonable balance of the broker's interests with the goals of investor protection. The Proposed Rule, however, greatly alters that balance, making it possible that frivolous claims remain reportable as a Historic Complaint for potentially years to come. In addition, the "three or more" standard would encompass such frivolous claims such that the vexatious complainant, who simply refuses to go away, can repeatedly place a broker in the status of having all claims disclosed.

NASD seems to believe that granting the broker a brief commentary will act as a counterweight to what it implicitly recognizes could be a tendency to have frivolous claims cloud a broker's file. In terms of actually reaching investors, it is almost certain that the structure of the BrokerCheck system will minimize the impact of the broker's comment. Moreover, it is a striking contrast that to make a claim, an investor simply needs to allege a sales practice complaint. In order to submit a comment, however, a broker must provide "a signed, notarized affidavit", which even then is subject to NASD's review for relevance and other issues. This lack of balance serves to threaten the livelihood of brokers without any effective protections against the harm that can flow from unfounded or legally unsupportable claims. In essence, the NASD will seek to "punish" an entire population of brokers without any judgment having been rendered that a particular broker, under the facts of her case, is deserving of what is essentially a sanction.

## **III. The Commission Should Order NASD to Consider Alternatives**

As stated above, Wachovia Securities opposes the Proposed Rule as currently drafted. NASD's analysis is insufficient to show that the Proposed Rule best accomplishes the investor protection goals cited by NASD. For such a dramatic change in rules permitting the disclosure of aged and potentially misleading information to the investing public, it seems important that the Commission require that NASD provide a stronger justification for its conclusion that disclosure of all Historic Claims is warranted whenever a broker has three current disclosures in the past 10 years.

For example, an alternative that could accomplish the investor protection goals sought by NASD would be to have the default option reversed, so that Historic Complaints are **not** disclosed unless NASD reviews the matter. With notice and opportunity to be heard to the involved broker, NASD could use widely disseminated criteria to determine, whether in a particular case, a broker's recent disclosure activity crosses a threshold that requires disclosure of all Historic Complaints. For brokers who are clearly the subject of vexatious or non-meritorious claims, NASD could decline to impose the requirement of disclosing all Historic Complaints. Such an alternative would also lessen the likelihood that there would be incentives to litigate when brokers would be aware that NASD would exercise discretion and judgment to determine when disclosure of Historic Complaints is warranted

Additional changes NASD should consider are the insertion of a clarifying legend for unadjudicated claims and de minimis settlements. The BrokerCheck report could contain the following language:

*The reader of this BrokerCheck report should understand that many matters remain unadjudicated because complainants decide to decline to pursue the matter further. In addition, settlements for modest dollar amounts are often undertaken by parties to avoid the costs and time associated with arbitrating a matter and should not be considered an admission of liability or responsibility.*

Such disclosure language will assist investors in putting the BrokerCheck information in context as they review aged information and Historic Complaints for matters that are in essence abandoned or settled for modest amounts.

#### **IV. Conclusion**

Wachovia Securities urges the Commission to reject the Proposed Rule as currently constructed. At a minimum, NASD should better justify the need for the Proposed Amendment and how it is less burdensome than alternatives. As always, we appreciate the opportunity to provide these comments, and we would be pleased to answer any questions or provide more information to the Commission or the Staff.

Very truly yours,

*Ronald C. Long*

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