April 17, 2008

Nancy M. Morris
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: File No. SR-FINRA-2008-010
(FINRA's proposed rule changes to FINRA Code of Arbitration Rule 12805 and Rule 13805 regarding expungement of customer dispute information under Rule 2130).

Dear Ms. Morris:

I write in the Public Interests as a former Morgan Stanley Vice President who has personally experienced the impact of CRD filings which can be (and are) abused by FINRA member firms:

(1) to retaliate against whistleblowers by willfully using the CRD filings to defame whistleblowers and other conscientious employees of FINRA member firms;

(2) to insulate the FINRA member firms from law enforcement investigating whistleblower allegations, as the whistleblower's credibility has been damaged by the FINRA member firms' defamatory CRD filings about the whistleblower; and

(3) to extortively coerce targets of customer dispute allegations into denying liability to customers.

While much attention has been given to preventing expungement of customer dispute information, what is ignored by FINRA is the material fact that it is the in-house lawyers employed by the FINRA member firms who have "at will" control over the language in CRD filings. Additionally, because of token fines levied by FINRA for late CRD filings, the FINRA member firms also have "at will" control over the timing of the CRD filings.

In other words, the practical reality is customers/investors have zero to minimal impact on the wording of the "customer dispute information" that is the subject of these FINRA proposed rule changes related to expungement of information on CRD filings.

FINRA member firms have "at will" control over the language in the CRD filings

Specifically, upon receipt of a customer complaint, in-house lawyers of the FINRA member firm choose the wording of the CRD U-4 (for current employees) filings and the CRD U-5 (for former employees) filings ("CRD filings") about the customer dispute. In other words, the same customer complaint can be filed by the FINRA member firm as either:

(a) "Alleged improper handling of account by employee Y during recent bear market";

or

(b) "Fraud, misrepresentation, breach of fiduciary duty, etc., etc. by employee Y". [1]

It is relevant to note that all it takes to make a CRD U-4 or CRD U-5 filing is for a senior in-house lawyer of a FINRA member firm to approve paperwork which a clerk employed by the FINRA member firm uses to send an electronic message to the CRD database.

[1] In the State of New York, the language in the CRD filings by FINRA member firms is absolutely immune.

In other words, there appears to be nothing to stop a FINRA member firm from subsequently amending the U-4 and U-5 in order to change the language of the CRD filings as what these proposed FINRA rule changes do is to make more difficult the expungement of the fact that there had been a customer dispute, and appear to do nothing to prevent FINRA member firms from continuing to willfully amend the language of the CRD filing even in instances where arbitrators denied expungement.

SEC should revisit, from "first principles", FINRA U-4 and U-5 required reporting

While it is in the Public Interests to know about substantive customer disputes involving an employee of a FINRA member firm, I don't believe that there is a compelling need to burden an employee with the record of every allegation, even those allegations which were found to be without merit. The Public gains by the fact that the in-house lawyers of FINRA member firms have less opportunity to make CRD filings about an employee.

It is relevant to note that the SEC approved FINRA Conduct Rule 3070 requires reporting of customer disputes either only after they are proved to have merit or if they involve allegations of criminal activity.

For example, FINRA Conduct Rule 3070 requires reporting to FINRA in such instances as:

a. after a FINRA member firm or employee has been adjudicated to have violated a law, regulation, or FINRA rule;

b. if there is a "written customer complaint involving allegations of theft or misappropriation of funds or securities or of forgery"; and

c. after a customer's claim for damages resulted in either a settlement of or an arbitration/judicial award of more than $15,000 (against an employee) or $25,000 (against a FINRA member firm).

In other words, as customers'/investors' interests are amply protected by the reporting requirements of FINRA Conduct Rule 3070, the SEC should conduct a thorough baseline/"first principles" review of the FINRA's current reporting requirements for CRD U-4 filings and CRD U-5 filings as it appears that many of FINRA's reporting requirements have been added on at various times on a piecemeal basis without sophisticated consideration given to examining and monitoring how the FINRA member firms abuse FINRA's reporting requirements in ways that damage the Public Interests.

FINRA's current U-4 and U-5 CRD filings' reporting requirements facilitate FINRA member firms' efforts to insulate themselves from whistleblower allegations

For example, FINRA's current reporting practices for U-4 and U-5 filings allow the FINRA member firms to insulate themselves from a whistleblower's allegations by making an immediate retaliatory defamatory CRD filing about a whistleblower-employee of the FINRA member firm.

The immediate CRD U-4 and CRD U-5 filing has the effect of insulating FINRA member firms from law enforcement (e.g., SEC / New York State Attorney General) investigating whistleblowers' allegations as, before law enforcement decides whether to allocate its scarce resources to investigating a whistleblower's allegations, it is a reasonable expectation that law enforcement would review the whistleblower's CRD records in order to evaluate: (a) the credibility of the whistleblower; and/or (b) the potential use of the whistleblower as a prosecution witness. Thus, another practical impact of FINRA member firms making retaliatory defamatory CRD filings about a whistleblower is that the FINRA member firms' lawyers can discredit the whistleblower's allegations by portraying the whistleblower as having an "axe to grind."

CRD filings are abused by FINRA member firms to coerce their employees

To those who argue that CRD U-4 and CRD U-5 filings are used by FINRA to evaluate whether to investigate a particular customer dispute allegation, the practical reality is that FINRA member firm exercise "at will" power to trigger FINRA investigations because FINRA has given its FINRA member firms "at will" choice of the defamatory language filed on U-4 and U-5 filings about the target of a customer complaint.

In other words, the in-house lawyers associated with FINRA member firms have turned FINRA regulatory investigations of customer complaints into a "second arm" of their litigatory efforts to deny adequate compensation for customers who make customer complaints (and then are forced to file for arbitration after the FINRA member firm routinely denies the customer complaint). Using the threat of FINRA sanctions resulting from FINRA investigations triggered by willfully defamatory CRD filings made by FINRA member firms, the in-house lawyers extortively coerce the stockbrokers employed by their FINRA member firms into denying any responsibility for damages and, therefore, make it more difficult for customers to gain adequate compensation for any damages caused by stockbrokers.[2]

[2] A Ninth Circuit decision shows that these are racketeering practices by the lawyers associated with FINRA member firms (e.g., fraudulently inducing customer settlements and arbitration awards for amounts that are lower than would be otherwise). Living Designs, Inc. v. E.I. DuPont de Nemours, 431 F3d 353 (9th Cir. 2005).

These proposed FINRA rule changes serve the interests of FINRA member firms

If there is any doubt that these FINRA proposed rule changes are self-serving to the interests of the FINRA member firms, it is very relevant to note that these FINRA proposed rule changes specifically exclude disputes between a FINRA member firm and an employee, as shown by reviewing the written discussion of the FINRA proposed rule changes that is currently on the SEC website. The written discussion's page 9 reads:

"[T]he proposed rule change would not affect FINRA's current practice of permitting expungement, without judicial intervention, of information from the Central Registration Depository ('CRD') system as directed by arbitrators in intra-industry arbitration awards that involve associated persons and firms based on the defamatory nature of the information ordered expunged. In allowing expungement relief without judicial intervention under such circumstances, FINRA believes that it is fairly balancing the interests of the brokerage community and others in expunging defamatory statements with FINRA's interests in investor protection and the integrity of the CRD system."

In other words, according to these proposed FINRA rule changes that are self-serving to the interests of FINRA member firms, the allegations by a whistleblower-employee (e.g., stockbroker) of a FINRA member firm of criminal activities either by the FINRA member firm or by senior executives of a FINRA member firm can be expunged by FINRA without judicial approval although the allegations by a customer that a stockbroker made, for example, an unsuitable recommendation of the purchase of, say, Microsoft stock instead of less volatile General Electric stock, requires judicial approval for expungement.

Moreover, how are whistleblowers protected from defamatory information retaliatorily filed about the whistleblower by a FINRA member firm? FINRA's proposed rule changes make it more difficult for the whistleblower to remove the defamatory language, especially if FINRA does not have a reason to aid the whistleblower in order to cover up the fact that FINRA failed to investigate the whistleblower's allegations of criminal activities by leading FINRA member firms.

<u>Unlike the NYSE, during Wall Street's recent reform era FINRA was not reformed</u>

With the exception of some cosmetic changes, as FINRA was not substantively reformed during Wall Street's reform era of then New York State Attorney General Eliot Spitzer and then SEC Commissioner William Donaldson, it is not surprising that FINRA continues to propose rule changes which favor the interests of its leading member firms while FINRA purports that these FINRA rule changes advance the public interests.

For example, the Board of Governors of the New York Stock Exchange ("NYSE") was substantially restructured after it was discovered that finance industry veteran Sandy Weill, Chairman and CEO of Citigroup (i.e., the parent company of leading FINRA member firm Smith Barney) was being appointed to the NYSE Board in order to represent the Public Interests.

Therefore, I was surprised to discover today that the Board of Governors of FINRA ("Financial Industry Regulatory Authority") similarly has not been reformed. For example, of the current twenty three (23) members of FINRA's Board of Governors, twelve (12) FINRA Governors are categorized by FINRA (on FINRA's website) as "Industry" Governors and eleven (11) FINRA Governors are categorized by FINRA as "Public" Governors.

More egregious is the fact that, and illustrative of how FINRA considers Public Interests, of FINRA's eleven (11) "Public" Governors:

(a) Four "Public" Governors are financial industry professionals; and

(b) Five "Public" Governors are "Ivory Tower" Professors from various Universities. [3]

[3] (a) Two (2) "Public" Governors retired from the financial industry (i.e., from DLJ Financial Services Group and from Prudential Corporation plc). It is relevant to note that, if these two (2) "Public" Governors were FINRA arbitrators, they would be classified by FINRA as "Industry Arbitrators";

(b) Two (2) "Public" Governors currently work in the financial industry (i.e., The Travelers Companies, Inc.; and World Gold Council). It is also relevant to note that, if these two (2) "Public" Governors were FINRA arbitrators, they would be classified by FINRA as "Industry Arbitrators"; and

(c) Five (5) "Public" Governors are Professors at various Universities, including former SEC Commissioner Harvey J. Goldschmid (now Professor at Columbia University's Law School) about whom there is no doubt that he represents the interests of customers/investors, as he showed during his tenure as SEC Commissioner.

Why are there so many “Ivory Tower” Professors on FINRA’s Board of Governors as “Public” Governors? Additionally, how many of these Professors have consulting/research engagements from FINRA member firms and, therefore, are beholden to the FINRA member firms?

Why doesn’t FINRA have on its Board of Governors to represent the Public Interests such persons as: (a) accomplished customers/investors/entrepreneurs such as Bill Gates; (b) investor advocates such as Eliot Spitzer; and (c) retired Federal Judges or politicians?

In light of FINRA’s failure to regulate its leading FINRA member firms, the SEC should conduct a review of FINRA’s current regulatory procedures and practices

By further facilitating retaliation by FINRA member firms against whistleblowers, FINRA’s proposed rule changes impair effective regulation of the FINRA member firms at a time when FINRA, as an organization, has failed to effectively regulate its FINRA member firms as illustrated by the fact that, in a wholesale regulatory failure by FINRA (formerly NASD, National Association of Securities Dealers), virtually all of the leading FINRA brokerage firms almost went bankrupt.

Specifically, leading FINRA member firms Merrill Lynch, Citigroup/Smith Barney, Morgan Stanley, and UBS Paine Webber have written off about $100 Billion since the start of 2007. To put this $100 Billion writeoff in perspective, these four leading FINRA firms started 2007 with combined shareholders' equity of approximately $240 Billion.

Therefore, given FINRA's failure to regulate its leading FINRA member firms, it is likely to be in the interests of customers/investors for the SEC to conduct a comprehensive review of FINRA's current regulatory procedures and practices.

Summary

In sum, the practical effect of these FINRA rule changes that make it more difficult to expunge the defamatory information filed on the CRD filings by FINRA member firms about their employees is to increase the extortive, coercive power that the FINRA member firms exercise over its employees, including whistleblowers and other conscientious employees. This, in turn, makes it more difficult for customers to gain adequate compensation for any damages they incurred. [4]

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[4] It may be relevant to note that the author of one of the public comment letters dated April 15, 2008 (that the author wrote on behalf of an University Law Center that the author is affiliated with, in which the author supported these proposed FINRA rule changes), failed to disclose the material fact that the author is a member of FINRA's Arbitration and Mediation Committee that, among its other activities, oversees the FINRA Code of Arbitration Procedure, including the arbitration rules that are affected by these proposed FINRA rule changes.

In conclusion, the new FINRA proposed rule changes for "Rule 2130 expungement of customer dispute information" under Rule 12805 (for the FINRA Code of Arbitration Procedure for Customer Disputes) and Rule 13805 (for the FINRA Code of Arbitration Procedure for Industry Disputes) is another example of FINRA's rule changes being presented in the customers/investors' interests although FINRA's proposed rule changes further advance the interests of FINRA's leading member firms. [5]

Respectfully Submitted,

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[5] Disclosure: I am a former whistleblower who was subject to a customer dispute during the stockmarket crash of 2000/2001. Within three days of my initial attempted whistleblowing to my then employer Morgan Stanley, my former employer Smith Barney filed a retaliatory, defamatory CRD filing about me involving the customer dispute. NASD admitted that Smith Barney's CRD filing triggered the NASD investigation against me. As also supported by the documentary evidence, it is also undisputed that, Smith Barney then guided the NASD investigation by Smith Barney selectively forwarding and withholding documents about me. After the NASD refused to investigate my allegations of criminal, anti-investor activities by leading NASD member firm Smith Barney, the NASD barred me from the industry notwithstanding the fact that I am the only stockbroker who was barred by the NASD solely for the non-criminal activity of unsuitable recommendation to a customer and his friend without either accompanying criminal activity or refusal to respond to the NASD's requests for information. Based on the Opinion prepared by a SEC Clerk which contained material factual errors, the SEC affirmed the NASD bar. Based on procedural issues, the SEC Clerk never ruled on my Motion to Reconsider as the SEC Clerk had refused to accept my Motion to Reconsider.