

Compliance
101 Montgomery Street San Francisco CA 94104
(415) 636 7000

April 17, 2009

BY EMAIL TO: rule-comments@sec.gov

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

RE: Release No. 34-59-616; File No. SR-FINRA-2009-008
Proposed Rule Change to Amend Form U4, Form U5 and FINRA Rule 8312.

Dear Ms. Murphy:

Charles Schwab & Co., Inc. ("Schwab") appreciates the opportunity to comment on FINRA's "Proposed Rule Change to Amend Uniform Application for Securities Industry Registration or Transfer (Form U4) and Uniform Termination Notice for Securities Industry Registration (Form U5) and FINRA Rule 8312 (FINRA BrokerCheck Disclosure)." Schwab supports many of the proposed rule changes as they are responsive to industry feedback, seek consistency in reporting requirements and provide clarity, most notably:

- **Increasing the monetary threshold for reporting customer complaints, arbitrations or litigation settlements from \$10,000 to \$15,000.** Schwab believes increasing the threshold is appropriate considering the threshold has not been raised since 1998.
- **Allowing firms to amend the "Date of Termination" and "Reason for Termination."** Schwab believes the proposed revisions will allow firms to correct clerical or administrative errors and accurately reflect such information on Form U5 filings, thereby reducing confusion (and consternation) when inaccurate information is noted on the Form U5.
- **Incorporation of the Form U4 instructions definition of "found" into the Form U5.** Schwab believes this would remove any possible ambiguity and achieve meaningful and important consistency in the interpretation and application of reporting requirements.

- **Amending the Customer Complaint/Arbitration/Civil Litigation DRPs to elicit whether a complaint is oral or written.**¹ Schwab believes the inclusion of this information will allow FINRA to more accurately assess the timeliness of certain settlement disclosure amendments that are currently systemically considered late by FINRA due to the inability of the Web CRD system to distinguish whether a settlement resulted from an oral or a written complaint.

Proposed Revisions Regarding Willful Violations

Schwab also supports FINRA's efforts to more readily identify individuals subject to statutory disqualification pursuant to Section 15(b)(4)(D) or (E) of the Exchange Act ("willful violations") by proposing to add six new Regulatory Action Disclosure Questions to the Form U4 ("New Questions"), however, Schwab believes FINRA has significantly underestimated the time, cost and complexity underlying the proposed implementation of the Form U4 changes.

The proposal states the following regarding implementation:

"With respect to the proposed new Questions 14C(6), (7) and (8), and 14E(5), (6) and (7) on the Form U4, firms will need to determine promptly whether any of their registered persons have been subject to an action that requires reporting. Firms then will be required to amend Forms U4 to respond to these new questions the first time they file a Form U4 amendment after the effective date of the proposed rule change, but no later than 120 days following the effective date of the proposed rule change. If a firm has determined that the registered person must answer "yes" to any part of Questions 14C(6), (7) or (8), or Questions 14E(5), (6) or (7), the amendment filings must include completed DRP(s) covering the proceedings or action reported."

Also, footnote 8 of the proposal explains:

"Under the proposal, the CRD system will process Form U4 filings as follows: answers to current Questions 14C(1) through (5) and Questions 14E(1) through (4) will be transferred without change to proposed new Questions 14C and 14E, respectively. In addition, all registered persons will have "null" values in the newly added Questions 14C(6), (7), and (8), and 14E(5), (6), and (7). In other words, answers to these new questions will be blank (i.e., not populated with either a "yes" or "no" answer). Firms must affirmatively answer these newly added questions (Questions 14C(6), (7), and (8) and 14E(5), (6), and (7)) by clicking the appropriate "yes" or "no" radio buttons the first time they file a Form U4 amendment after the effective date of the proposed rule change, but no later than 120 days following the effective date of the proposed rule change. If a firm

¹See SR-FINRA-2009-008, page 17, footnote 25.

does not affirmatively answer the new questions for registered persons, the filing of any amendments to the Form will fail the CRD-system completeness check.”

Specifically, Schwab is concerned that the proposed 120 day time-frame to implement the proposed changes² and the associated requirements may impose unnecessary and costly burdens on firms and pose numerous and significant practical challenges that may make it untenable to comply with. Schwab also believes that FINRA can obtain the information necessary to identify registered persons subject to statutory disqualification for “willful violations” in a more efficient, effective and less burdensome manner by leveraging the current Regulatory Action Disclosure Questions (“Current Questions”). Specifically, Schwab requests that FINRA consider the following:

The Form U4 should default to “no” for the New Questions” for registered persons who have “no” answers to all the Current Questions.

Schwab believes the Current Questions meaningfully and substantially elicit findings of violations of SEC, CFTC, other Federal regulatory agency, state regulatory agency and self regulatory organization rules, regulations or statutes.³ Therefore, Schwab believes that the vast majority of registered persons who may possibly respond “yes” to the New Questions designed to identify “willful violations” to be a subset of registered personnel with a “yes” response to any of the Current Questions and believes that the possibility of a “yes” response to the New Questions, absent a “yes” response to any of the Current Questions, to be remote.

In addition, Schwab notes that in 2003 when new Regulatory Action Disclosure Questions 14D(2)(a) and (b), also designed to elicit reporting of regulatory actions that may cause a registered person to be subject to a statutory disqualification under the expanded definition and also created by the passage of the Sarbanes-Oxley Act, the CRD system defaulted new questions 14D(2)(a) and (b) to “no” for all registered persons who had all “no” answers in response to their Form U4 disclosure questions.⁴

² Schwab notes that the “2009 ARM National Conference FINRA Uniform Forms & Systems Updates” presentation, dated 1/27/09, indicated FINRA would permit Firms a 180 day time-frame following the approved effective date to answer the new Regulatory Action Disclosure Questions. Schwab is uncertain why FINRA would shortly thereafter submit the rule filing with the time-frame significantly shortened to 120 days. The presentation is available at <http://www.finra.org/web/groups/industry/@ip/@comp/@regis/documents/appsupportdocs/p117790.pdf>.

³ For example current Regulatory Action Disclosure question 14C(2) asks “Has the U.S. Securities and Exchange Commission or the Commodity Futures Trading Commission ever: found you to have been involved in a violation of its regulations or statutes?” Question 14E(2) asks “Has any self-regulatory organization ever: found you to have been involved in a violation of its rules (other than a violation designated as a “minor rule violation” under a plan approved by the U.S. Securities and Exchange Commission)?” Findings of “willful violations” of SEC, CFTC and SROs by such regulators of their rules, regulations or statutes would certainly require a “yes” response to the noted, current Regulatory Action Disclosure Questions and also to the proposed, associated New Questions.

⁴ NASD Notice to Members 03-42, Revised Forms U4 and U5.

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Therefore, Schwab believes the Form U4 should default the New Question responses to “no” for registered persons who currently have “no” answers to all the current Regulatory Action Disclosure Questions and that the New Question responses should be null for any registered person who has a “yes” response to any Current Questions and, therefore, requiring a Form U4 amendment.. Schwab believes this approach will permit FINRA to meet its express goal “...to enable FINRA and other regulators to identify more readily individuals...subject to statutory disqualification pursuant to Section 15(b)(4)(D) or (E) of the Exchange Action (referred to as “willful violations”)” by promptly identifying those registered persons most likely to respond “yes” to the proposed New Questions.

If FINRA is unable or unwilling to implement the above noted recommendation, Schwab suggests that FINRA consider the following:

- 1. Apply the proposed 120 day time-frame only to registered persons with a “yes” response to any of the Current Questions and extend to 365 days the time-frame for registered persons with “no” responses to all the Current Questions.**

Allowing the extended time-frame will enable Firms to leverage existing systems and processes to obtain a Form U4 disclosure amendment, will be less costly and burdensome for Firms to implement and does not significantly increase the possibility that a registered person who would be subject to a statutory disqualification for “willful violations” is not identified timely.

- 2. Mitigate the immediate effectiveness of the proposed changes by removing the requirement that Firms must affirmatively answer the New Questions the first time they file a Form U4 amendment after the effective date of the proposed rule.**

Schwab understands such “amendments” to include administrative information such as the addition of state or self-regulatory organization registrations, exam scheduling, and updates to residential, business and personal history, amendments for which the associated person’s signature is currently not required and which may be filed electronically via WEB EFT.⁵

The requirement that firms must affirmatively answer the New Questions the first time they file a Form U4 amendment after the effective date prompts the immediate effectiveness of the proposals. Thus, Firms would be required to have policies, procedures and systems in place to immediately implement the proposed changes on the effective date of the rule. This is particularly problematic for Firms leveraging and using FINRA Web EFT technology to automatically upload administrative amendments as they would be required to change their systems by the effective date of the rule. While

⁵ Web EFT is a secure, state-of-the-art electronic file transfer application that eliminates the need for firms to manually submit online form filings to Web CRD[®]. By providing a mechanism to submit batch transmissions over the Internet, Web EFT can significantly streamline registration processing by reducing the amount of time and effort needed to manually file Form U4, Form U5, Form BR and NRF.

Schwab appreciates FINRA's efforts to provide Firms with information related to Web EFT Release 2009.2 and Web CRD & IARD Release 2009.2⁶ (the releases intended to accommodate the Form U4 changes), Schwab believes it is unreasonable to expect Firms to develop, test and implement costly systems changes to comply with the immediate effectiveness of changes based on a proposed rule that has not been subject to public comment or approved by the SEC and which may be subject to further changes.

Additionally, the timeliness of administrative information filings may be significantly impacted by a Firm's inability to electronically submit such filings without an affirmative response to the New Questions. An unintended consequence will be the negative impact on Firm's ability to serve their customers and conduct business, particularly as state registration requests will be impacted.

3. Do not require a signature and permit the electronic "batch" filings of Form U4 amendments with "no" responses to the New Questions.

Pursuant to existing FINRA guidance, firms are required to obtain a signature with respect to amendments to disclosure information on the Form U4. As FINRA is aware, obtaining a registered person's signature on the Form U4 amendment is labor intensive. The process has multiple steps, including but certainly not limited to:

- Communicating the New Questions to registered persons;
- Obtaining and recording responses to the New Questions;
- Delivering the Form U4 to the registered person and requesting they complete; sign and return the Form U4 by a specified date;
- Tracking individuals who have and have not responded; and
- Sending reminders to registered persons who have not responded and escalating late responders to supervisors.

In addition to being readily available for questions and inquiries, upon receipt of the signed Form U4, the Registration Department would be required to:

- Indicate receipt of the signed amended Form U4;
- Validate the responses;
- Enter the data via Web CRD; and
- File the signed amendment in the registered persons file.

Even in the best case, this will result in significant labor and processing costs, particularly for larger Firms. Therefore, to alleviate the administrative costs and complexity associated with this endeavor, Schwab requests that FINRA consider providing a facility

⁶ See "2009 ARM National Conference FINRA Uniform Forms & Systems Updates" presentation, (<http://www.finra.org/web/groups/industry/@ip/@comp/@regis/documents/appsupportdocs/p117790.pdf>) and "Web EFT Release 2009.2 Overview Web EFT Conference Call," dated February 2009: (<http://www.finra.org/web/groups/industry/@ip/@comp/@regis/documents/appsupportdocs/p038940.pdf>)

for Firms to electronically batch file Forms U4 with “no” responses to the New Questions and without a manual signature.

Schwab is cognizant of SR-FINRA-2009-019, “Proposed Rule Change to Adopt FINRA Rules 1010 (Requirements for Uniform Forms) and 2263 (Arbitration Disclosure to Associated Persons Signing or Acknowledging Form U4) in the Consolidated FINRA Rulebook” filing which:

“...would permit a firm to file amendments to the Form U4 disclosure information without obtaining the registered person’s manual signature if the firm uses reasonable efforts to (1) provide the registered person with a copy of the amended disclosure information prior to filing and (2) obtain the registered person’s written acknowledgment (which may be electronic) prior to filing that the information has been received and reviewed. The proposed rule change also requires a member, as part of its recordkeeping requirements, to retain the written acknowledgment in accordance with SEC Rule 17a-4(e)(1) and make it available promptly upon regulatory request.”

While Schwab welcomes and supports this proposal, it would not provide meaningful relief in the implementation of the proposed changes discussed herein if⁷ applied to the New Questions due to the restrictive provisions requiring Firms to provide the registered person with a copy of the amended disclosure information and obtain the registered person’s written acknowledgment that the information has been received and reviewed prior to filing the Form U4 amendment. To take advantage of this relief, Firms would first be required to implement significant process and systems modifications to meet these requirements.

Schwab believes that consideration and implementation of these recommendations will provide firms with the appropriate flexibility and time to properly and effectively implement the proposed changes at significantly less cost and without an increase in the risk that a registered person who is subject to a statutory disqualification for “willful violations” is not identified.

Proposed Revisions Regarding Reporting of Alleged Sales Practice Violations Made in Arbitrations or Litigation where the Registered Person is Not a Named Party

Schwab does not support the proposal relating to the reporting of sales practice allegations made in arbitrations or litigation where the registered person is not a named party. Allegations presented in an arbitration/litigation are appreciably different than in a customer complaint. A customer’s decision to file a lawsuit against a registered person is a more serious and thoughtful action than that of filing a complaint. Clients and their attorneys seriously consider who should be named in an arbitration or lawsuit and naming

⁷ It should be noted that neither SR-FINRA-2009-008 nor SR-FINRA-2009-019 indicates that FINRA intends to permit Form U4 disclosure amendments without a manual signature to accommodate the proposed Form U4 changes in SR-FINRA-2009-008.

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an individual in the body of such actions does not carry the same weight. Additionally, the filing of a lawsuit against a registered representative is more damaging to the reputation of that individual than those same allegations made in a customer complaint. Arbitrations and litigations carry a greater stigma because of the formality of the proceedings and can impact a registered person's registration with various state securities agencies solely on the basis of an allegation. In addition, these allegations are often inaccurate. Moreover, the general public checking on a broker through broker check will likely not make a distinction between a registered person who is named as opposed to one who is referenced in the body of the arbitration or litigation.

Finally, it is very difficult and expensive to get a matter expunged from a registered person's CRD record, even for a representative who is named in an arbitration or litigation and represented by counsel. This will be particularly difficult for a registered person who is not a named party and has a less meaningful opportunity to participate in the arbitration or litigation to pursue expungement.

We appreciate the opportunity to provide comments and thank you for your consideration of the points we have raised in this letter. Please feel free to contact me at (415) 636-3540 to discuss them in more detail.

Sincerely,

A handwritten signature in cursive script that reads "Bari Havlik".

Bari Havlik
SVP and Chief Compliance Officer
Charles Schwab & Co., Inc.