Public Investors Arbitration Bar Association

September 4, 2009

VIA E-MAIL TO: rule-comments@sec.gov

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

RE: File Number SR-FINRA-2009-050
FINRA BrokerCheck Disclosure

Dear Ms. Murphy:

I write on behalf of the Public Investors Arbitration Bar Association ("PIABA") regarding the above-referenced proposal concerning the expansion of information that will be available through BrokerCheck to the public. PIABA is a bar association comprised of attorneys who represent investors in securities arbitrations. Since its formation in 1990, PIABA has promoted the interests of the public investor in all securities and commodities arbitration forums. Our members and their clients have a strong interest in FINRA rules that govern the arbitration process, as well as rules that benefit the public investor.

PIABA endorses the current rule proposal, as any effort to increase the amount of information regarding individuals formerly registered with FINRA that is available to the public is a positive one. We do so, however, with great reservations. We believe that the rule change could and should go much further by including, for an indefinite period of time, other categories of information that are available concerning currently registered representatives. FINRA's explanations for expanding the time period during which it discloses final regulatory orders, while continuing to limit the disclosure of other, equally important and relevant information, are inconsistent and unpersuasive.

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ADDITIONAL INFORMATION REGARDING FORMER ASSOCIATED PERSONS SHOULD BE MADE AVAILABLE PERMANENTLY TO THE PUBLIC

Under the current disclosure system, once an individual ceases to be registered with FINRA for at least two years, no information is available about that individual through BrokerCheck. The new FINRA proposal would extend the availability of all final regulatory actions that have been reported to the Central Registration Depository ("CRD") system for associated persons, as well as "administrative" information, such as employment and registration history, irrespective of whether such persons continue to be registered. The proposal, however, leaves out significant additional information that would benefit the investing public.

FINRA'S STATED PURPOSE FOR THIS RULE PROPOSAL OF PROVIDING INFORMATION TO INVESTORS REGARDING INDIVIDUALS WHO ARE NO LONGER REGISTERED BUT MAY BE IN POSITIONS OF TRUST IS BEST SERVED BY EXPANDING THE SCOPE OF THE RULE

FINRA identifies the primary purpose of BrokerCheck as "help[ing] investors make informed choices about the individuals and firms with which they may wish to do business." FINRA further acknowledges that the purpose of the proposed rule change "would allow the public access to information about formerly registered persons who, although no longer in the securities industry in a registered capacity, may work in other investment-related industries or attain other positions of trust and about whom investors may wish to learn relevant disciplinary information." FINRA, however, chooses to limit the information that is permanently available only to final regulatory orders. This is troubling because there is important additional information disclosed through BrokerCheck for current registered representatives that would serve the purpose of the current proposal by providing relevant information to investors who utilize BrokerCheck to investigate former brokers.

Currently, under FINRA Rule 8312, an investor who wishes to investigate a broker's history is able to ascertain the following, so long as the broker is registered, or has been within the previous two years:

- Customer complaints
- Arbitration actions filed against the broker
- Bankruptcies
- Liens
- Certain criminal complaints and charges made against a broker

FINRA'S EXPLANATION FOR NOT INCLUDING INFORMATION OTHER THAN FINAL REGULATORY ORDERS IS ILLOGICAL AND INCONSISTENT

FINRA reasons that the expansion of the time during which final regulatory actions will be available through BrokerCheck is appropriate because final regulatory actions are available to the public anyway. All of the other categories of information identified above, except for customer complaints made to a broker's employer, are also publicly available through any number of sources, but not necessarily to the public investor who uses BrokerCheck. FINRA's justification makes no sense in light of its failure to include other categories of publicly available information. Moreover, arbitration actions, bankruptcies, liens, and especially *criminal actions* would all be of extreme importance to an investor who uses BrokerCheck to gather information on an individual who may be handling his or her money, or who may be gaining access to an investor's assets through a position of trust.

FINRA also claims that final regulatory orders "are subject to procedures that allow an opportunity for the subject person to present arguments to a fact-finder about the allegations prior to the final disposition of the matter." FINRA also claims that arbitration claims, unlike final regulatory actions, "may not be subject to procedures that allow an opportunity for the subject person to present arguments to a fact-finder about the allegations prior to final disposition." All parties named as respondents in an arbitration action, however, are given opportunity to respond to the allegations asserted against them, and are entitled to appear at all hearings, just as in regulatory enforcement proceedings. Moreover, as previously noted, FINRA Rule 8312 allows individuals to submit a comment that addresses any disclosed information, thereby alleviating any cries of unfairness regarding the procedures related to arbitration actions.

FINRA comments that its refusal to include criminal charges and convictions is related to the possibility that such charges and convictions "subsequently may have a different disposition, which may significantly change the meaning of the matter as originally reported." This assertion seems illogical. A criminal charge is a criminal charge. Form U-4 requires the disclosure of certain criminal convictions *and charges*, not only such charges as ultimately resulted in a conviction. Moreover, such information is already disclosed for currently registered individuals and for those who have been registered within the last two years. FINRA has determined that this information is relevant and furthers its objectives in providing information to investors. Finally, if a conviction met with a subsequent different disposition, such as being overturned on appeal or sealed for some reason, then it may not even be subject to disclosure.

FINRA finally claims that certain financial information, such as bankruptcies or liens, are not material enough to warrant disclosure. Such information, however, may shed light on an individual's level of financial responsibility and may be absolutely material to an investor who seeks to determine whether he or she wishes to entrust money or personal affairs to a formerly registered person.

FINRA explains more than once that a broker has an opportunity to submit a statement regarding any disclosed events. The ability for a broker to offer his or her own statement addressing disclosed information more appropriately achieves the balance between fairness to the individual and disclosure to the public of adverse information that FINRA claims to seek. FINRA's current proposal does not go far enough to achieve the balance between the two interests, instead tipping the scales in favor of hiding otherwise relevant and important information regarding former registered representatives.

AGGRIEVED INVESTORS MAY REQUIRE ACCESS TO INFORMATION FOR SEVERAL YEARS AFTER A BROKER LEAVES THE INDUSTRY

In this rule proposal, FINRA has focused almost exclusively on the needs of investors to learn about their brokers *before* they invest. However,

FINRA's mission must also include the protection of investors who have gotten into a dispute with their broker or former broker.

It is not unusual for aggrieved investors to seek out a lawyer and file an arbitration claim several years after the events which gave rise to their losses. In fact, the FINRA Code of Arbitration Procedure makes claims eligible for submission to arbitration for up to six years after the event or occurrence giving rise to the claim. (FINRA Customer Code of Arbitration Procedure, Rule 12206(a).) Currently, in many instances attorneys consult BrokerCheck to procure information about a broker who wronged their clients, only to learn that the broker left the industry more than two years earlier. This makes it difficult to learn important facts (which may, for example show that the brokers engaged in similar misconduct) about the brokers which were previously public record. There is no reason to remove these disclosures from the public record; doing so is antithetical to FINRA's mission of protecting investors.

This state of affairs leads to a somewhat anomalous result. An aggrieved investor has more trouble learning about a broker whose misconduct led to his termination by a reputable firm than he has learning about a broker whose conduct was not serious enough to warrant termination. This makes no sense. Moreover, it makes no sense for FINRA to be jumping through hoops to protect the "privacy rights" of these bad brokers, to the detriment of the investors which it is supposed to protect.

As an association of attorneys who represent aggrieved investors in FINRA arbitration proceedings and in court, PIABA believes that all of the information which is disclosed for current FINRA members and associated persons should remain in the public domain indefinitely. If there were a bona fide need to balance competing interests, the period should be lengthened to at least 6 years, to coincide with the arbitration eligibility rule.

CONCLUSION

There are many career paths that a former associated person could take that would place him or her in a position of trust with access to client funds. A client would likely want to know the full extent of the person's prior history, and should be entitled to that information if it has previously been

available to the public. The instant proposal should not be limited just to final regulatory orders, but should include all information now subject to disclosure for currently registered individuals in order to accomplish FINRA's stated objective of allowing investors access to relevant information that they need to make an informed decision. Expanding the scope of disclosed information also serves the overarching objective of FINRA of investor protection, even at the risk of potential inconvenience to associated persons who may properly be asked to make public disclosure as a condition of the privilege of obtaining securities licenses.

Ultimately, we feel strongly that any move to disclose information to the public that is not currently available is a positive step. Accordingly, the current proposal should not be rejected, but we do believe that its scope should be increased to allow public access to information that is not covered by the proposal. For the reasons set forth above, PIABA recommends that the current rule proposal be approved with the inclusion of the categories outlined above.

Please do not hesitate to contact me should you require additional information or wish to discuss this important topic.

Yours very truly,

PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION

Brian N. Smiley
President