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September 4, 2009

VIA E-MAIL TO RULE-COMMENTS@SEC.GOV

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

Re: SR-FINRA-2009-050

Dear Ms. Murphy:

I have been representing investors in claims against the brokerage industry for more than the past 30 years and have represented investors in arbitration since the 1987 *McMahon* decision. I have also served as an arbitrator for the New York Stock Exchange and the National Association of Securities Dealers, and I currently serve as an arbitrator for the Financial Industry Regulatory Authority (FINRA).

I am pleased to have the opportunity to comment on FINRA's proposal to amend FINRA Rule 8312 concerning the BrokerCheck disclosure system.

Background

Rule 8312 describes the information which FINRA will release to the public through its BrokerCheck disclosure system. The BrokerCheck system is a valuable source of information to the investing public, allowing investors to check the record of a prospective broker they might retain. In addition, the rule is very important to investors who have claims arising out of their brokerage accounts, allowing them or their attorneys to check the disciplinary record of the broker and determine if there was other wrongdoing or disciplinary problems that may impact their claims.

In February 2000, the SEC approved a FINRA-proposed amendment to Rule 8312 which provided that the BrokerCheck system would not publicly disclose any information concerning a broker who had been out of the industry for two years. Prior to the adoption of this amendment, information concerning brokers who had left the industry

was provided to the public regardless of how long the ex-broker had been unlicensed. Under the amended rule, whenever an investor inquiry is made of an ex-broker who has been out of the industry for two years, FINRA merely responds that there are no records pertaining to that person. FINRA does not even confirm that the ex-broker had ever been in the industry.

This is anomalous. FINRA, whose responsibility is investor protection, is concealing its records concerning ex-brokers who have potentially wronged an innocent investor, simply because the broker had been out of the industry two years. This information should continue to be available to all investors. At the very least, the information concerning ex-brokers should be available to investors for six years after the broker leaves the industry, which would be consistent with the FINRA six-year eligibility rule for the pursuit of investor claims.

FINRA's Proposal

FINRA now proposes an amendment which would allow investors to get access to information concerning brokers who had been out of the industry more than two years. But it would only apply to those brokers who, although not in the securities industry, were working in other investment-related industries or in other positions of trust. The amendment ignores the needs of investors who are seeking to recover lost savings and retirement funds due to broker wrongdoing and who are searching the records for information about ex-brokers to assist them in pursuit of their claims. FINRA's sole objective in this proposal is to allow investors to obtain information about ex-brokers with whom they intend to do business. Thus, FINRA's proposal would help a very limited number of investors while ignoring the fact that the vast majority of investors who are seeking information about ex-brokers are doing so because they are trying to get information that will assist them in recovery of their losses.

The FINRA proposal should be expanded to apply to all ex-brokers regardless of whether they are newly engaged in investment-related matters or hold a position of trust. FINRA must recognize that the two-year cutoff which was imposed on disclosure of information concerning ex-brokers in February 2000 does not protect investor interests but rather is injurious to investors and protects the brokerage industry.

The BrokerCheck rule was established for general investor protection. It was to allow investors broad access to brokerage information – not just to assist in broker selection, but also specifically to provide information to investors in connection with the pursuit of broker claims.[1] The time period during which all investors can obtain information to

[1]See subparagraph 4(b) of the BrokerCheck Terms and Conditions.

pursue claims should be unlimited or at the very least governed by the six-year eligibility rule and not by a shorter two-year period which would potentially result in investors being unable to obtain broker information while their claims are still viable under FINRA rules.[2]

FINRA's stated reason for limiting the disclosure of ex-broker information to two years is privacy concerns for ex-brokers. As a general principle, it is submitted that the privacy concerns of an ex-broker with respect to information concerning that broker's activities while registered are far outweighed by the investor protection interests of those investors who may have claims arising out of doing business with that broker. Any privacy concerns of the ex-broker are already addressed and protected by subsection (c) of Rule 8312 which reserves the right to FINRA to "exclude, on a case-by-case basis, information that contains . . . information that raises . . . personal safety or privacy concerns that are not outweighed by investor protection concerns."

It is important to note that the two-year secrecy rule also helps to protect brokerage firms from legitimate investor claims involving some of the worst brokers. Typically, those brokers who have the worst disciplinary records and who have caused great harm to investors end up quitting or being drummed out of the industry. Investors who are unable to get information on these ex-brokers may be less likely to pursue legitimate claims against their former brokerage firms. FINRA's two-year secrecy rule actually seems to focus on industry protection rather than investor protection.

It is inexplicable that the worst of the worst brokers who may have multiple sanctions, investor arbitrations, and settlements and finally quit or are forced out of the industry should be shielded by FINRA's rule preventing investors from obtaining access to their records. As stated above, investors seeking information on these wrongdoers are simply told by FINRA that there is no record of the broker. Investors getting such a response from a regulator could easily conclude that they were an isolated victim instead of one of many victims.

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[2]It is noteworthy that the 1999 FINRA proposal which adopted the two-year cutoff period failed to even consider the six-year eligibility period during which investors can pursue claims. FINRA instead focused on the fact that the two-year period during which ex-broker information would be made available coincided with the period during which an ex-broker can return to the securities industry without re-examination and the two-year period during which an ex-broker remained subject to the jurisdiction of the association after termination. Thus, the two-year disclosure cutoff period was established without seriously considering the interests of the investor in obtaining information about ex-brokers. See *Securities and Exchange Commission Release No. 34-42240*; File No. SR-NASD-99-45.

It is also troubling that FINRA's statement to the public that there is no record of such a broker is misleading in itself. Indeed, there are records concerning such a broker, and these records are available, but FINRA merely is refusing to disclose them to the investor.

Such a dead end at BrokerCheck can only discourage pursuit of a claim. Individual investors understandably would be stalled in their inquiry, and even investor attorneys who don't understand the system could also be stopped short from getting the facts.

I recently made a BrokerCheck inquiry concerning an ex-broker in a case involving a major firm. FINRA told me they had no record of the broker. I contacted a helpful state examiner, located the records, and soon obtained a 59-page CRD disclosure which contained several arbitrations and settlements. There is no doubt that other victims of that ex-broker who unsuccessfully tried to find him on the FINRA BrokerCheck system were deterred from pursuing their claims, and had they seen the 59-page CRD disclosure, they would have taken action.

In addition to ignoring the interests of investors who may have a claim and seek information on their ex-brokers, FINRA's proposal fails to allow access to other information that may be part of the CRD system regarding former registered persons, such as bankruptcies, liens, criminal events, or arbitration claims. In this regard, FINRA states that it believes that these other categories of information are more relevant to an investor or potential customer when the individual is registered or was recently deregistered (i.e., within two years). While such information may be valuable to investors or potential customers of ex-brokers who were recently deregistered, it is fallacious to assume that this information would not be equally valuable to other investors who are seeking information in connection with claims against an ex-broker. Losses experienced by an investor involving a broker who is long out of the industry are no less important to the investor than losses experienced where the broker remains in the industry. This information should be provided to all investors who are inquiring concerning ex-brokers.

FINRA's proposed rule change provides that it would allow the public access to information as to only 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. Limiting disclosure to this class of former brokers renders the proposed rule so narrow and as to such a small class of ex-brokers as to be of little significance.

It is also important to note that definitions of "investment-related industry" and "other positions of trust" do not appear in the text of the proposed rule as set forth in Exhibit 5

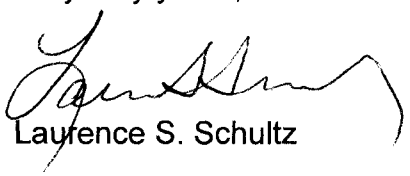
to the filing. In addition, nothing in the proposal itself is provided describing what is meant by working in "investment-related" industries or what is meant by a "position of trust." Nor is any procedure provided for an investor to establish that an ex-broker meets these tests. Without these elements the rule is vague and would be extremely difficult to implement.

Conclusion

I would recommend that the FINRA proposal be modified to apply to all ex-brokers and to require disclosure of information indefinitely as was the case prior to the 2000 amendment to BrokerCheck. At the very least, disclosure should be allowed for a period of six years following the broker's termination from the industry. Furthermore, disclosure with respect to ex-brokers should include the same information which is provided with respect to brokers who are currently registered.

Thank you for the opportunity to provide comments with respect to this proposal.

Very truly yours,



Laurence S. Schultz

LSS/ch

cc: The Honorable John D. Dingell
The Honorable Edward J. Markey
The Honorable Charles Grassley