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

Re: Release Number 34-60462; File Number SR-FINRA-2009-050

Dear Ms. Murphy:

As an attorney with over fifteen years experience representing investors who have suffered losses due to fraud, theft and other forms of stockbroker misconduct, I was urged to comment upon the above-referenced proposal by the Securities Industry to expand the scope of information that it makes available to the public through its "self-regulatory organization," the Financial Industry Regulatory Authority ("FINRA"). The entire notion of the Securities Industry ("Wall Street") regulating itself is in wide disrepute, and for very good reason. The Madoff scandal demonstrated to the American public what professionals such as myself already knew all too well, which is that well-connected Wall Street insiders, whether it be the untouchable chieftains of Wall Street such as Bernie Madoff or major stock brokerage firms such as Morgan Stanley, have nothing to fear from a self-regulatory organization such as FINRA. It is widely known that "self-regulation" is designed to permit the important players on Wall Street to escape effective regulation, as opposed to protecting investors. The proposed rule under consideration is one of a long history of window-dressing measures undertaken by FINRA, as occurred with the NASD before it, to create the false appearance and impression that Wall Street actually polices its own when it comes to protecting investor interests.

The Proposed Rule as a Case Study in Ineffective and Deceptive Wall Street "Self-Regulation."

As is often the case when Wall Street self-regulation comes under fire, Wall Street's self-regulatory organization, now FINRA, serves up proposals that the industry holds out to Congress and the media as practical demonstrations of its taking action to protect investors. Approximately ten years ago, the NASD affirmatively shut-off public access to the records of former stockbrokers two years after their formal membership in the industry, their industry "registration," had expired. In our experience representing investors, a brokerage firm will often identify and purge a dishonest stockbroker before his misconduct is discovered by customers, knowing that customers may at a later time discover the misconduct and seek to hold the brokerage firm responsible for its dishonest broker. By the time a brokerage firm makes the decision to terminate a dishonest broker, there can often be a long trail of reportable incidents of misconduct, which if available to the public could enhance the ability of investor victims to make claims against the brokerage firm responsible for the broker's conduct.

Ten years ago when the NASD shut down access to the records of stockbrokers who were out of the industry for two years, the NASD made this change to protect Wall Street firms against the claims of investors who were victimized by dishonest brokers. This change in the Rules concerning public access to information on stockbrokers occurred at a time when then Chairman of the SEC, Arthur Levitt, later described the ability of major Wall Street firms to influence and control the self-regulatory function of the NASD as being a case where: "The inmates were running the asylum."[1] So now that FINRA has taken over from the NASD the duty of "self-regulating" Wall Street and is looking to do something to demonstrate it is serving its purported function of protecting investors, as opposed to its actual function of protecting Wall Street, what does it do? FINRA merely proposes with this new Rule to carve out a minor and insignificant exception to what the NASD did ten years ago when the NASD significantly shut down investor access to the records of dishonest brokers who had been kicked out of the industry.

None of these window-dressing, insignificant investor protection measures put forth by FINRA ever pose any significant threat to the major players on Wall Street. Former SEC Chairman Arthur Levitt described this reality as follows:

> *"[T]he NASD had gradually been taken over by a cabal of dealers who used the NASD's disciplinary process to punish certain players, such as day traders, while failing to prosecute serious infractions by market-makers."*[2]

By "market-makers," former Chairman Levitt is referring, of course, to the large, prominent Wall Street firms. Moreover, the SEC's limited function of monitoring the Rules created by an industry self-regulatory organization ("SRO"), such as FINRA, provides no assurance that the industry's captive regulator will enforce those Rules in a manner that is effective to protect investors. This point again was made by former SEC Chairman Levitt when he noted:

> *"The SEC, with its limited resources, can monitor the SRO to make sure it has rules that prevent investor fraud and market manipulation, and that promote fair trading practices. ... And when [the Rules are broken], the SRO must have procedures to investigate the charges and, if necessary, take disciplinary action."*[3]

Not only does Wall Street self-regulation still largely serve Wall Street's major firms, as Levitt described, but also the SEC still largely relies upon Wall Street's own captive regulators, such as FINRA, to protect investors.

In representing investors, I have first-hand experience of this observation and concession by the former SEC Chairman that the SEC's role of overseeing the FINRA rulemaking process

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[1] Levitt, *Take on the Street*, p. 197 (2003).
[2] Id. at 195.
[3] Id. at 198.

does not mean that the SEC can or will compel FINRA to enforce the adopted Rules. When investors are forced to have their claims against Wall Street decided by Wall Street's own arbitration panels, the theory is that these investor claims will be treated fairly because the Rules to be applied in Wall Street's arbitration system (administered by FINRA) must be approved by the SEC. It is up to FINRA, however, to enforce these SEC approved arbitration rules.

As an illustration of FINRA's willingness to ignore SEC approved arbitration Rules, it is very widely known among attorneys who represent investors that FINRA has enforced a practice for many years that favors Wall Street in defending investor claims that involve joint accounts. Not only is the practice in question not permitted by SEC approved arbitration Rules, it is directly contrary to the principles that the SEC itself follows and enforces in connection with the proper handling of investor joint accounts. When I brought this improper FINRA arbitration practice to the attention of the SEC, I was contacted by two SEC staff attorneys who then admitted to me that (1) FINRA's handling of joint accounts in arbitration was not proper under the SEC approved arbitration Rules and (2) that the SEC nonetheless had no intention of interfering with FINRA's application of the Rules, even where FINRA was obviously and deliberately breaking the Rules to favor its Wall Street masters. When speaking on the subject of SRO arbitration at an annual Securities Forum hosted by the Connecticut Department of Banking, I had the opportunity to pose a question to an SEC Commissioner in attendance about SRO arbitration. I asked him whether he would be willing to agree to entrust the claims that the SEC brings against stockbrokers to a Wall Street arbitration panel, as investors are required to do, and naturally he conceded that it would be a bad idea to allow Wall Street to sit in judgment its own wrongful conduct, at least so far as the SEC was concerned regarding its own enforcement actions.[4]

The Superior Investor Protections Accorded by State Laws as Enforced by State Regulators and State Courts Versus Wall Street "Self-Regulation."

It took some prodding in order for me to take the time to review the proposed FINRA rule at issue for the simple reason that, in representing investors, my law firm makes very little use of FINRA's public access to stockbroker records. Most of the comments submitted on this proposed Rule criticize FINRA's having a two-year time limit of any kind restricting public access to stockbroker records. FINRA's time limitations on accessing stockbroker records is not the only deficiency, however, in its granting public access to such records. The records available from our state regulators in Connecticut are in many respects far superior to FINRA, and so we simply do not place any significant reliance upon the FINRA records.

This point regarding the superior records available from state regulators is very aptly made within the Comment Letter submitted on behalf of the North American Securities Administrators Association ("NASAA") by its General Counsel, Rex Staples. General Counsel

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[4] I have attested to these facts in an affidavit in support of pending litigation challenging the fairness of investors being forced to have their claims against Wall Street decided by a Wall Street arbitration system.

Staples' Comment Letter to this proposed Rule describes in considerable detail how the records available through its member state regulators are not only superior with respect to the absence of unreasonable time limitations to access these records, but also in terms of the far superior breadth of records that can be obtained from state regulators. I wholeheartedly support NASAA's recommendation that the SEC also require FINRA to inform members of the public seeking information on former stockbroker of the records that are available from state regulators.

It is worthwhile to generalize the superiority of state securities regulation versus the Wall Street "self-regulation" system that is employed on the federal level, beyond the specific issue presented here concerning public access to stockbroker records. Harry Markopolos compared the effectiveness of the SEC/FINRA self-regulation model to state regulation in his testimony before Congress, as part of his addressing how Bernie Madoff was able to operate an enormous Ponzi scheme, despite his having provided a detailed account of the Madoff fraud to federal securities regulators.

In his written testimony before Congress,[5] Markopolos described the SEC's effectiveness as a securities regulator in similar terms as former SEC Chairman Levitt had described the NASD:

> *"The SEC seems to be a captive agency that purposefully ignores the large frauds, focusing only upon minor transgressions it can find during the normal, routine examination process."*

Markopolos further compared the SEC's ineffectiveness with the successes of state securities regulators in policing Wall Street, focusing upon New York and Massachusetts:

> *"Fortunately, the US already has two very competent securities' regulators who do a truly fantastic job and at an unbelievably low cost. Unfortunately, they are the New York Attorney General's office (NYAG) and the Massachusetts Securities Division (MSD). The NYAG and MSD have busted open the Wall Street analysts' bogus stock recommendations scandal, the mutual fund market-timing scandal and a whole host of other industry violations. Where has the SEC been beforehand while all these frauds were being committed? Sitting safely on the sidelines watching fraud go by, daring not to get involved for fear of upsetting their masters on Wall Street."*

With such an abysmal track record of financial regulation on the federal level, there is no sound reason to place any restrictions upon American investors in pursuing alternative resources and remedies to combat financial fraud, which are available through the states. Easily the most significant restriction that American citizens face in this regard is the ability of Wall Street firms to coerce investors to seek redress for financial fraud only through a corrupt arbitration system administered by FINRA and controlled by Wall Street. The first time that

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[5] Markopolos, Testimony before House of Representatives Committee on Financial Affairs, February 4, 2009.

Wall Street attempted to force its own industry arbitration panels upon investors was in the 1950's, and the SEC opposed that effort in an Amicus brief submitted to the United States Supreme Court, which rejected Wall Street's first attempt at coercive arbitration. Wall Street later prevailed in this same effort, however, in the 1980s, primarily because the SEC reversed its earlier position and submitted an Amicus brief to the United States Supreme Court supporting coercive Wall Street arbitration to resolve investor fraud claims. On that second occasion, the SEC asserted that it believed that it could satisfactorily supervise a Wall Street arbitration system so as to make it fair for investors, which resulted in the United States Supreme Court narrowly (5-4) granting the right to Wall Street to force investors to arbitrate claims before an arbitration system that it operated.

It is time for the SEC to correct this error made in the 1980s and once again revert to its original principled stand opposing the ability of Wall Street to coerce investors into seeking redress for financial fraud before Wall Street arbitration panels. This privilege that is inexplicably accorded to Wall Street, in direct opposition to federal and state Constitutional rights to a trial by jury in a court of law, can no longer be defended by any individual or institution purporting to be an advocate for investors' rights. State laws and state courts are vastly superior for vindicating investor rights as compared to Wall Street arbitration panels, and there can be no principled basis for further restricting the rights of American citizens to access the courts when pursuing claims against Wall Street. The right to pursue such claims in court should be reestablished, whether it is done (1) by the SEC through its authority to regulate Wall Street, (2) by legislation pending in Congress to reestablish investor access to the courts, or (3) by the courts in reasserting the primacy of the protections set forth in the securities laws over those laws protecting the enforcement of arbitration agreements.

There is a growing sentiment among Americans that lends itself to questioning whether it is our Government that regulates Wall Street or whether it is Wall Street that regulates our Government. The case for belief in the latter is certainly made stronger by Wall Street's ability to block investor access to the courts in favor of a disreputable self-regulatory scheme, which presently funnels investor claims into an arbitration system controlled by Wall Street. Whether the issue is access to stockbroker records or access to a fair venue for investor claims, in our experience the best solution is to avoid Wall Street self-regulation altogether and instead pursue our clients' interests with state regulators and within the courts. This is the primary principle that ought to be addressed in connection with this proposed Rule before the Commission – providing alternatives to investors as to existing rules and systems that compel investors to rely upon Wall Street self-regulation.

Very truly yours,

Thomas P. Willcutts