

## VIA ELECTRONIC MAIL

May 19, 2010

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

RE: File Number SR-FINRA-2010-012

Dear Ms. Murphy:

On March 30, 2010, the Financial Industry Regulatory Authority, Inc. (FINRA) filed with the Securities and Exchange Commission (SEC) proposed amendments to FINRA Rule 8312 (Proposed Rule) concerning FINRA's BrokerCheck Disclosures. On April 16, 2010, the SEC published the Proposed Rule for comment in the Federal Register.<sup>1</sup> The Proposed Rule will: 1) expand the information released through BrokerCheck, both in terms of scope and time disclosed; and 2) establish a process to dispute the accuracy of (or update) information disclosed through BrokerCheck.

The Financial Services Institute (FSI)<sup>2</sup> welcomes this opportunity to comment on the Proposed Rule. FSI generally supports the Proposed Rule as a way to help protect investors and arm them with information about the associated persons they purchase securities through. However, we believe that specific sections of the Proposed Rule should be amended to achieve a more appropriate balance between the investor's need to know and a sense of common fairness to securities industry professionals. Specifically, we urge FINRA to reevaluate its position with respect to historical complaints<sup>3</sup>, the date that these historical complaints will begin to be reported, the dispute process in the Proposed Rule related to historical complaints, and the overall look and feel of the BrokerCheck report.

### Background on FSI Members

The IBD community has been an important and active part of the lives of American investors for more than 30 years. The IBD business model focuses on comprehensive financial planning services and unbiased investment advice. IBD firms also share a number of other similar business characteristics. They generally clear their securities business on a fully disclosed basis; primarily engage in the sale of packaged products, such as mutual funds and variable insurance products;

---

<sup>1</sup> Notice of Filing of Proposed Rule Change to Amend FINRA Rule 8312 (FINRA BrokerCheck Disclosure), Federal Register, Vol. 75, No. 77, 21064 (April 22, 2010), available at <http://edocket.access.gpo.gov/2010/pdf/2010-9282.pdf>.

<sup>2</sup> The Financial Services Institute, Voice of Independent Broker-Dealers and Independent Financial Advisors, was formed on January 1, 2004. Our members are broker-dealers, often dually registered as federal investment advisers, and their independent contractor registered representatives. FSI has 122 Broker-Dealer member firms that have more than 178,000 affiliated registered representatives serving more than 15 million American households. FSI also has more than 15,000 Financial Advisor members.

<sup>3</sup> FINRA Rule 8312(b)(7) - "Historical Complaint" is the information last reported on Registration Forms relating to customer complaints that are more than two (2) years old and that have not been settled or adjudicated, and customer complaints, arbitrations or litigations that have been settled for an amount less than \$10,000 prior to May 18, 2009 or an amount less than \$15,000 on or after May 18, 2009 and are no longer reported on a Registration Form.

take a comprehensive approach to their clients' financial goals and objectives; and provide investment advisory services through either affiliated registered investment adviser firms or such firms owned by their registered representatives. Due to their unique business model, IBDs and their affiliated financial advisors are especially well positioned to provide middle-class Americans with the financial advice, products, and services necessary to achieve their financial goals and objectives.

In the U.S., approximately 180,000 financial advisors – or approximately 61.7% percent of all practicing registered representatives – operate as self-employed independent contractors, rather than employees, of their affiliated broker-dealer firm.<sup>4</sup> These financial advisors provide comprehensive and affordable financial services that help millions of individuals, families, small businesses, associations, organizations, and retirement plans with financial education, planning, implementation, and investment monitoring. Clients of independent financial advisors are typically “main street America” – it is, in fact, almost part of the “charter” of the independent channel. The core market of advisors affiliated with IBDs is clients who have tens and hundreds of thousands as opposed to millions of dollars to invest. Independent financial advisors are entrepreneurial business owners who typically have strong ties, visibility, and individual name recognition within their communities and client base. Most of their new clients come through referrals from existing clients or other centers of influence.<sup>5</sup> Independent financial advisors get to know their clients personally and provide them investment advice in face-to-face meetings. Due to their close ties to the communities in which they operate their small businesses, we believe these financial advisors have a strong incentive to make the achievement of their clients' investment objectives their primary goal.

FSI is the advocacy organization for IBDs and independent financial advisors. Member firms formed FSI to improve their compliance efforts and promote the IBD business model. FSI is committed to preserving the valuable role that IBDs and independent advisors play in helping Americans plan for and achieve their financial goals. FSI's mission is to ensure our members operate in a regulatory environment that is fair and balanced. FSI's advocacy efforts on behalf of our members include industry surveys, research, and outreach to legislators, regulators, and policymakers. FSI also provides our members with an appropriate forum to share best practices in an effort to improve their compliance, operations, and marketing efforts.

#### Comments on the Proposed Rule

As stated above, FSI generally supports the Proposed Rule as a way to help protect investors and arm them with information about the associated persons they purchase securities through. However, we believe the Proposed Rule could be improved substantially by addressing the concerns we raise below:

- **Archived Historical Customer Complaints** - The preamble of the Proposed Rule provides that the FINRA Rule 8312 will seek to “make publicly available in BrokerCheck all historic customer complaints that were archived after the implementation of Web CRD.”<sup>6</sup> We believe that making these historical customer complaints publically available will cause a great deal of confusion for investors. Below are some of the reasons why there will be confusion among investors:

---

<sup>4</sup> Cerulli Associates.

<sup>5</sup> These “centers of influence” may include lawyers, accountants, human resources managers, or other trusted advisors.

<sup>6</sup> Federal Register, Vol. 75, No. 77, 21065. Web CRD was implemented on August 16, 1999.

- Inaccurate information - FINRA member firms have historically reported customer complaints in an effort to meet regulatory requirements, and not with an eye toward making disclosures to customers. We anticipate that many firms and their associated persons will have to spend a great deal of time and effort going back through their records to correct the disposition of these customer complaints so they are properly reported on a firm's and individual's BrokerCheck report.
- Meritless Complaints - Individual customers are not limited or prohibited in submitting customer complaints. Firms have an affirmative obligation to report all customer complaints, regardless of allegations, substance, or merit of the complaint. We believe that these meritless and non-substantive complaints will thwart an investor's ability to distinguish a true and valid complaint from a false complaint.

Accordingly, we ask that FINRA remove from the Proposed Rule the directive to report historical customer complaints for the prior 10-year period via BrokerCheck. We propose that FINRA require that all customer complaints received after the implementation of this rule be reported via BrokerCheck under the current two-year period and then start running for a 10-year period after the Proposed Rule is approved. For example, if the Proposed Rule were implemented on January 1, 2011, all historical customer complaints for an associated person would be posted to BrokerCheck dating back to January 1, 2009. Moving forward, all other customer complaints would be reported via BrokerCheck until January 1, 2019. On January 2, 2019, the January 1, 2009 historical customer complaint would roll off the associated persons BrokerCheck report.

Accordingly, we offer the following language:

- FINRA Rule 8312(b)(1) Except as otherwise provided in paragraph (d) below, FINRA shall release the information specified in subparagraph (2) below f[F] or inquiries regarding a current or former member, a current associated person, or a person who was associated with a member within the preceding ~~ten~~ [two] years. After **X date** (i.e. implementation date of the Proposed Rule), these items will be available for going forward for a ten year period. On **Y date** (i.e. 10 years after the implementation date) FINRA shall release the information specified in subparagraph (2) below for inquiries regarding a current or former member, a current associated person, or a person who was associated with a member within the preceding ten years.

This approach will provide the industry with notice that all customer complaints that are received will be made publically available. It will also afford the industry with an opportunity to dispute, respond, and/or resolve the complaint knowing that the results will be part of the BrokerCheck report. Moreover, imposing a retroactive approach will bring confusion to the investing public and will detract from an investor's ability to give the appropriate weight to complaints on a representative's BrokerCheck.

Alternatively, we suggest that FINRA provide member firms and associate persons with an opportunity to update their existing filings so that the disclosures are more tailored and appropriate for an investor audience.

- **Timing of Disclosure of Historical Complaints** – Footnote 20 of the preamble of the Proposed Rule provides, “[t]he Investment Adviser Public Disclosure- Individual (“IAPD–

I") database (currently scheduled to be deployed in June 2010) will provide to the public registration and licensing information on natural persons who are registered as investment advisers with the states. IAPD-I will disclose all Historic Complaints that became non-reportable after the individual first became registered through the Investment Adviser Registration Depository ("IARD") system. Accordingly, IAPD-I will include Historic Complaints that became Historic Complaints on or after March 18, 2002, which is the date IARD was established for investment adviser representative registration. As a result, when IAPD-I is deployed, BrokerCheck and IAPD-I may disclose slightly different information regarding Historic Complaints of those financial services professionals that are dually registered as brokers and investment advisers."<sup>7</sup>

Footnote 18 of the preamble to the Proposed Rule provides, "FINRA is proposing to limit the Historic Complaints eligible for display in BrokerCheck to those that became non-reportable after the implementation of Web CRD in [August 16,] 1999, because the Web CRD system (unlike Legacy CRD) contains the specific reason that a matter was archived."<sup>8</sup>

Many registered representatives are also registered investment advisers. In fact, Richard Ketchum, Chairman & CEO of FINRA, estimates that 88% of all registered representatives are also dually registered investment advisor representatives of a Registered Investment Advisor.<sup>9</sup> This means that these dually registered individuals will have both an IAPD-I report and a BrokerCheck report available to the public. In an effort to provide investors with consistent and useful information about the backgrounds of the registered representatives and investment advisor representatives they do business with, we recommend that FINRA alter their approach to reporting "historical information" beginning on August 16, 1999. We urge FINRA to use the same reporting date that the IAPD-I system will use – March 18, 2002.

- **Dispute Process** – FINRA appears to appreciate the important need for disputing the accuracy of information reported to the public via BrokerCheck. In the preamble to the Proposed Rule, it provides that proposed changes to the rule "underscore(s) the need for a formalized process for disputing the accuracy of (or updating) information displayed through BrokerCheck."<sup>10</sup> It goes on to state that "FINRA recognizes, for example, that there may be an increased possibility that information disclosed through BrokerCheck for former associated persons may have become inaccurate (*i.e.*, a disposition reported previously may have changed)."<sup>11</sup>

We applaud FINRA for attempting to address the dispute process in the Proposed Rule, but request that additional modification be made to this section of the Proposed Rule. The Proposed Rule does not currently provide hard and fast response dates for which FINRA will be required to render its determination regarding an update or removal of a complaint. As an initial matter, we believe that 30 days is adequate time to make this determination and suggest the following language:

---

<sup>7</sup> Federal Register, Vol. 75, No. 77, 21067, Footnote 20.

<sup>8</sup> *Id.*, Footnote 18.

<sup>9</sup> See Richard G. Ketchum, Chairman & CEO of FINRA, Testimony Before the Committee on Financial Services U.S. House of Representatives (October 6, 2009), available at <http://www.finra.org/Newsroom/Speeches/Ketchum/P120108>

<sup>10</sup> Federal Register, Vol. 75, No. 77, 21067

<sup>11</sup> *Id.*

- FINRA Rule 8312(e)(2)(D) – FINRA will make a determination on the eligibility of a factual dispute within 30 days of receipt of written notice.

Alternatively, we believe that FINRA should create a mechanism by which a firm or an associated person can supplement the description of the incident being reported via BrokerCheck, specifically related to historical complaints. We realize that FINRA does not want to create an appeals process relating to the facts contained in a customer complaint or second-guess a member firm's decision to report a complaint. However, associated persons and firms may have provided more detail in the explanation of the complaint if they knew that the submission would be made public. We suggest that FINRA provide member firms and registered representatives with an opportunity to update their existing filings so that the disclosures are more tailored and appropriate for an investor audience.

- **Format of BrokerCheck Report** – It is apparent that FINRA would like to arm investors with more information about the individuals and firms with whom they choose to conduct business. To this end, we believe that the BrokerCheck reports should be reviewed and modified to make them easier to read for investors. In addition, the BrokerCheck reports should be designed in such a way as to help investors evaluate the likely merit of the underlying complaint matters reported.

Specifically, we suggest that historical complaints that are reported via BrokerCheck that have not been resolved, are still pending, or have not been completely adjudicated contain some type of disclosure on the BrokerCheck report. This disclosure should be made in a prominent section of the BrokerCheck report and indicate that the claim(s) have not been resolved.

Moreover, we suggest that FINRA establish a Task Force to rework the style and feel of the BrokerCheck report. FINRA may benefit from consulting with focus groups made up of non-securities related individuals to vet a new design of the BrokerCheck reports. We believe that the current BrokerCheck report is hard to interpret and difficult to read.

#### Conclusion

We are committed to constructive engagement in the regulatory process and, therefore, welcome the opportunity to work with you to revise the parameters of the BrokerCheck system.

Thank you for your consideration of our comments. Should you have any questions, please contact me at

Respectfully submitted,



Dale E. Brown, CAE  
President & CEO