

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-61002; File No. SR-FINRA-2009-050)

November 13, 2009

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving a Proposed Rule Change Relating to Availability of Information Pursuant to FINRA Rule 8312 (FINRA BrokerCheck Disclosure)

I. Introduction

On July 24, 2009, the Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² a proposed rule change to make available in BrokerCheck information about former associated persons of a FINRA member who were the subject of a final regulatory action as defined in Form U4 that has been reported to the Central Registration Depository (“CRD[®]” or “CRD System”). The proposal was published for comment in the Federal Register on August 7, 2009.³ The Commission received fifty-two comments on the proposal.⁴ FINRA responded to the comments on October 15, 2009.⁵ This order approves the proposed rule change.

II. Description of the Proposal

Pursuant to FINRA Rule 8312, BrokerCheck allows the public to obtain information regarding current and former members, as well as associated persons and persons who were

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 60462 (August 7, 2009), 74 FR 41470 (August 17, 2009)(“Notice”).

⁴ See Exhibit A for a list of comment letters.

⁵ See letter to Elizabeth M. Murphy, Secretary, Commission, from Richard E. Pullano, Associate Vice President and Chief Counsel, FINRA, dated October 15, 2009 (“Response Letter”).

associated with a member within the preceding two years. Formerly registered persons, although no longer in the securities industry in a registered capacity, may, however, work in other investment-related industries or attain positions of trust. FINRA thus proposed to expand the information available via BrokerCheck to certain information with respect to persons who were associated with a member but who have not been associated with a member in the preceding two years (“formerly associated persons”), if those persons were the subject of any final regulatory action, as defined in Form U4, that has been reported to CRD via a uniform registration form.⁶

“Final regulatory action” includes any final action of the Commission, Commodity Futures Trading Commission, a federal banking agency, the National Credit Union Administration, another federal regulatory agency, a state regulatory agency, a foreign financial regulatory authority, or a self-regulatory organization, including actions that have been appealed.⁷ FINRA staff will review the information on Forms U4 and U5 (including predecessor questions), as well as information filed on Form U6, to determine whether a formerly associated person is subject to a final regulatory action and should be included in BrokerCheck pursuant to the proposed rule.⁸

For such formerly associated persons,⁹ FINRA will disclose: (i) information concerning any final regulatory action; (ii) administrative information, such as employment and registration

⁶ See proposed FINRA Rule 8312(c).

⁷ See Form U4 questions 14C, 14D, and 14E, as well as Question 7D of Form U5. See also Section 3(a)(39) of the Act.

⁸ Under the proposed rule change, FINRA may disclose a final action that is reported by a regulator on a Form U6 even if that action has not been reported by an individual on a Form U4 because, for example, the individual was not registered at the time the final regulatory action was reported.

⁹ Certain information about some formerly associated persons who have not been associated with a member since January 1, 1999, may not be available through BrokerCheck. As discussed more fully in the Notice, two conditions apply to a small percentage of individuals who were no longer registered at the time Web CRD was established in 1999. First, not all of these individuals’ records are available in the Web CRD format; instead,

history as reported on a registration form; (iii) the most recently submitted comment, if any, provided by the person, if the comment is relevant and in accordance with the procedures established by FINRA; and (iv) dates and names of qualification examinations passed by the formerly associated person, if available.¹⁰

The proposed rule change would not expand access to other information that is included in the CRD System, such as customer complaints, bankruptcies, liens, criminal events or arbitration claims. In addition, a final regulatory action would not include any action limited to the revocation or suspension of an individual's authorization to act as an attorney, accountant or federal contractor (Form U4, Question 14F).

If FINRA receives a request regarding a formerly associated person for which it has data in a different format, FINRA's staff will manually prepare the BrokerCheck report, convert the report to an electronic format, and make the report available through BrokerCheck. Once the information has been converted to the Web CRD format it will be available in Web CRD from that point forward.¹¹

III. Summary of Comments and FINRA's Response

their records exist in the Legacy CRD format. Second, for a very small percentage of individuals, certain administrative information is unavailable in either the Web or Legacy CRD format.

¹⁰ See proposed FINRA Rule 8312(c).

¹¹ FINRA stated that if it identifies or becomes aware of potentially inappropriate information, including customer names, confidential account information or possibly offensive or potentially defamatory language in a BrokerCheck report, FINRA would balance the value of the language in controversy for regulatory and investor protection purposes against the objector's asserted privacy rights and/or potential defamation claims. Based on this balancing, FINRA may determine to redact language from BrokerCheck reports on a case-by-case basis. See the Notice, citing, e.g., Securities Exchange Act Release No. 42402 (February 7, 2000), 65 FR 7582 (February 15, 2000) (Order Approving SR-NASD-99-45).

The Commission received fifty-two comment letters on the proposed rule change.¹² Most comments focus on two issues. First, commenters address the provision of FINRA Rule 8312 that provides for the release of certain information regarding an individual who is a current or former member or current associated person of a member of FINRA, or a person who has been an associated person of a member of FINRA within the past two preceding years. FINRA is not making a substantive change to this provision.¹³ Second, commenters take issue with the limited nature of the information to be disclosed regarding formerly associated persons.

A. General Two-Year BrokerCheck Disclosure Period

Most information available through BrokerCheck is only available with respect to current or former members, or associated persons of members, or persons who were associated persons of FINRA members within the preceding two years.¹⁴ Forty commenters argue that, for investor protection purposes, this two-year time frame should be increased so that information remains available to the public via BrokerCheck for a longer period of time – anywhere from five years to

¹² See supra, note 4.

¹³ Current FINRA Rule 8312(a); proposed to be re-numbered to FINRA Rule 8312(b).

¹⁴ Id. FINRA stated that some commenters incorrectly mentioned that information regarding an individual is “purged” from BrokerCheck once that individual ceases to be registered with FINRA for a period of two years. See, e.g., comment letters from Lipner, Van Kampen, Sigler, Speyer, and Claxton. FINRA stated that the information is retained in the CRD system even though it is not displayed through BrokerCheck and would be available for display through BrokerCheck should the individual reregister with FINRA or otherwise become covered by BrokerCheck. See Response Letter at 2.

forever.¹⁵ Twelve commenters¹⁶ advised a six-year disclosure period, which corresponds to the time limit in FINRA’s rule for the submission of arbitration claims involving public customers (“eligibility rule”).¹⁷ FINRA believes that these comments are outside the scope of the rule proposal, since it is not proposing to change the two-year disclosure period currently set forth in Rule 8312; rather, the proposed rule change expands BrokerCheck only with respect to formerly associated persons who are subject to a final regulatory action.¹⁸

Nevertheless, FINRA notes that the two-year disclosure period coincides with the period in which an individual can return to the industry without being required to requalify by examination and the initial period in which an individual remains subject to FINRA’s jurisdiction.¹⁹ FINRA states that when the two-year time frame was proposed, FINRA believed that the two-year time frame struck the appropriate balance between an investor’s interest in being easily able to obtain information about a former registered person and a person’s desire for privacy once he has left the securities industry,²⁰ and it continues to believe that is the proper balance today.²¹

¹⁵ See comment letters from Lipner, Van Kampen, Sigler, Pounds, Steiner, Neuman, Blecher, Estell, Layne, PIABA, Schultz 1, Shewan, Port, Graham, Speyer, AARP, Griffin, Sherman, Cornell, Evans/Edmiston, St. John’s, Rosenfield, Ilgenfritz, Buchwalter, Miller, Rosca, Guiliano, Greco, Sonn, Haigney, Sutherland, Davis, Mougey, Claxton, DeVita, Ledbetter, Gladden, McCauley, Malarney, and Willcutts.

¹⁶ See comment letters from Pounds, Steiner, Estell, PIABA, Schultz 1, Graham, Rosenfield, Ilgenfritz, Miller, Greco, Sonn, and Haigney.

¹⁷ See FINRA Rule 12206.

¹⁸ See Response Letter at 3. FINRA clarifies that four commenters (Lipner, Neuman, AARP, and Malarney) erroneously state that the proposal will limit the time frame during which information on former registered persons will be available through BrokerCheck.

¹⁹ See Response Letter at 3, citing Securities Exchange Act Release No. 42240 (December 16, 1999), 64 FR 72125 (December 23, 1999) (Notice of Filing SR-NASD-99-45).

²⁰ *Id.* FINRA also notes that the Commission received no comments when FINRA proposed establishing the two-year disclosure period for BrokerCheck.

²¹ See Response Letter at 3.

Finally, FINRA disagrees with the commenters who represent investors in securities litigation or other matters who suggest a six-year disclosure period, which FINRA believes is in order to make it easier to conduct research on former registered persons.²² FINRA states that the BrokerCheck system was established principally to help members of the public determine whether to conduct or continue to conduct business with a FINRA member or any of the member's associated persons and not for the purpose suggested by these commenters.²³ FINRA believes that the commenters' attempt to link the time limitation on the submission of claims provided for under the eligibility rule and the time frame for BrokerCheck disclosure is misplaced, since the time limitation under the eligibility rule is determined by the date of the occurrence or event giving rise to the claim and has no relationship whatsoever to the termination of an individual's registration with FINRA.²⁴ Therefore, in FINRA's opinion, the commenters' suggested change is outside the scope of the rule proposal and also would not necessarily address the commenters' concerns.²⁵

B. Expanding Access to Disclosure Information, Other than Final Regulatory Actions, Pertaining to Individuals Not Registered with FINRA for More than Two Years

Eighteen commenters express concern that FINRA's proposal may be too limiting in that it only expands BrokerCheck with respect to those formerly associated persons who are the subject of a final regulatory action, and for those persons, only with respect to certain information.²⁶

²² See Response Letter at 4, citing e.g., comment letters from PIABA, Rosca, Greco, Sonn, and Haigney.

²³ See Response Letter at 4.

²⁴ Id.

²⁵ Id.

²⁶ See comment letters from Caruso, Bleacher, PIABA, Schultz 1, Feldman, Sherman, Lewins, Cornell, Bakhtiari, Evans/Edmiston, St. John's, Rosenfield, NASAA, Guiliano,

Many of these commenters suggest that BrokerCheck should include additional information, such as arbitration claims, criminal proceedings, and bankruptcies and liens, contending that these other categories are just as valuable to investors as final regulatory actions.²⁷ FINRA believes that these comments are outside the scope of the rule proposal because they pertain to categories of disclosure that are not the subject of the current rule proposal.²⁸

Notwithstanding that, FINRA states these other categories of information are more relevant when the individual is registered or was recently registered (i.e., within two years) and reiterates that it believes the proposal strikes a balance between personal privacy and investor protection concerns.²⁹ FINRA justifies one distinction by noting that while final regulatory actions are subject to procedures that allow an opportunity for the person to present arguments to a fact-finder about the allegations before the final disposition of the matter,³⁰ arbitration claims may not be subject to procedures that allow an opportunity for the person to present arguments to a fact-finder about the allegations before final disposition. Further, FINRA notes, a firm may choose to settle an arbitration claim regardless of whether the person wishes to contest the claim

Sonn, Meyer, Haigney, and Amato. Two commenters stated that FINRA's proposed rule change would apply only to those formerly associated persons who are the subject of a final regulatory action and who work in other investment-related industries or positions of trust. See comment letters from Schultz 1 and Sonn. FINRA clarified that the proposal will, in fact, apply to all former registered persons who are the subject of a final regulatory action regardless of their current occupation, if any. See Response Letter at 4.

²⁷ See, e.g., comment letters from PIABA, Schultz 1, Cornell, Evans/Edmiston, St. John's, and Rosenfield.

²⁸ See Response Letter at 4.

²⁹ See Response Letter at 5.

³⁰ The formerly associated person has the opportunity to submit a comment for publication in BrokerCheck in response to information provided through BrokerCheck if the comment is in the form and in accordance with the procedures established by FINRA and relates to the information provided through BrokerCheck.

(e.g., for business reasons). With respect to criminal charges and convictions, FINRA states that these claims that are reported subsequently may have a different disposition, which may significantly change the meaning of the matter as originally reported (for example, such charges or convictions may have been dismissed or expunged). Finally, FINRA does not think that reportable financial matters have the same degree of materiality as final regulatory actions such that they warrant disclosure on a permanent basis.

IV. Discussion and Commission Findings

After carefully reviewing the proposed rule change, the comment letters, and the Response Letter, the Commission finds that the proposal is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.³¹ In particular, the Commission finds that the proposal is consistent with Section 15A(b)(6) of the Act,³² which requires, among other things that FINRA's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

Specifically, the Commission believes that making information available through BrokerCheck about formerly associated persons who were the subject of a final regulatory action will help members of the public to protect themselves from unscrupulous people and thus the proposed rule change should help prevent fraudulent and manipulative acts and practices, and protect investors and the public interest. One commenter suggests the disclosure of this

³¹ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

³² 15 U.S.C. 78o-3(b)(6).

additional information may serve as a deterrent to fraudulent activity.³³ The Commission believes that the information FINRA proposes to disclose is relevant to investors and members of the public who wish to educate themselves with respect to the professional history of a formerly associated person. It is possible that a formerly associated person could become a financial planner or work in another related field where his securities record would help members of the public decide if they should accept his financial advice or rely on his advice or expertise. One commenter suggested a formerly associated person could serve as a non-public arbitrator.³⁴ Clearly, in any of these circumstances, the formerly associated person's BrokerCheck information would be relevant in determining whether to do business with him, or, in the case of a claimant, in deciding whether to challenge a potential arbitrator.

The Commission agrees that the concerns raised by commenters who believe that the time frame for general disclosure should be increased are outside the scope of this proposal. However, the categories of information that should be disclosed for formerly associated persons is within the scope of the instant proposal and the commenters make a number of legitimate arguments with respect to the usefulness of the additional information they seek to have disclosed. The Commission understands that certain commenters, as well as other members of the public, may utilize information in BrokerCheck in considering whether to bring action against a formerly associated person for potentially actionable deeds³⁵ and believes that this is a legitimate use for BrokerCheck. The Commission recognizes that the public's ability to access information, whether to inquire about a registered person or to obtain information in connection with an alleged wrongdoing of a formerly associated person may serve to protect investors, the integrity of the

³³ See Cornell letter.

³⁴ See Estell letter.

³⁵ See supra, note 22.

marketplace, and the public interest. The Commission urges the public to utilize all sources of information, particularly the databases of the state regulators, as well as, legal search engines, and records searches, in conducting a thorough search of any associated person's activities.

The Commission notes that FINRA stated it would continue to evaluate all aspects of the BrokerCheck program to determine whether future circumstances should lead to greater disclosure through BrokerCheck.³⁶ FINRA has a statutory obligation to make information available to the public and,³⁷ as stated in the past, the Commission believes that FINRA should continuously strive to improve BrokerCheck because it is a valuable tool for the public in deciding whether to work with an industry member.³⁸ The changes proposed in this filing will enhance BrokerCheck by including more information that should prove useful to the general public.

For the reasons discussed above, the Commission finds that the rule change is consistent with the Act.

³⁶ See Response Letter at 5.

³⁷ See Section 15A(i) of the Act.

³⁸ See, e.g., Securities Exchange Act Release No. 59916 (May 13, 2009), 74 FR 23750 (May 20, 2009).

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,³⁹ that the proposed rule change (SR-FINRA-2009-050), be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴⁰

Florence E. Harmon
Deputy Secretary

³⁹ 15 U.S.C. 78s(b)(2).

⁴⁰ 17 CFR 200.30-3(a)(12).

Exhibit A

List of Comment Letters Received for FINRA-2009-050

1. Daniel W. Roberts, President/CEO, Roberts & Ryan Investments Inc., dated August 21, 2009 (“Roberts”)
2. Seth E. Lipner, Professor of Law, Zicklin School of Business, Baruch College, CUNY, dated August 27, 2009 (“Lipner”)
3. Al Van Kampen, Attorney at Law, dated August 31, 2009 (“Van Kampen”)
4. James A. Sigler, Esq., dated August 31, 2009 (“Sigler”)
5. Herb Pounds, dated August 31, 2009 (“Pounds”)
6. Leonard Steiner, Lawyer, dated August 31, 2009 (“Steiner”)
7. David P. Neuman, Stoltmann Law Offices, PC, dated August 31, 2009 (“Neuman”)
8. Steven B. Caruso, Esq., Maddox Hargett & Caruso, P.C., dated September 1, 2009 (“Caruso”)
9. Rob Blecher, Attorney, dated September 1, 2009 (“Blecher”)
10. Barry D. Estell, Esq., dated September 1, 2009 (“Estell”)
11. Richard M. Layne, Esq., Law Office of Richard M. Layne, dated September 1, 2009 (“Layne”)
12. Brian N. Smiley, President, Public Investors Arbitration Bar Association, dated September 4, 2009 (“PIABA”)
13. Laurence S. Schultz, Driggers, Schultz & Herbst, P.C., dated September 4, 2009 (“Schultz 1”)
14. Scott R. Shewan, Pape Shewan LLP, dated September 4, 2009 (“Shewan”)
15. Robert C. Port, Esq., dated September 4, 2009 (“Port”)

16. Jan Graham, Graham Law Offices, dated September 4, 2009 (“Graham”)
17. Jeffrey A. Feldman, dated September 7, 2009 (“Feldman”)
18. Debra G. Speyer, Esq., Law Offices of Debra G. Speyer, dated September 7, 2009 (“Speyer”)
19. Tim Canning, Law Offices of Timothy A. Canning, dated September 8, 2009 (“Canning”)
20. David Certner, Legislative Counsel and Legislative Policy Director, AARP, dated September 8, 2009 (“AARP”)
21. Keith L. Griffin, Griffin Law Firm, LLC, dated September 8, 2009 (“Griffin”)
22. Steven M. Sherman, Sherman Business Law, received September 8, 2009 (“Sherman”)
23. Richard A. Lewins, Esq., dated September 8, 2009 (“Lewins”)
24. William A. Jacobson, Esq., Associate Clinical Professor of Law, Director, Cornell Securities Law Clinic, dated September 8, 2009 (“Cornell”)
25. Ryan K. Bakhtiari, Aidikoff, Uhl and Bakhtiari, dated September 8, 2009 (“Bakhtiari”)
26. Jonathan W. Evans and Michael S. Edmiston, dated September 8, 2009 (“Evans/Edmiston”)
27. Christine Lazaro, Supervising Attorney, Lisa A. Catalano, Director, Peter J. Harrington, Legal Intern, Securities Arbitration Clinic, St. John's University School of Law, dated September 8, 2009 (“St. John’s”)
28. William S. Shepherd, Managing Partner, Shepherd Smith Edwards Kantas, LLP, dated September 8, 2009 (“Shepherd”)
29. Howard Rosenfield, Law Offices of Howard Rosenfield, received September 8, 2009 (“Rosenfield”)
30. Rex Staples, General Counsel, North American Securities Administrators Association, dated September 8, 2009 (“NASAA”)

31. Scott C. Ilgenfritz, Johnson, Pope, Bokor, Ruppel & Burns, LLP, dated September 8, 2009 (“Ilgenfritz”)
32. Steve A. Buchwalter, Esq., dated September 8, 2009 (“Buchwalter”)
33. John Miller, Attorney, Swanson Midgley, LLC, dated September 9, 2009 (“Miller”)
34. Alin L. Rosca, Attorney at Law, John S. Chapman & Associates, LLC, received September 9, 2009 (“Rosca”)
35. Nicholas J. Guiliano, The Guiliano Law Firm, received September 9, 2009 (“Guiliano”)
36. W. Scott Greco, Greco Greco, P.C., dated September 9, 2009 (“Greco”)
37. Jeffrey Sonn, Esq., Sonn & Erez, PLC, dated September 9, 2009 (“Sonn”)
38. Stephen P. Meyer, Esq., Meyer, Ford & Glasser, dated September 10, 2009 (“Meyer”)
39. Dayton P. Haigney, III, Attorney at Law, dated September 10, 2009 (“Haigney”)
40. John E. Sutherland, Brickley, Sears & Sorett, P.A., dated September 11, 2009 (“Sutherland”)
41. Theodore M. Davis, Esq., dated September 11, 2009 (“Davis”)
42. Peter J. Mougey, Esq., dated September 14, 2009 (“Mougey”)
43. Roger F. Claxton, Law Office of Roger F. Claxton, dated September 15, 2009 (“Claxton”)
44. Richard D. DeVita, Esq., dated September 15, 2009 (“DeVita”)
45. Dale Ledbetter, Ledbetter & Associates, P.A., dated September 16, 2009 (“Ledbetter”)
46. William J. Gladden, JD, CFP, dated September 16, 2009 (“Gladden”)
47. Steven M. McCauley, Esq., dated September 16, 2009 (“McCauley”)
48. Michael W. Malarney, Esq., The Pearl Law Firm, P.A., dated September 17, 2009 (“Malarney”)

49. Ronald M. Amato, Esq., Shaheen, Novoselsky, Staat, Filipowski Eccleston, PC, dated September 18, 2009 (“Amato”)
50. Thomas P. Willcutts, Willcutts Law Group, LLC, dated September 21, 2009 (“Willcutts”)
51. Scot D. Bernstein, Law Offices of Scot D. Bernstein, dated September 24, 2009 (“Bernstein”)
52. Laurence S. Schultz, Driggers, Schultz & Herbst, P.C., dated September 30, 2009 (“Schultz 2”)