Public Investors Arbitration Bar Association

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

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

Re: Proposed Revisions to Forms U4 and U5
SR-FINRA-2009-008

Dear Ms. Murphy:

On behalf of the Public Investors Arbitration Bar Association (PIABA), I am pleased to comment on the above-referenced proposed changes to Forms U4 and U5.

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 which govern the arbitration process. PIABA members are regular users of the CRD system and believe that all public investors should have free and unfettered access to information about their brokers.

As advocates for investors with grievances against persons in the securities industry, PIABA members have a special interest in full and fair disclosure of available information concerning customer complaints, court actions and arbitrations, alleging wrongdoing by FINRA registered persons. As such, we support the changes to Forms U4 and U5 to include questions that would enable FINRA to identify findings of willful violations of law and/or regulations that are a basis for statutory disqualification of an associated person. We support the proposed rule change that requires reporting of arbitration cases in which a registered person is not named as a party respondent, but in which a registered person's conduct is nonetheless the subject of the claimant's misconduct allegations against the member firm. We oppose any dollar value threshold for the reporting of settlements and/or awards in FINRA arbitration proceedings. Finally, we question the wisdom of the proposed rule change that would permit member firms to amend the reason for termination of a registered person's employment without a court order or arbitration award.

PIABA Supports the Proposed Provisions Concerning Amendments to Forms U4 and U5 to Identify Willful Violations of Law and/or Regulations

The first proposal would amend Question 14E FINRA's Forms U4 and U5 (the "Forms") to specifically request information that would permit FINRA to identify persons subject to statutory disqualification as a result of a finding of intentional violation of law or regulations. PIABA supports the proposal because the current questions on the Forms are insufficiently specific to elicit information that would identify some persons as disqualified under these statutory provisions.

Section 15(b)(4) of the Securities Exchange Act of 1934 ("Exchange Act") *requires* the censure, placing of limitations on the activities, functions, or operations of, or suspension for a period not exceeding twelve months, of any associated person who has willfully violated the Securities Act of 1933, the Exchange Act, the Commodities Exchange Act, the Investment Company Act of 1940, or the rules of the Municipal Securities Rulemaking Board. 15 U.S.C. 78o(b)(4). Thus, it was Congress's clear intent to require self-regulatory organizations who are delegated regulatory authority pursuant to the Exchange Act to identify and disqualify *all* persons found to have committed willful violations of the enumerated laws and/or regulations.

The proposed amendment should be approved by FINRA because it would protect investors by effectuating the statutory disqualification provisions of the Exchange Act and promoting full and fair disclosure without unduly burdening FINRA member firms.

PIABA Supports Requiring Reporting of All Arbitration Claims Alleging Sales-Practice Misconduct by a Registered Person

The second proposal would revise Questions 14I(2) and (3) on Form U4 and Questions 7E(2) and (3) on Form U5 to require firms to report, as customer complaints, allegations of sales practice violations made in arbitration claims and civil lawsuits against registered persons who are not named as parties in those proceedings. PIABA supports this rule change without reservation.

PIABA is deeply concerned about the lack of integrity of the CRD system. The CRD system provides the underpinning of FINRA's Broker Check system. As such, it is used by public investors who desire to obtain information about their broker, or about a broker to whom they are considering entrusting their life's savings. Self-regulatory organizations and state regulators utilize the system in carrying out their regulatory functions, and the CRD system is jointly owned by FINRA and the North American Securities Administrators Association ("NASAA"). The accuracy and integrity of the system are of utmost importance to the public.

Unfortunately, the CRD system falls far short of the accuracy which its users have a right to expect. A number of factors have contributed to this. One factor has been the proliferation of expungement orders. FINRA has taken and continues to take action to ensure that the expungement procedure is not abused. PIABA supported FINRA's most recent rule proposal in this regard.[1]

Another problem has been, quite simply, failure to report. We note with approval that FINRA has increased its disciplinary filings against firms and brokers that refuse or neglect to make timely reports to the CRD.

A third problem is the subject of this proposed revision to the Form U4 and U5. Under the current reporting system, a written complaint such as a letter to a FINRA member firm alleging that a registered person committed a sales practice violation must be reported, but a written allegation of such a violation contained in the text of an arbitration statement of claim or civil lawsuit complaint is not required to be reported unless the registered person is also named as a party to the proceeding.

The current system thus mandates a Form U4 filing and CRD public disclosure of a sales-practice complaint by an investor who feels sufficiently aggrieved to send a note, or even an e-mail, to a member firm, but does not require disclosure of the identical claims of investors who feel aggrieved enough to sue the firm with identical allegations but where the registered person is not named in the case caption as a party. This has led to many anomalous results, and PIABA strongly feels that there is no supportable rationale for permitting the non-reporting of these claims. For example, where a public investor chooses not to name an individual registered representative in the caption of an arbitration claim upon the advice of counsel, that broker will not be required to report the claim.

It is important to note that many attorneys recommend to their clients that they name only the firm in an arbitration proceeding since the firm is legally responsible for the wrongful conduct of its employee. Yet if that same customer had gone to a different attorney who filed the same claim, but named the individual representative as a respondent in the arbitration, the broker would have to report the claim. There is no reason to have different reporting requirements for the same conduct, depending upon the attorney's strategic decision to name or not name the individual wrongdoer as a respondent.

In addition, this reporting loophole impacts arbitration settlement negotiations between the parties, dictated by the named registered person's objective of avoiding a permanent report on the CRD. Under the current rules, if a named registered person participates in a settlement of $10,000 or more, the settlement will appear on the registered person's CRD. However, if the named registered person and the firm arbitrate the claim to a zero award, the CRD disclosure may be removed from the reporting system. The current rule thus encourages claimants' counsel not to name

[1] See Letter of Laurence S. Schultz, President of PIABA, to Nancy Morris, SEC, dated May 16, 2008. PIABA's comment letters are accessible through www.piaba.org.

individual registered persons as arbitration respondents, in order to avoid providing the member firm an artificial incentive to arbitrate, rather than settle the claims.

The net effect of the current system is that complaints of serious wrongdoing by registered persons who are not named in proceedings are not reported on the CRD. The proposed rule change will close this problematic loophole in the reporting rules and promote full and fair disclosure of customer complaints charging misconduct by registered persons.

PIABA Opposes Any Arbitrary Dollar Value Threshold for Reporting of Arbitration Awards and Settlements

Both the current rule requiring the disclosure of claims settled for $10,000 or more and the proposed change requiring disclosure of settlements of $15,000 or more impose a completely arbitrary threshold for reporting arbitration settlements. PIABA views the change from $10,000 to $15,000 as relatively immaterial; as a matter of principle, however, PIABA opposes *any* monetary threshold for the reporting of settlements.

Both the current rule and the proposed change permit registered persons to essentially ensure that they will retain a "clean" CRD if they pay the customer a settlement sum under the threshold. There is, however, no basis for *assuming* that a payment of up to $10,000 (or $15,000) represents a settlement for nuisance value of a non-meritorious claim. Such a settlement may in fact be reasonable compensation for egregious conduct such as unauthorized trading or misrepresentation.

PIABA believes that the proposed change should be revised to eliminate *any* monetary threshold for the reporting of settled claims, and require all settled sales-practice claims to be reported. Prospective customers and other persons can then decide for themselves in an environment of full disclosure whether a financial settlement of a customer case is a material factor in their evaluation of the ability, integrity and trustworthiness of a registered person.

PIABA Opposes Giving Member Firms Free Rein to Amend the Reason for Termination of Employment of Registered Persons

Under current practice, as recited in the proposed changes, member firms do not have the ability to amend the reason for termination or date of termination after the initial filing of Form U5. Instead, member firms can place a Registration Comment on the WebCRD to explain "unusual circumstances or irregularities in an individual's registration history that: (1) relates to the date or reason for termination on the Form U5; and (2) cannot be addressed otherwise through a form filing . . . ." Alternatively, the member firm or registered persons may follow the expungement procedure set forth in NASD Rule 2130.

FINRA proposes to allow member firms to amend the reason for, or date of, termination without any arbitration award or court order. Member firms would, however, have to give a reason for the change. FINRA would notify other regulators and the broker-dealer currently employing the person (if the person is with another firm) when a reason for termination or date of termination has been amended.

PIABA has no objection to the rule proposal insofar as it relates to the change in the date of termination. Obviously, if an error is made in the date reported, that should readily be subject to correction. However, PIABA is concerned about granting the same latitude to firms wishing to make changes in the *reasons* for a broker's termination.

While it is certainly more expedient for member firms to amend the reason for termination of a registered person without a court order or arbitration award, PIABA is concerned about the potential for abuse and collusion. In some circumstances, departing registered persons have financial disputes with member firms. For example, promissory notes may exist to repay a registered person's "draw" against commissions, or a registered person may be obligated for a portion of a sum advanced by the member firm to resolve a customer arbitration or satisfy an arbitration award. Certainly, where the member firm and departing registered person have financial issues to resolve and may be otherwise adverse, it is possible that amendment of the reason for termination of the registered person may become a subject of bargained-for exchange as the parties negotiate their other issues. This would not lead to greater integrity of the reporting system.

The present rule's requirement that a member firm obtain an arbitration award or court order in order to make an amendment to the reason for termination serves an important purpose by requiring member firms to explain the reason(s) for the change to an impartial decision maker. The current process effectively requires the member firm to make a verified statement setting forth a legitimate reason for the change in the reason for termination. While sharp practices unfortunately may develop under any set of rules, and while the current requirement of judicial/arbitral approval of changes does not guarantee accurate and transparent reporting, the proposed change lessens rather than increases the likelihood of trustworthy information and increases the potential for collusion.

<u>Conclusion</u>

For the above reasons, PIABA respectfully requests that FINRA approve the changes to reporting on Forms U4 and U5 with respect to arbitration claims in which registered persons' conduct is complained of but as to which registered persons are not named as party respondents. We favor elimination of any arbitrary monetary threshold for the reporting of customer arbitrations and oppose permitting member firms to unilaterally change the reasons for a broker's termination.

Thank you for your consideration.

Respectfully,

PUBLIC INVESTORS ARBITRATION
BAR ASSOCIATION

Brian N. Smiley
President