



VOICE OF INDEPENDENT FINANCIAL SERVICES FIRMS  
AND INDEPENDENT FINANCIAL ADVISORS

## VIA ELECTRONIC MAIL

January 27, 2015

Brent J. Fields  
Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

**Re: Release No. 34-73238; File No. SR-FINRA-2014-38**

Dear Mr. Fields,

On September 18, 2014 the Financial Industry Regulatory Authority (FINRA) filed a proposed rule change (Proposed Rule) to adopt NASD Rule 3010 (Qualifications Investigated) relating to background investigations as FINRA 3110(e) (Responsibility of Member to Investigate Applicants for Registration) in the consolidated FINRA Rulebook.<sup>1</sup> The rule change would retain and clarify existing requirements and add a provision to require members to adopt written procedures that are reasonably designed to verify the accuracy and completeness of the information contained in an applicant's Form U4. The Proposed Rule is occurring alongside FINRA's one-time search of specific financial public records, including bankruptcies, judgments, and liens, on all registered persons. FINRA also proposed Supplementary Material .15 (Temporary Program to Address Underreported Form U4 Information), a temporary program that would have issued a refund of Late Disclosure Fees to members for late filings of unsatisfied judgments if all three of the following conditions are met: 1) the U4 amendments are filed between April 24, 2014 and March 31, 2015; 2) the judgment or lien is under \$5,000 and more than five years old; and 3) the registered person was not employed by or otherwise associated with the firm filing the amended Form U4 on the date the judgment or lien was filed with the court. The Financial Services Institute (FSI) and several other commenters responded with comment letters, raising concerns with regard to the conditions with regard to the eligibility conditions under the refund program. On December 8, 2014, FINRA issued a response to comments and amendments to the rule filing (Amended Filing).<sup>2</sup> The Amended Filing changes the conditions for issuing reimbursements for late Form U4 filings related to unsatisfied judgments or liens. The refunds would instead be issued if one of the following conditions is met: (1) the judgment or lien has been satisfied, and at the time it was unsatisfied, it was under \$5,000 and the date the judgment or lien was filed with a court (as reported on Form U4 Judgment/Lien DRP, Question 4.A.) was on or before August 13, 2012; or (2) the unsatisfied judgment or lien was satisfied within 30 days after the individual learned of the judgment or lien (as reported on Form U4 Judgment/Lien DRP, Question 4.B.). This program has a retroactive effective date of April 24, 2014, and it will automatically sunset on July 31, 2015. On January 6, 2015, the SEC approved the amended rule.<sup>3</sup>

<sup>1</sup> See SR-FINRA-2014-038, 79 Fed. Reg. 59,884 (October 3, 2014).

<sup>2</sup> SR-FINRA-2014-038, Amendment No. 1 (dated December 8, 2014) [hereinafter "Amendment No. 1"].

<sup>3</sup> 80 Fed. Reg. 546 (Jan. 6, 2015).

FSI remains concerned with respect to the criteria to qualify for the refund program. We expand on these points below and provide suggestions for addressing these issues.

### Comments

FSI appreciates FINRA's response to comments to the Proposed Rule, and for making changes aimed to address concerns related to the Temporary Refund Program. FSI continues to support the Amended Filing's provisions related to adopting written procedures for verification of information in the Form U4, as well as obligations for conducting searches of reasonably available public records for representatives. These provisions will strengthen investor protection and provide additional transparency. However, FSI remains concerned with the Amended Filing's proposed conditions for eligibility with respect to the Temporary Refund Program outlined in Supplementary Material .15. For the following reasons, FSI suggests that FINRA consider making changes to these requirements.

#### **I. Establishing That Conditions of Revised Program Have Been Satisfied**

The Amended Filing states that “[f]irms initially will be charged a Late Disclosure Fee and subsequently receive a refund in their FINRA Flex-Funding Account if they can establish, or if FINRA otherwise determines, that the conditions of the revised program have been satisfied.”<sup>4</sup> While FINRA revised the conditions for reimbursement to include instances where an unsatisfied judgment or lien was satisfied within 30 days after the individual learned of the judgment or lien, FINRA has not provided specificity with regard to how firms must establish this condition to be eligible to receive reimbursement. Many of the previously satisfied unreported judgments or liens that FINRA would expectedly identify through their one-time search are likely to be aged. For example, an advisor will face significant difficulty to provide evidence regarding when they learned of a judgment or lien against them that was satisfied 30 years prior. This evidence will be necessary for an advisor to prove that the judgment or lien was satisfied within 30 days of them becoming aware of it. This will very likely require firms to spend resources to collect this information without the benefit of specifics with regard to the standard of proof required for FINRA to issue a refund under the program. FSI suggests that FINRA provide additional clarity with respect to this issue or, in the alternative, provide refunds for all unreported satisfied judgment or liens that occurred more than 5 years ago.

#### **II. Fines May Unfairly Be Levied on a Financial Advisor's Current Firm**

The Amended Filing does not provide for situations where an unreported judgment or lien was unreported by a financial advisor's previous firm. With many advisors switching firms more frequently, and especially for more seasoned financial advisors with years of experience in the industry, it is increasingly likely that a prior firm's decision with respect to filing a U4 will be the basis for penalizing a financial advisor's current firm. For example, a financial advisor's current firm would be penalized in the event that a prior broker-dealer did not file their U4 after the advisor informed them of an unsatisfied judgment or lien. To penalize an advisor's current firm would not advance investor protection nor would it fairly address the shortcomings of their policies and procedures with respect to timely U4 filings. FSI suggests that FINRA provide reimbursement for a representative's current firm in instances where an unreported satisfied judgment or lien occurred at the representative's previous firm.

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<sup>4</sup> Amendment No. 1 at 25.

### III. FINRA Will Continue to Issue Late Filing Fees Because of the Language of Question 14M

FINRA notes that “there is a misconception regarding the obligation to report unsatisfied judgment and liens under Question 14M on the Form U4. The obligation to amend a Form U4 arises on the date a registered person receives notice or learns that he or she is subject to an unsatisfied judgment or lien, and an amended Form U4 should be filed no later than 30 calendar days from that date, regardless of whether the registered person satisfied the judgment or lien in the interim period prior to the 30 day-deadline for filing a form U4 amendment.”<sup>5</sup> Despite making this statement, the language of Form U4 casts doubt regarding whether this is in fact a misconception, or whether the language itself is clear with respect to the reporting expectation. Question 14M is clear, asking “Do you have any unsatisfied judgments or liens against you.”<sup>6</sup> Registered persons may only answer yes or no to this question. As quoted above, FINRA argues that any judgment or lien should, whether satisfied or unsatisfied, require registered persons to answer this question yes. This interpretation ignores the fact that the word “unsatisfied” is included in the question. Until FINRA addresses this issue, firms will continue to be fined for late disclosure filings despite their reasonable interpretation of the current language in Question 14M.

#### Conclusion

We are committed to constructive engagement in the regulatory process and, therefore, welcome the opportunity to work with FINRA and the SEC on this and other important regulatory efforts.

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

Respectfully submitted,



David T. Bellaire, Esq.  
Executive Vice President & General Counsel

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<sup>5</sup> Amendment No. 1 at 24, note 42.

<sup>6</sup> See FINRA Form U4 (Uniform Application for Securities Industry Registration or Transfer) at 14; available at <http://www.finra.org/web/groups/industry/@ip/@comp/@regis/documents/appsupportdocs/p015112.pdf>.