FRANCIS J. SKINNER
CHIEF LEGAL OFFICER
[redacted]

July 6, 2022

Securities and Exchange Commission
100 F Street NE
Washington DC 20549

VIA EMAIL ONLY rule-comments@sec.gov

Re: **Release No. 34-95092; File No. SR-FINRA-2022-015**
Notice of Filing of Proposed Rule Change To Amend FINRA Rule 8312
(FINRA BrokerCheck Disclosure) To Release Information on BrokerCheck
Relating to Firm Designation as a Restricted Firm (the "**Proposal**")

> "It [the scarlet letter] had the effect of a spell, taking her out of the ordinary relations with humanity, and enclosing her in a sphere by herself."
> — Nathaniel Hawthorne, *The Scarlet Letter*

Dear Sir/Madam:

We appreciate the opportunity to provide comment concerning the above-referenced proposed rule change.

FINRA's statement of purpose for the Proposal reiterates that of Rule 4111: to "protect investors and the public interest by strengthening tools available to FINRA to address the risks posed by member firms with a significant history of misconduct. The rule will create incentives for firms to change behaviors and activities, either to avoid being designated or re-designated as a Restricted Firm, to mitigate FINRA's concerns."

In adopting Rule 4111, FINRA also adopted Rule 9561(a)(1) and amended Rule 9559. Within the Release, FINRA addressed comments lobbying for the publication of Restricted Firms, and FINRA initially refuted the concept because the purpose of Rule 4111 was to incentivize such firms to remedy those risks. FINRA then reconsidered that concept in order to explore the value of publication in the name of investor protection, and the SEC now asks for comment about the Proposal.

First, FINRA has neither identified nor discussed any objective evidence which would demonstrate the effectiveness of any such disclosure. Is there objective statistical evidence that this Proposal is helpful? What percentage of *investors* have even ever checked their firm or financial professional on BrokerCheck? What information do investors consider important when reviewing BrokerCheck? What would the impact be if an investor sees that a firm is a Restricted Firm? Would he or she ask further questions or summarily move on? Would the investor understand what a Restricted Firm means? Would he or she even click the proposed hyper-link to learn what a Restricted Firm is? Without

objective evidence, it is respectfully submitted that FINRA is proposing a rule which has no rational basis to support its implementation, and for this reason alone it should be reconsidered.

Additionally, such a disclosure on BrokerCheck would be confusing and misleading to the general public. FINRA states that it will provide a hyperlink to additional information which will define a Restricted Firm, but there can be no assurances that the prospective investor will click it and may instead make a conclusory decision to move away from such firms. Without guidance, a Restricted Firm could be viewed as one which does not even service retail customers, removing choice to the investing public. Or, it could be viewed as a firm which offers limited products, services and accounts, again restricting choice to the investing public. Moreover, FINRA has not included a specimen of the proposed linked web page which would purportedly explain the process and significance of a Restricted Firm designation, which leaves commenters to merely speculate as to whether an explanatory link, if clicked at all, could reasonably address the issues presented herein.

There is no doubt that even if completely understood by the investing public, including institutional investors, the designation as a Restricted Firm would be a 'Scarlet Letter' and will no doubt have severe economic impact upon such firms. This Proposal is an unnecessary 'add-on' to a Rule which is already extremely punitive in nature. Under Rule 4111 FINRA may impose upon a Restricted Firm a monetary cash escrow deposit which FINRA will effectively control, and that sum cannot be calculated in net capital. This alone will put some small firms on the edge of net capital failure. In addition, FINRA may order other remedies, such as shorted examination cycles, which result in additional overhead costs to firms. Those remedies alone are sufficient to achieve FINRA's purposes in Rule 4111. If FINRA required additional tools to achieve its goal, it should have annunciated them within Rule 4111, not by piling on additional Rules designed merely to punish such firms. Adding a 'Scarlet Letter' on BrokerCheck serves no purpose other than to put additional financial strain on Restricted Firms, especially the smaller firms, where FINRA has already sequestered a substantial sum to be placed in escrow. Some existing and prospective customers will no longer do business with the firm for certain. Registered persons, both in sales and in back office positions, will depart the firm, and the firms will have difficulty recruiting good talent going forward. Attracting 'good' employees and sales persons should be in furtherance of FINRA's goal, but this Rule will serve only to defeat that goal by labeling Restricted Firms as 'bad' firms, which will certainly hinder their recruiting efforts. In short, it is illogical to adopt a rule when the stated but speculative public policy to be advanced is outweighed by the harm it will cause to Restricted Firms and its personnel.

This Proposal is redundant. Disclosures about firms are reported on Form BD which appear on BrokerCheck, including, but not limited to, litigation, regulatory actions, and financial disclosures. Investors already have that data available. Rule 4111 of course considers statistical data not presented on Form BD because it includes data concerning broker-dealers' registered persons in addition to the firm's disclosures. Application of that data to some notion of investor protection is dubious at best. For example, some registered persons are back office personnel or even sales representatives who had the simple misfortune of being associated with an expelled firm even though they had nothing to do in the least with the activity which brought about the expulsion. Moreover, not only may an investor search the firm on BrokerCheck, but the investor may also search for disclosures upon the broker, and any other broker associated with the branch and even the firm, including the firm's principals. Rule 4111 is based upon the statistical data disclosed on U4 and U5, *and all of this is already available on BrokerCheck.* Please also consider the employees of those firms. Compliance personnel, supervisors, and

administrative persons associated with those firms would also be burdened by the Scarlet Letter. Adding a Scarlet Letter is redundant, serves no valuable purpose, and in fact will harm firms, employees and registered persons associated with those firms, and formerly associated with those firms.

The end-game of Rule 4111 results in a surcharge to the firm to be held in escrow based primarily upon the claim amount of pending arbitrations. FINRA has made it abundantly clear that its purpose is to provide some assurances that if a firm is levied with a large arbitration award, it does not simply fold the tents and disappear, leaving wronged investors with unpaid arbitration awards. Notwithstanding the centuries of jurisprudence since the King's Bench where the courts refused to burden the accused with depositing cash equal to the claim amount in trust without due process, FINRA has chosen to go this route for certain firms that fit Rule 4111's profile. This is again based upon potentially unpaid arbitration awards. The Scarlet Letter adds nothing to further that purpose. It is within FINRA's domain to adjust that Restricted Deposit based upon the facts and circumstances in order to protect the investing public. If that purpose is not served by the Restricted Deposit account alone, perhaps that Rule should be repealed.

The Economic Impacts discussion within the Proposal clearly overestimates the value of this Rule to investors versus the underestimated economic impact it will have on Restricted Firms. In essence, there is high probability that it will simply put those firms out of business. If that is FINRA's purpose, then kudos, that goal will be achieved. If it is not the Proposal cannot go forward. As stated above and as admitted in the Release, there is no doubt that such firms will lose customers, prospective customers, financial professionals, prospective financial professionals, and employees. Place this impact atop the already onerous Restricted Deposit Account, and you have a recipe for net capital disaster. FINRA acknowledges that some firms may go out of business because of this Proposal. *See* Release 34-95092, Part II(3).

Moreover, a Restricted Firm's financial professionals and employees, who in fairness should not be impacted by this rule, will necessarily be impacted in their efforts to obtain future employment, because, as FINRA points out, millions of users are using the free BrokerCheck tool to do background checks on personnel. Prospective employers will use this tool as well. Rule 4111's statistical tranches are low bars. As a percentage of the firm's population, they represent a minority of such a firm's population and although the tranches may serve FINRA's risk profiling, the designation as a Restricted Firm is mis-representative of the majority of the population of the firm's registered persons. Hindering future employment prospects of innocent back-office and sales persons with clean U4's is not the purpose of Rule 4111, but this Proposal, if approved, will impede good people from finding employment.

For the reasons set forth above, we object to the Proposal. There is no objective evidence that the Proposal has regulatory value. If it has any at all, it is certainly outweighed by the tremendous economic harm it will cause firms forced to bear the Scarlet Letter on BrokerCheck. In addition, it creates collateral damage by punishing the innocent: the employees and sales personnel who are merely 'guilty by association.' This cannot be the intent of our member organization. Please reconsider the Proposal.

Respectfully Submitted,

Francis J. Skinner, Esq., CLO