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November 25, 2022

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: File No. SR-FINRA-2022-015 (Proposed Rule Change to Amend FINRA Rule 8312 (FINRA BrokerCheck Disclosure) to Release Information on BrokerCheck Relating to Firm Designation as a Restricted Firm)

Dear Ms. Countryman:

This letter is being submitted by the Financial Industry Regulatory Authority (“FINRA”) in response to comments received by the Securities and Exchange Commission (“SEC” or “Commission”) regarding the above-referenced rule filing. The proposed rule change would amend Rule 8312 (FINRA BrokerCheck Disclosure) to release information on BrokerCheck® as to whether a particular member firm or former member firm is currently designated as a “Restricted Firm” pursuant to Rule 4111 (Restricted Firm Obligations) and Rule 9561 (Procedures for Regulating Activities Under Rule 4111).

The Commission published the proposed rule change for public comment in the Federal Register on June 17, 2022.¹ The Commission received four comment letters directed to the rule filing.² On July 20, 2022, FINRA consented to an extension of the time period for SEC action on the proposed rule change to September 15, 2022. On September

¹ See Securities Exchange Act Release No. 95092 (June 13, 2022), 87 FR 36551 (June 17, 2022) (Notice of Filing of File No. SR-FINRA-2022-015) (“Filing”).

² See Letter from Francis J. Skinner, Esq., CLO, CoastalOne, to SEC, dated July 6, 2022 (“Skinner”); Letter from Nicole G. Iannarone, Assistant Professor of Law, Drexel University, Thomas R. Kline School of Law & Christine Lazaro, Professor of Clinical Legal Education and Director of the Securities Arbitration Clinic, St. John’s University School of Law, to Vanessa Countryman, Secretary, SEC, dated July 7, 2022 (“Iannarone and Lazaro”); Letter from Mark Quinn, Director of Regulatory Affairs, Cetera Financial Group, to Secretary, SEC, dated July 8, 2022 (“Cetera”); and Letter from Michael Edmiston, President, Public Investors Advocate Bar Association, to J. Matthew DeLesDernier, Assistant Secretary, SEC, dated July 8, 2022 (“PIABA”).

15, 2022, FINRA submitted a response to the comments.³ As FINRA explained in more detail in that response to comments, two commenters generally supported the proposal,⁴ and two commenters did not support the proposal.⁵

On September 15, 2022, the SEC issued an order instituting proceedings to determine whether to approve or disapprove the proposed rule change. On September 21, 2022, the SEC published that order in the Federal Register.⁶ The Commission received three additional comment letters directed towards the rule filing.⁷ The following are FINRA's responses to those commenters' material concerns.

General Support for the Proposal

Cornell and NASAA generally support the proposal. For example, Cornell comments that the proposed rule change “fulfills the goals of the Exchange Act by giving consumers access to important information which will help to protect investors and promote free and equitable trade,” and would “add to the information easily accessible to the consumer, without requiring any further inquiry beyond the BrokerCheck website.” NASAA comments that disclosing a firm's Restricted Firm designation on BrokerCheck would “advance investor protection and transparency (consistent with the purpose of BrokerCheck)” and “be consistent with FINRA's general standards for public disclosure under . . . Rule 8312.” FINRA appreciates and agrees with these comments.

³ See Letter from Michael Garawski, Associate General Counsel, FINRA, to Vanessa Countryman, Secretary, SEC, dated September 15, 2022 (“Response to Comments”).

⁴ See Iannarone and Lazaro, PIABA.

⁵ See Cetera, Skinner.

⁶ See Securities Exchange Act Release No. 95791 (September 15, 2022), 87 FR 57731 (September 21, 2022) (Order Instituting Proceedings to Determine Whether to Approve or Disapprove the Proposed Rule Change in SR-FINRA-2022-015).

⁷ See Letter from Steven B. Caruso, submitted September 21, 2022 (“Caruso”); Letter from William A. Jacobson, Clinical Professor of Law, Cornell Law School, and Director, Cornell Securities Law Clinic, and Erik Olson, Cornell Law School, Class of 2024, to Vanessa Countryman, Secretary, SEC, dated October 10, 2022 (“Cornell”); and Letter from Andrew Hartnett, NASAA President, North American Securities Administrators Association, Inc., to J. Matthew DeLesDernier, Deputy Secretary, SEC, dated October 12, 2022 (“NASAA”).

Scope of the Disclosure

The proposed rule change would amend Rule 8312 to release information on BrokerCheck as to whether a particular current or former member is currently designated as a Restricted Firm. Although Cornell supports the proposed rule change “as it stands,” it suggests that a firm’s history regarding its Restricted Firm status also should be disclosed on BrokerCheck.⁸ While Cornell “recognizes that withholding this [historical] information provides an incentive for a firm to correct practices in order to remove the restricted designation,” it believes that disclosing historical Restricted Firm designations “will further incentivize firms to avoid becoming restricted, while also benefitting consumers.” In a related comment, Caruso expressed that the proposed rule change should be disapproved unless it is revised to require the disclosure of historical information about a firm’s Restricted Firm designations. Caruso explains that “[i]f . . . BrokerCheck is intended to help investors make informed choices about the brokers and member firms with which they conduct business . . . , then the fact that a member firm was *ever* designated as a Restricted Firm is information that is clearly critical and material to investors.”

As FINRA previously explained, however, FINRA believes that the potential for a Restricted Firm disclosure to be removed from BrokerCheck would serve as a strong incentive for firms designated as Restricted Firms to improve their behavior and, thus, would further the primary purpose of Rule 4111 itself.⁹ Although Caruso contends that not disclosing historical Restricted Firm designations on BrokerCheck would be inconsistent with how “disciplinary history” is disclosed on BrokerCheck, FINRA has previously stated a Restricted Firm designation is not disciplinary in nature.¹⁰ Therefore, FINRA believes the more direct analogy is how disclosing current Restricted Firm designations would be akin to how Rule 8312 requires the disclosure of information as to whether a particular member “is” subject to the provisions of Rule 3170 (the “Taping Rule”).¹¹

⁸ Iannarone and Lazaro made a similar suggestion, to which FINRA previously responded. See Response to Comments, at p. 8 & n.24.

⁹ See Response to Comments, at p. 8 & n.24; see also Securities Exchange Act Release No. 90527 (November 27, 2020), 85 FR 78540, 78550 (December 4, 2020) (Notice of Filing of File No. SR-FINRA-2020-041) (“Notice”) (explaining that Rule 4111 would “create incentives for firms to change behaviors and activities, either to avoid being designated as a Restricted Firm or lose an existing Restricted Firm designation”).

¹⁰ See Notice, 85 FR 78540, 78566 (explaining that the Rule 4111 process is not a disciplinary proceeding).

¹¹ See Rule 8312(b)(2)(F).

Caruso further comments that not disclosing a firm's historical Restricted Firm designations on BrokerCheck would be inconsistent with the disclosure requirements in Questions 11E(3) and (4) of the SEC's Form BD (Uniform Application for Broker-Dealer Registration).¹² The proposed rule change, however, would not impact a firm's obligations under Form BD or alter how Rule 8312 requires the release on BrokerCheck of "any information reported on the most recently filed . . . Form BD."¹³ Indeed, FINRA has previously acknowledged that "information about a firm's status as a Restricted Firm . . . could become publicly available through existing sources or processes," such as "through Form BD."¹⁴

Finally, FINRA reiterates that it appreciates the commenters' suggestions to disclose on BrokerCheck a firm's prior Restricted Firm's designations and, if the proposed rule change is approved, will revisit them after gaining experience with disclosing Restricted Firm designations on BrokerCheck.¹⁵

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FINRA believes that the foregoing responds to the material issues raised by the commenters to the rule filing. If you have any questions, please contact me at [REDACTED], [REDACTED].

Best regards,

/s/ Michael Garawski

Michael Garawski
Associate General Counsel
FINRA Office of General Counsel

¹² Form BD Question 11E(3) asks, in pertinent part, "[h]as any self-regulatory organization . . . ever . . . found the applicant . . . to have been the cause of an investment-related business having its authorization to do business . . . restricted?" Form BD Question 11E(4) asks, in pertinent part, "[h]as any self-regulatory organization . . . ever . . . disciplined the applicant . . . by expelling or suspending it from membership, barring or suspending its association with other members, or otherwise restricting its activities?"

¹³ See Rule 8312(b)(2)(A).

¹⁴ See Notice, 85 FR 78540, 78567 n.159.

¹⁵ See Response to Comments, at p. 8.