Securities Industry Association
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July 20, 2006

Nancy M. Morris
Secretary
U.S. Securities and Exchange Commission
Station Place
100 F Street NE
Washington, DC 20549-9303

Re: Release No. 34-54053; File No. SR-NASD-2003-168
Proposed Amendments 4 and 5 Relating to the Release
of Information Through the NASD BrokerCheck

Dear Ms. Morris:

The Securities Industry Association ("SIA")[1] appreciates the opportunity to offer comments in response to NASD's proposed additional amendments to NASD Interpretive Material 8310-2, which relate to the types of information NASD proposes to release through its public disclosure system ("BrokerCheck"). As noted in our prior comment letters,[2] SIA has long had fundamental fairness and practicality concerns about the retroactive disclosure of unadjudicated customer complaints that have since been archived by NASD. SIA continues to believe that the disclosure of archived "Historic Complaints" could result in significant inequities to registered persons, create a chilling effect on settlements, and mislead investors seeking meaningful information from the BrokerCheck system.[3]

Nevertheless, SIA recognizes that as the keeper of this type of information, NASD must carefully weigh the legitimate interests of registered persons against the public's need

[1] The Securities Industry Association brings together the shared interests of more than 600 securities firms to accomplish common goals. SIA's primary mission is to build and maintain public trust and confidence in the securities markets. SIA members (including investment banks, broker-dealers, and mutual fund companies) are active in all U.S. and foreign markets and in all phases of corporate and public finance. According to the Bureau of Labor Statistics, the U.S. securities industry employs nearly 800,000 individuals, and its personnel manage the accounts of nearly 93-million investors directly and indirectly through corporate, thrift, and pension plans. In 2005, the industry generated an estimated $322.4 billion in domestic revenue and an estimated $474 billion in global revenues. (More information about SIA is available at: www.sia.com.)

[2] See attached letter to Jonathan G. Katz, dated July 27, 2005 and letter to Barbara J. Sweeney, dated January 6, 2003.

[3] Historic Complaints are defined as "customer complaints that are more than two years old and have not been settled or adjudicated, or customer complaints, arbitrations, or litigations that have been settled for an amount less than $10,000, and which are no longer reported on a registration form."

for comprehensive disclosure about brokers with whom they are, or may be, doing business. For this reason, and though far from a perfect solution, SIA supports the most recent amendments as a measured compromise to a difficult issue.

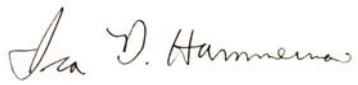
Historically, member firms and registered representatives decide to settle customer claims for a variety of reasons, not the least of which is to avoid the time, effort and expense of a protracted arbitration or litigation. Consider, for example, a customer complaint alleging unauthorized sale of securities that in fact are proper margin liquidations. In such a situation, a registered representative may have agreed to settle the claim for little or no consideration, knowing that the settlement information would become a Historic Complaint after two years, and thus having no long-term negative effect on his or her reputation or business relationships.

In proposing to disclose Historic Complaints prospectively, the amendments seek to balance the equally compelling interests at stake by expanding significantly the type of information NASD will release to the public through BrokerCheck, without unduly prejudicing individuals and firms that may have made settlement decisions based on pre-existing NASD disclosure standards.[4]

* * *

We thank you for the opportunity to comment. If we can provide any further information or clarification of points made in this letter, please contact me or Amal Aly, Associate General Counsel, at (212) 618-0568.

Sincerely,



Ira Hammerman
Senior Vice President and
General Counsel

cc: Mary L. Schapiro, Vice Chairman and President, Regulatory Policy & Oversight, NASD
Douglas Shulman, Vice Chairman, NASD; President, Markets, Services and Information
Marc Menchel, Executive Vice President and General Counsel, Regulatory Policy & Oversight, NASD
Elisse B. Walter, Executive Vice President, Regulatory Policy & Programs, NASD

[4] Notably, SIA previously recommended that NASD to apply a truly prospective standard and disclose only those complaints reported after the effective date of the new rule, thus ensuring that the amendments did not unfairly prejudice firma and individuals that made settlement or litigation decisions bases on the pre-existing NASD public disclosure standards. Because the current amendments only address Historic Complaints archived on or after the effective date of the rule change, still unresolved are the due process concerns surrounding customer disputes that would have been archived within two years, but are still pending at the time of the new rule's implementation date.

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July 27, 2005

Jonathan G. Katz
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: File No. SR-NASD-2003-168 -- NASD Proposed Amendments Relating to the Release of Information Through the Public Disclosure Program

Dear Mr. Katz:

The Securities Industry Association ("SIA")[1] appreciates the opportunity to offer comments in response to the referenced rule filing ("Rule Filing"), which seeks input on proposed expansions to the types of information NASD currently makes available through its public disclosure system ("BrokerCheck"). As detailed in SIA's prior written submissions, as well as during several lengthy discussions with NASD staff, SIA supports NASD's efforts to provide investors with additional tools that will better assist them in making informed decisions about firms and registered persons with whom they are, or may be, doing business.[2]

SIA continues to have serious concerns, however, about the proposed release of archived "Historic Complaints" which we believe would result in significant inequities to registered persons, as well as confuse investors who seek meaningful information from the BrokerCheck system. We therefore urge NASD to withdraw this provision from the Rule Filing as recommended below. Alternatively, we respectfully request that NASD adopt SIA's proposed alternatives as suggested herein.

I. Introduction

As a threshold matter, SIA agrees that NASD's existing public disclosure system would benefit from many of the technological enhancements under consideration. In particular, we fully support consolidation and reconfiguration of the existing disclosure information into a single, more "user-friendly" website. We agree that this modification,

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[2] See letter to Barbara J. Sweeney, NASD (January 6, 2003) and letter to Jonathan G. Katz, SEC (January 20, 2004), which we incorporate by reference herein.

along with the proposed improvements to the existing Internet application to provide for ease of use and expeditious delivery of information will benefit investors. SIA, therefore, supports and welcomes modifications that update, streamline and simplify the existing technology underlying the public disclosure system. Similarly, SIA also supports NASD's efforts to provide more comprehensive and constructive disclosures. SIA has long espoused the principles of fair and accurate disclosure to the investing public. Such disclosures, especially those that relate to individuals or firms with whom investors are contemplating doing business, are vital to the industry's ongoing commitment to strengthen public trust and confidence in our capital markets.

As NASD correctly notes, the key challenge presented by this initiative is to ensure that any changes to the existing disclosure system are reasonable, well-balanced, and do not needlessly jeopardize the legitimate privacy and fairness interests at stake.[3] In that regard, SIA greatly appreciates NASD staff's continued willingness to work with various constituencies to ensure that the disclosure information is sensible and helpful to the overriding purpose of providing investors with constructive information. Such cooperation and regular exchange of ideas have yielded a significantly improved rule proposal.

Regrettably, and notwithstanding strenuous industry objection, the current proposal still contains disclosure of the highly controversial "Historic Complaints."[4] As before, SIA continues to have fundamental fairness concerns about the retroactive disclosure of unadjudicated customer complaints that have long since been archived by NASD. We believe that this expansion could have negative consequences to the broker community (the vast majority of whom are honest, hard working professionals), create a chilling effect on settlements and inundate investors with potentially misleading information. Indeed, in light of the ever-increasing regulatory focus on firm internal controls and supervisory structures, particularly in the area of registered representative activity, we believe that drudging up Historic Complaints adds little substantive value to the current disclosure system and may ultimately undermine the objectives of enhanced regulatory disclosure.

In short, more information does not necessarily equate to better disclosure. As with any disclosure regime, the benchmark here must be the quality of the disclosure, not merely the quantity of the disclosure. Thus, we respectfully request that the Historic Complaints provision be eliminated from the Rule Filing. Alternatively, we request that NASD adopt SIA's suggested alternatives, which would allow for the disclosure of Historic Complaints in a more reasonable and equitable manner.

II. SIA's Objections to the Release of Historic Complaints

Under the proposal, NASD would release all Historic Complaint information, *regardless of age*, if the registered person has a total of three or more disclosures in a ten-year period. This includes a total of three or more (i) currently disclosed regulatory actions; (ii) currently reported customer complaints, arbitration, or litigation disclosures; (iii) Historic Complaint disclosures; or (iv) any combination thereof. In addition, NASD would also

[3] NASD Notice to Members 02-74 (October 24, 2002).

[4] Historic Complaints are defined as (i) customer complaints that are more than two years old and have not been settled or adjudicated; or (ii) customer complaints, arbitrations, or litigation that have been settled for an amount less than $10,000.

require that the most recent customer complaint have been filed within the past 10 years. NASD justifies the Historic Complaint disclosures by explaining that by releasing Historical Complaints for registered representatives who meet the 3 disclosures in 10 years threshold, NASD would enable public investors "to determine for themselves whether a particular broker has demonstrated a pattern of conduct over the years and the significance if any, they should attach to the Historic Complaint information."[5]

A. Disclosure of Historic Complaints Ignores the Inherent Differences Between the CRD and BrokerCheck Systems

Among the most troubling aspects of the proposed Historic Complaints disclosure is that it ignores the inherent differences between the Central Registration Depository ("CRD") and BrokerCheck. As the central licensing database for the securities industry, the CRD system was created for use by *regulators* in connection with registration and licensing matters. Consequently, the CRD database captures an unparalleled amount of information, unmatched by any other professional or commercial licensing system. This includes registration information, personal and professional information, as well as virtually *all* customer-initiated complaint information regardless of veracity or outcome.[6] Moreover, because of the sensitivity of the data, the CRD system itself permits varying degrees of access, depending the identity of the requester and intended purpose of the request. Securities regulators, therefore, have the broadest range of access, while others, including member firms, have limited access to specific subsets of that information.

By contrast, BrokerCheck is the platform through which the general public may view *some* of the information contained within CRD. Established in 1988 and originally called the Public Disclosure Program, BrokerCheck is intended to provide investors with fair and *informative* disclosure that adequately balances the public's need for relevant information against the equally compelling privacy and due process rights of registered persons. To that end, BrokerCheck currently provides investors with a wide array of information about the registered persons' professional background, regulatory and litigation history, as well as certain customer dispute information. By the same token, and due to public policy and fairness considerations, BrokerCheck also archives (i.e., removes from the public disclosure system) certain potentially inflammatory or outdated information after a certain period of time. This includes, for example, satisfied personal judgments or liens, bankruptcies initiated over ten years ago, and Historic Complaint information.

Notably, while archived disclosures no longer appear on BrokerCheck, there is no limitation period after which they are automatically removed from the CRD. Therefore, a false accusation of wrongdoing will remain affixed to a registered person's permanent CRD record unless and until expunged by court order. The difficulty, of course, is that NASD recently imposed additional procedural requirements for registered persons seeking to remove meritless claims from their record. While we do not seek to recommence the debate over the wisdom or fairness of the expungement rules here, it is both appropriate and

[5] Securities Exchange Act Release No. 51915 (June 23, 2005), 70 Fed. Reg. 37880, 37884 (June 30, 2005) (Rule Filing).

[6] For individuals, the CRD system houses information about residential history; education and employment experience; regulatory and disciplinary history; criminal arrests and convictions; personal bankruptcies, judgments and liens; and customer complaints, litigations and arbitrations.

necessary to consider carefully how the recent contraction of the expungement remedy and the proposed changes to the BrokerCheck will interact. We believe that these tandem changes will create a disclosure system that unfairly forces securities professionals to have to explain away baseless allegations that have long since been archived for the duration of their professional careers. Such a result, we believe, is unjust, unwarranted and should not be countenanced.

B. NASD's Rationale for the Release of Archived Historic Complaint Information is Fundamentally Flawed

As noted above, NASD supports the disclosure of archived Historic Complaint information by explaining that it will only release this information if a registered person meets the proposed 3 disclosures in 10 years threshold, which NASD deems as potentially indicative of a "pattern of conduct" by the registered person.

Three Disclosures in 10-Years is Not Necessarily Indicative of a Pattern

NASD's reasoning is flawed because it incorrectly presumes that all disclosures housed in the CRD system have merit. This simply is not the case. Because the Uniform Forms require firms and associated persons to report *all* customer disputes *alleging* sales practice violations no matter how frivolous, registered persons (particularly those that service a large number of retail accounts) may have multiple customer complaint disclosures on their CRD record that are without factual or legal basis.[7] This is particularly true within the context of Historic Complaints, which is why many of these sit idle for years without any further activity by either the firm or the customer.

The same reasoning applies to many settlements of customer disputes. As with customer complaints that are neither settled nor pursued in arbitration or litigation, settlements are not *per se* significant, nor do they necessarily represent an acknowledgement of wrongdoing. Rather, parties often settle disputes – including those without merit -- for many reasons, not the least of which is a desire to avoid the considerable time, effort and expense that a full blown arbitration or litigation invariably will entail. As a result, parties frequently will enter into settlements based on a cost-benefit analysis or a firm business decision to maintain client goodwill. Thus, contrary to NASD's assertions, we do not support the notion that NASD's proposed threshold of three disclosures within in a ten-year period is germane to a registered person's competency and business conduct.

Release of Archived Complaint Information Is Highly Prejudicial and Potentially Misleading to Investors

We are also unconvinced by NASD's assertion that once it places Historic Complaint information in the public domain, the general public will be able to make informed, objective independent decisions about what weight, if any, to give this information. The fact is, regardless of how much qualifying language NASD attaches to the Historic Complaint

[7] For example, a customer dispute can stem from frustration with poor market conditions or unrealistic expectations.

disclosures,[8] the average users of the BrokerCheck system will not be able to objectively asses the value of the Historic Complaint disclosures as compared to other types of disclosures. On the contrary, by including Historic Complaint information on NASD's BrokerCheck website – the purpose of which is to assist investors in making "informed" decisions about the brokers with whom they will do business – NASD will appear to affix a level of legitimacy to those disclosures. Otherwise, why would a regulator alert the public about previously archived allegations contained in complaints spanning a ten-year period?

Notably, while NASD specifically excludes information that is no longer reportable under the current Uniform Forms from the BrokerCheck system, NASD expressly carves out Historic Complaints from this standard.[9] Such an approach is ill conceived, however, because it undermines both the spirit and letter of many of the questions that currently appear on these Forms -- questions that were the subject of careful deliberation and negotiation between NASD, the North American Securities Administrators Association ("NASAA"), and the industry. Having taken great care in developing questions that thoughtfully balance the competing disclosure and privacy interests, NASD has offered no reasonable justification for disregarding the current regime that is specifically designed to remove or make non-reportable on the Forms certain irrelevant or erroneous information. As NASD freely admits, "NASD currently provides an unparalleled amount of information about firms, markets and regulation to the public." [10] Expansion of the current public disclosure framework to include outdated, unproven, archived Historic Complaint information adds very little to the interests of investors seeking meaningful information about their brokers.

C. The Proposal Could Have an Adverse Impact on Settlements and Overwhelm NASD's Dispute Resolution Process

Equally troubling is the chilling effect this proposal could have on settlements. As noted above, settlements of customer complaints can be motivated by several factors, including economic and client relation considerations. Once NASD creates a disclosure regime that includes settlements as the basis for disclosure of *all* Historic Complaint information, there will be little incentive to settle claims, particularly those under $10,000. Firms and registered persons will insist on challenging every customer dispute, no matter how unfounded, thereby forcing investors to proceed in arbitration or abandon the claim for lack of resources. NASD Dispute Resolution, in turn, will become flooded with new cases that otherwise would have been amicably settled. Clearly, such an outcome does not advance the interests of investor protection or other public interest.

III. SIA Alternatives

While SIA opposes the inclusion of Historic Complaints and hopes that the SEC will reject that aspect of the Rule Filing, should the SEC determine that there might be certain circumstances in which Historic Complaint information is important to the objectives of

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[8] Based on a preliminary prototype provided to SIA by NASD staff, the BrokerCheck system will contain the following cautionary language "reporting disclosures does not necessarily indicate that the broker has been engaged in any wrongdoing."

[9] See Rule Filing at 37884.

[10] NASD Notice to Members 02-74.

investor protection, we respectfully request that the Rule Filing be modified to incorporate SIA's suggested alternatives.

A. Disclosure of Historic Information Should Not Be Retroactive

Among the most problematic aspects of the Rule Filing is the retroactive disclosure of archived Historic Complaint information well after decisions were made as to how to handle particular customer disputes. Often times, registered persons will agree to their firms' settlement request with the understanding that NASD will archive the settlement information after two years, thus having no long-term negative effect on their reputations or business relationships. SIA seriously questions the fairness of a regulatory framework that would change the standard for public disclosure, years after the fact when there is little doubt that many registered persons simply would not have entered settlements (especially for non-meritorious cases) had the current rule proposal been in effect. Thus, to the extent NASD proceeds with disclosure of Historic Complaint information, we strongly urge NASD to apply a prospective standard and disclose only those complaints reported after the effective date of the new rule.

B. NASD Should Utilize A Five Events in Three Years Threshold for the Release of Historic Complaints

In addition to the forgoing, SIA also believes that the appropriate threshold for identifying those registered persons most likely to engage in a *pattern* of sales practice violations is one that focuses on persons with five disclosure events within three years, instead of the proposed three events within ten years. Currently, SRO Examination Guidance[11] uses a three-year look back period to achieve the objective of assessing a registered person's "recent history of final disciplinary actions." In that regard, the NYSE historically has defined "high profile" registered representatives as persons with five or more sales practice complaints in a rolling three-year period. Thus, to the extent NASD wishes to craft a threshold for disclosure of Historic Complaints, we strongly recommend that it adopt the NYSE approach of five disclosures in three years.

C. NASD Should Exclude Additional Types of Complaints From the Disclosure Threshold

In all events, we also urge NASD to specifically exclude certain types of complaints when calculating the number of threshold regulatory events for purposes of disclosing Historic Complaints. These include: (i) complaints filed by joint or related account holders based on the same set of facts and circumstances; and (ii) operational complaints or complaints alleging primarily a product failure or poor performance, even if the registered person is named in the related litigation or arbitration.

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[11] In a report issued by staff of the SEC, NASD, NYSE and NASAA, "A Review of the Sales Practice Activities of Selected Registered Representatives and the Hiring, Retention, and Supervisory Practices of the Brokerage Firms Employing Them," a recommendation was made to have member firms enhance their supervision of registered representatives with a recent history of final disciplinary actions involving sales practice abuse or other customer harm.

IV. NASD Should Adopt Additional Measures to Promote Responsible Pleading Practice

As described above, the CRD system captures virtually all customer complaints irrespective of merit or factual basis. As a result, the system is subject to potential abuses by disgruntled customers or unscrupulous claimant's counsel. Experience shows that many claims and complaints contain a garden variety of alleged wrongful acts, including fraud, churning, unauthorized trading and conversion of funds, without prior sufficient knowledge of all facts to substantiate the claim. Therefore, we think it both prudent and fair that NASD implement meaningful safeguards to ensure that claimants and/or lawyers who engage in this practice (i) understand the significant consequences of what they are doing and (ii) have a reasonable, good faith basis for naming the particular registered person. One option worthy of consideration is to require claimants and their counsel to attest at the time the statement of claim is filed that there is a good-faith basis for naming the registered person(s).[12]

At a minimum, we strongly suggest that NASD provide additional investor education material to the initial claim packet sent to customers preparing to file a claim that clearly explains the implications of naming a particular registered person and include the potential damaging implications. Not only will these measures help promote more responsible pleading practice, they will ultimately enhance the integrity of the CRD system, and in turn the quality of information upon which regulators, investors and firms all rely upon.

V. Conclusion

Once again, we fully support NASD's efforts to enhance the BrokerCheck system and echo the principle that any effort to broaden the scope of public disclosure must be tempered by fundamental privacy and due process considerations. We continue to object, however, to the release of archived Historic Complaints as unjustified, irrelevant and contrary to the stated objectives of enhanced, quality disclosure of meaningful information. As gatekeeper of the securities industry-licensing database, NASD owes a duty of trust to the securities professionals who must submit information to the CRD system as a prerequisite to conducting business with the public. Therefore, it is incumbent upon NASD to manage the information contained within that database reasonably and responsibly. This means that NASD must be mindful of the original intent of the CRD system and take the necessary measures to ensure that the information it releases to the public is relevant, accurate and respectful of the compelling interests at stake. Unfortunately, we do not believe that the retroactive disclosure of archived information meets this standard.

[12] This could be accomplished through either: (i) modification of the Uniform Submission Agreement to include a separate signature line, whereby a Claimant would certify to a good-faith basis for naming the individual registered representative as a Respondent; or (ii) a requirement that claimants attest in writing that they have read the materials provided by NASD and have a good-faith basis for naming an individual Respondent.

We thank you for the opportunity to comment and hope this letter has been helpful. If we can provide any further information or clarification of points made in this letter, please contact me or Amal Aly, Associate General Counsel, at (212) 618-0568.

Sincerely,

Ira Hammerman
Senior Vice President and
General Counsel

cc: Annette L. Nazareth, SEC, Director, Division of Market Regulation
Robert L. Colby, SEC, Deputy Director, Division of Market Regulation
Catherine McGuire, SEC, Associate Director, Division of Market Regulation
Mary L. Schapiro, Vice Chairman and President, Regulatory Policy & Oversight, NASD
Douglas Shulman, President, Regulatory Services & Operations, NASD
Marc Menchel, Senior Vice President and General Counsel, Regulatory Policy & Oversight, NASD
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January 6, 2003

Barbara Z. Sweeney
NASD
Office of the Corporate Secretary
1735 K Street, NW
Washington, D.C. 20006-1500

Re: NASD Notice to Members 02-74 – Comment on Proposed Public Information Review Initiative

Dear Ms. Sweeney:

The Securities Industry Association ("SIA")[1] is pleased to offer comment in response to the referenced Notice to Members ("*Notice*"), which seeks input from interested parties on a broad range of issues relating to information the NASD makes public. According to the *Notice*, NASD is considering various changes, both substantive and technological, to the existing NASD public disclosure framework. Among these are significant expansions to the type of information it currently makes available through its Public Disclosure Program ("PD Program").

I. Introduction

SIA commends NASD for undertaking this comprehensive review of the information it collects, develops and makes available to the general public. We too share the view that the existing system, which has served the public well for over a decade, will stand to benefit from many of the technological enhancements under consideration. In particular, SIA supports consolidation and reconfiguration of the existing disclosure information into a single, more "user-friendly" website. We agree that this modification,

[1] The Securities Industry Association brings together the shared interests of more than 600 securities firms to accomplish common goals. SIA member-firms (including investment banks, broker-dealers, and mutual fund companies) are active in all U.S. and foreign markets and in all phases of corporate and public finance. Collectively they employ more than 495,000 individuals, representing 97 percent of total employment in securities brokers and dealers. The U.S. securities industry manages the accounts of nearly 93-million investors directly and indirectly through corporate, thrift, and pension plans. In 2001, the industry generated $280 billion in U.S. revenue and $383 billion in global revenues. (More information about SIA is available on its home page: www.sia.com.)

along with the proposed improvements to the existing Internet application to provide for ease of use and expeditious delivery of information, will benefit investors. SIA, therefore, applauds NASD's efforts to update, streamline and simplify the existing technology underlying the public disclosure system.

SIA also commends NASD for undertaking to provide more comprehensive and constructive disclosures. SIA has long espoused the principles of fair and accurate disclosure to the investing public. Such disclosures, particularly those that relate to the individuals or firms with whom investors are contemplating doing business, are vital to the industry's ongoing commitment to strengthening public trust and confidence in our capital markets. As NASD correctly notes, however, the key challenge presented by this initiative is to ensure that any changes to the existing disclosure system are reasonable, well balanced and do not needlessly jeopardize the legitimate privacy interests at stake.

Unfortunately, many of the substantive expansions enumerated in the *Notice* fall short in several significant respects. In particular, we believe that the proposed expansions to the PD Program do not strike a fair balance between the need for quality disclosure on the one hand and legitimate privacy interests on the other. As detailed below, SIA has several concerns with the proposed expansions relating to CRD form filing information, individual licensing examination results, Form U-5 information and comparative data. Also problematic are the suggested "safeguards" purportedly designed to promote timely reporting of disclosure information by member firms and associated persons.

Though some will argue that increased public disclosure is better disclosure, we believe this to be a faulty premise. Certainly, we agree, as Justice Brandeis said, that "sunlight is the best disinfectant," but there are limits to the benefit of any policy tool, including one as sacrosanct as disclosure. Burying investors in the type of information contemplated within the *Notice*, however, does not help the investor or the thousands of honest men and women who work in this industry. What purpose does it serve to have innocent individuals explain and defend their records perpetually, or worse, lose business, because of unfounded allegations, outdated historical information, or erroneous filings that have since been removed from the PD Program?

As the *Notice* candidly acknowledges, "NASD currently provides an unparalleled amount of information about firms, markets and regulation to the public." To the best of our knowledge, no other profession must contend with the amount and type of public disclosure both under consideration and currently available about securities professionals: not physicians, lawyers, or accountants -- all of whom hold positions of public trust at least as important as that occupied by stockbrokers.

If implemented, NASD's proposed expansions would place within the public domain a trove of personal information about securities professionals, without regard for who is seeking the information or for what purpose the information is being sought.

Moreover, because current reporting requirements sweep in unsubstantiated and unproven allegations, irrespective of how frivolous or facially incorrect, we believe the PD Program will become flooded with irrelevant and confusing information. Indeed, we fear that these proposed expansions, coupled with the modifications to the Internet application,[2] will encourage fishing expeditions into private and potentially sensitive personal records of associated persons by anyone with Internet access – irrespective of motive or an existing business relationship.

Our concerns about the serious erosion of the privacy rights of securities professionals are heightened further still when we view the proposed expansions outlined in the *Notice* against the backdrop of NASD's recent curtailment of the expungement remedy. Notwithstanding strenuous industry objection, NASD submitted a rule filing that severely constrains the rights of associated persons to have meritless claims removed from their CRD records pursuant to an arbitration award. While we do not seek to recommence the debate over the wisdom or fairness of that development here, it is both appropriate and necessary to consider carefully how the recent contraction of the expungement remedy and the proposed changes to the PD Program will interact. We believe that these tandem changes will create a disclosure system that unfairly places securities professionals under the harsh glare of a universally accessible, 24-hour electronic bulletin board that indiscriminately records and displays sales practice complaints made against them – no matter how frivolous or unfounded – with little or no ability on their part to remove the stain of a baseless claim. Clearly, the effect of such a system would be unfair and unjust and we respectfully urge the NASD to reconsider its proposal.

Finally, we note that while we attempt to cover as many issues as possible in this letter, we do not view our comments as all-inclusive. Rather, they are intended to be the starting point of an evolving regulatory dialogue with the NASD as it moves forward with this initiative. Indeed, because the *Notice* lacks specificity about many of the proposed expansions, we urge the NASD to provide interested parties with further opportunity to review and comment upon each specific expansion once NASD has further considered and formulated the underlying details.

II. CRD Data and Other Form Filing Information

Among the most troubling aspects of the proposed expansions to the current public disclosure framework are those relating to the CRD data and form filing information. Specifically, NASD proposes to disseminate through the PD Program individual broker examination information, historical form filing information and Form

[2] The *Notice* contemplates expanding the PD Program to provide on-line for the first time "disclosure" type information, such as customer sales practice complaints and related litigation or arbitration.

U-5 information. We address each of these proposals separately below. We begin, however, with a brief review of the function and purpose of the CRD and PD Program.

A. The CRD System and PD Program

As noted above, the CRD database contains an "unparalleled" amount of information about member firms and their associated persons, unmatched by any other professional or commercial licensing system. This information is derived predominantly from data filed by broker-dealers, individuals and securities regulators through the Uniform Forms.[3] With respect to individuals, CRD contains not only registration and licensing information, but a host of personal data as well, including information about residential history; education and employment experience; regulatory and disciplinary history; criminal arrests and convictions; and personal financial information, such as personal bankruptcies, judgments and liens. CRD also contains information about customer-initiated complaints, related arbitrations and judicial proceedings.

With respect to customer complaints, the Uniform Forms require firms and associated persons to report alleged sales practice violations without regard to the apparent degree of seriousness, the veracity of the claim or its outcome. Consequently, the CRD system is replete with customer complaints that are without any factual or legal basis.[4]

In recognition of the far-reaching ramifications of the reporting requirements, as well as due process and privacy concerns, the CRD system itself permits varying degrees of access to this information, depending on who is requesting the information and for what purpose. Securities regulators, therefore, have the broadest range of access, while other parties, including member firms,[5] are provided only with specific subsets of that information. NASD's PD Program is the vehicle by which members of the general public access this subset of information.

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[3] The uniform forms include the Form U-4 (the Uniform Application for Securities Industry Registration), the Form U-5 (the Uniform Termination Notice for Securities Industry Registration), the Form U-6 (the Uniform Disciplinary Action Reporting Form), the Form BD (Uniform Application for Broker-Dealer), and the Form BDW (the Uniform Request for Broker-Dealer Withdrawal).

[4] SIA has long questioned the equity and value of a regulatory disclosure system that mandates the reporting of unproven and unsubstantiated allegations. Fundamental principles of fairness and due process mandate that individuals be not subject to wrongful consequences stemming from incorrect data contained within the CRD that is subsequently disseminated through the public disclosure program. The problem with the proposal, of course, is that the more information NASD intends to disseminate publicly, the greater the risk of potential harm to associated persons.

[5] For example, member firms conducting pre-employment screening cannot access CRD information about a potential candidate absent the candidate's express written consent.

Established in 1988, the PD Program was created with a goal of helping investors make informed decisions about the individuals and firms with whom they were contemplating doing business. Consequently, the PD Program provides investors with certain information about the professional background, regulatory and litigation history of NASD members and their associated persons, as well as allegations made against those parties.[6]

In determining what subset of CRD information is made public, the central premise underlying the PD Program has always been -- and should remain -- fair and *informative* disclosure that adequately balances investors' access to relevant information against the privacy rights of associated persons. For this reason, the PD Program traditionally has excluded certain types of potentially inflammatory or outdated information. For instance, although the CRD system collects verbal and written customer-initiated complaints reported during the lifetime of the registered person, the PD Program omits what is commonly referred to as "stale" customer complaints – that is, complaints more that 24 months old that were neither settled nor pursued in arbitration or litigation. Similarly, NASD currently does not release certain historical financial information for individuals, such as *satisfied* personal judgments or liens, or bankruptcies initiated over ten years ago.

B. Historical Form Filing Information

Given the differing roles and intended audiences of the CRD system and PD Program, it is extremely disconcerting that NASD would offer to publicly disclose much of the information currently warehoused in the CRD system. In particular, we are deeply concerned over the modification that would disseminate the historical form filings submitted to the CRD system, as well as the information contained in the specific filings. As stated in the *Notice*, this expansion would encompass not only disclosure events reported in *error,* but previously reported information that is no longer reportable, either due to a change in the question or a "sunset" provision within the question.

SIA believes such an expansion is not only unwarranted, it is highly prejudicial and counterproductive to the stated goals of enhanced pubic disclosure. Simply stated, increased disclosure does not necessarily equate to better disclosure in this case. No legitimate purpose is served by thrusting into the public domain historical information previously withheld as irrelevant, outdated and factually incorrect. Indeed, given the scope of the existing reporting parameters and the array of data currently captured within the CRD system,[7] we believe that disclosure of this type of information will inundate

[6] NASD's PD Program is described in Interpretive Material 83210-2 of the NASD Rules ('the Interpretation").

[7] It is worthy of mention that there is no limitations period after which unfounded accusations are automatically removed from the CRD system. Therefore, such accusations remain affixed to a registered person's permanent record unless and until expunged by court order.

investors with unhelpful and potentially misleading information. In the end, what is meant to improve investor protection will have the unintended consequence of diminishing the quality of the disclosure that will be provided to the public.

Equally compelling of course are the privacy interests of associated persons. Under the proposed historical filing expansions, the NASD would now release highly personal information previously recorded in the CRD system, irrespective of time lapsed or current status. For example, this change to the PD Program would now allow the general public to view historical financial information that is no longer applicable, such as personal judgments or liens originally reported to the CRD but subsequently satisfied. Also subject to public scrutiny is information relating to personal bankruptcy proceedings filed over a decade ago.

By disseminating historical information that no longer meets the existing Uniform Form reporting requirements, NASD also undermines both the spirit and letter of many of the questions that currently appear on these Forms -- questions that were the subject of careful deliberation and negotiation between NASD, the North American Securities Administrators Association ("NASAA"), and the industry. Having taken great care in developing questions that thoughtfully balance the competing disclosure and privacy interests, NASD has offered no reasonable justification for disregarding the current regime that is specifically designed to remove or make non-reportable on the Forms certain irrelevant or erroneous items.

As gatekeeper of the securities industry licensing database, NASD owes a duty of trust to the securities professionals who submit their personal information to the CRD system as a prerequisite to conducting business with the public. Therefore, it is incumbent upon NASD to manage the information contained within that database reasonably and responsibly. This means that NASD must take the necessary measures to safeguard against unnecessary disclosure and to ensure that the information it does release is relevant, accurate and respectful of the compelling privacy interests at stake. Given the current public and legislative concern for the privacy of personal information as reflected by the Gramm, Leach, Bliley Act, Regulation SP and the growing problem of identity theft, NASD's proposal is oddly out of step and ignores these important concerns.

We note that the NASD does not specify whether the proposed historical filing expansions will apply to information about persons formerly associated with a member firm. Currently, NASD releases information about persons who have been associated with an NASD member within the preceding two years. NASD adopted the two-year limitation period because it believed it inappropriate to continue public disclosure

indefinitely for individuals who choose to leave the securities industry.[8] Moreover, a two-year period coincides with the period in which an individual can return to the industry without being required to re-qualify by examination. We urge NASD to continue this policy, which we believe achieves the necessary balance between the investor's interest to easily obtain information about a former associated person against that person's desire to privacy once he or she left the securities industry.

C. Individual Exam Information

SIA also finds problematic the proposed changes relating to individual licensing examination information. As stated in the *Notice*, NASD intends to publicize a registered person's examination results (pass or fail), the type of exams requested, as well as the number and type of examinations taken and not taken by a registered person. SIA objects to this proposed expansion on several grounds.

As a preliminary matter, we disagree with the proposition that public display of individual examination information (perhaps 5, 10 or 20 years old) will somehow advance the interests of investor protection. Absent full explanation of surrounding facts and circumstances, we believe that this type of disclosure at best will provide investors will a false sense of security. At worst, it will prove harmful to existing and prospective business relationships by unfairly calling into question a person's competence or ability based on standardized test scores that may have been recorded years ago.

Not only are examination results increasingly irrelevant as time goes by, disclosure of this type of information undermines the NASD's industry-wide Continuing Education Program,[9] which is designed to ensure that registered persons undergo training and education on both general sales practice issues and topics specific to the particular services and products provided by them.

Moreover, we question the utility and the fairness of allowing the general public to peer so closely into the lives of registered persons. Information relating to whether a

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[8] SEC approved in 2000 changes to NASD IM-8310 to allow NASD to release information about persons formally associated with a member for a two-year period following termination of their registration with the NASD.

[9] NASD's Continuing Education Program is a mandatory two-part, industry wide program that is comprised of the Regulatory Element and the Firm Element. The Regulatory Element requires registered persons to complete a computer-based training program on the 2nd anniversary of their registration, and every three years thereafter on various topics, including those relating to sales practices, customer communications, compliance, ethics, and other subjects pertinent to conducting a securities business. The Firm Element requires broker-dealers to provide ongoing training, tailored specifically to the products and services they provide. Such training must be reviewed and updated at least annually, and must also focus specifically on supervisory training needs. Compliance with Regulatory Element and Firm Element requirements is evaluated as part of the on-site examinations that are conducted by the self-regulatory organizations.

person passed or failed an exam or chose to take a particular securities exam is inherently private and cannot be treated cavalierly.

In short, associated persons do not forswear their privacy rights and agree to public scrutiny of every aspect of their professional and personal lives upon entering the securities business. Rather, the rules of the road are reasonable disclosure of important and meaningful information that helps investors make informed decisions about the people with whom they want to enter into a business relationship. Disclosure of examination information serves no legitimate purpose and has the potential to do considerable harm to both business and reputation. In light of the forgoing, we cannot support this proposed expansion and respectfully request it be abandoned.

D. Form U-5 Information

NASD also proposes to disclose Form U-5 information (including date and reason for termination) immediately upon filing, rather than upon the registered person's re-registration with another firm. The *Notice* states that NASD does not intend to undertake any Form U-5 disclosures until it has modified the Form U-5. SIA strongly urges NASD to defer any action with regard to Form U-5 information until there is a nationwide uniform standard for qualified immunity to firms for good faith disclosures on the Form U-5.

With increased frequency, firms are faced with an untenable dilemma when fulfilling their Form U-5 reporting obligations. On the one hand, firms must satisfy their regulatory obligations to file a Form U-5 which calls for accurate disclosure of even suspected misconduct by a former employee. This reporting obligation extends to post-termination events, such as customer complaints or settlements that may not arise until well after the employee left the firm. Failure to complete the Form U-5 fully and accurately can lead to serious consequences for firms, including disciplinary sanctions and civil liability. On the other hand, including negative language in a Form U-5 increases the risk of a potential defamation claim.

An important proposed rule change by the NASD to strengthen investor protection has been pending before the SEC for several years now. Proposed new NASD Rule 1150 would establish a national, uniform standard of qualified immunity from arbitration proceedings filed against member firms with respect to statements they make on Forms U-4 and U-5. Keeping bad actors out of the securities industry is vital to public trust and confidence in the integrity of the securities markets, and ensuring that the information on Form U-5 is as complete and forthcoming as possible is an important ingredient in screening out undesirable individuals from securities employment.

This issue is important to broker-dealers as a matter of simple investor protection. Currently, employees who are terminated by firms for regulatory violations are able to use the threat of a defamation action as leverage to try to get the firm to dilute any

statement about possible regulatory violations committed by the terminated employee. Firms that ignore such pressure then face the litigation risk that an arbitration panel might not properly understand or apply the law of defamation.

SIA believes that developing an appropriate level of protection for U-5 statements is an important investor protection issue that should be resolved promptly. In this spirit, we have stated our support for the nationwide qualified immunity standard proposed by the NASD. SIA therefore reiterates its support for the nationwide qualified immunity standard, which we believe will help strike an appropriate balance between encouraging candid and accurate disclosure by member firms on the Form U-5 and allowing member firms to defend themselves against frivolous actions alleging that statements made on such Forms are defamatory. In light of the foregoing, we believe that NASD should postpone any action with regard to Form U-5 information until the SEC has approved a qualified immunity standard, at which time the NASD should provide the public with an opportunity to review and comment upon the proposed modifications.

III. Comparative Information

SIA also is concerned by NASD's proposal to place CRD information "in context" by including comparative statistics against which a particular broker's or firm's complaint record may be measured. NASD intends to compile and release various statistical information, such as total number of active brokers or firms, industry averages, as well as the average number of disclosure events by category for a particular broker or firm. While SIA recognizes that truly comparative information could be a useful complement to existing disclosures, we do not believe that offering this type of raw data, particularly in the area of customer complaints, is helpful. On the contrary, we think it will only serve to confuse or potentially mislead the general public.

As with the proposed historical CRD information, here too the difficulty lies with the CRD system itself, which captures allegations of sales practice violations, irrespective of how old, frivolous, or facially incorrect. Since NASD will simply mine the data from the CRD system, we are concerned that the resulting statistical picture could be extremely skewed depending upon the individual facts and circumstances of each complaint. Consider, for example, a broker who, through no fault of his own, gets named in a number of complaints as a result of a product failure. Or, the broker who has the misfortune to have his client list mined by an overly aggressive claimants' lawyer who is engaged in unprofessional champerty. A simplistic statistical comparison would paint an unfairly negative picture of both brokers, neither of whom has a public forum to correct the resulting misimpression. Moreover, depending on the size of the branch office, or even the firm, the potential for overstating the number of reportable events can be significant, thereby unfairly prejudicing firms that are diligent in their reporting obligations. For these reasons, we cannot support this proposed modification as well.

IV. Additional Safeguards

In addition to the substantive expansions detailed above, SIA also has several concerns regarding the various "safeguards" enumerated within the *Notice,* which NASD claims will improve the integrity of the CRD data. These include, among other things, creation of a new registration status called "Inactive Disclosure Review," and construction of a public NASD web page for attorneys and investors.

A. "Inactive Disclosure Review" Status

NASD proposes to create a new registration status, which would automatically render a person's registration inactive whenever a member of the NASD staff concluded that such person failed to (i) meet a reporting requirement or (ii) respond timely to a staff request for disclosure or related information. Once a person's registration status is deemed "Inactive Disclosure Review," that person would be prohibited from conducting any sales or other regulated activity until he or she satisfied the reporting obligation or responded to the staff's request.

This proposal is seriously flawed on several fronts. First, this new registration status is both heavy handed and unnecessary in light of NASD's proposed imposition of automatic fines on late Form U-4 or U-5 filings. Second, we are deeply troubled that NASD would consider *automatically* rendering a person's registration inactive – and thereby deprive them of their livelihood – without more thought to the types of safeguards needed to ensure proper notice and review. For example, an inadvertent late Form U-4 or U-5 filing (or, just as likely, a mistake by a NASD staff member) could easily result in a broker unwittingly conducting securities transactions without a license. This in turn raises the corollary risk of investors asserting rescission claims of otherwise valid transactions under state Blue Sky laws. Third, given the ongoing debate between NASD and registration personnel surrounding what constitutes a new reportable event, we find this proposal to be unreasonable and extremely unfair. Finally, contrary to NASD's assertion that the proposed modifications are not intended to "increase member firms' compliance and reporting obligations," this new status would present a significant challenge to registration and compliance departments, who will have to closely monitor this new registration status. Indeed, we think that this new status, coupled with the proposed attorney website, is a Pandora's box that is likely to do more harm than good. In the end, both NASD and member firms will be required to build an infrastructure to track, review and investigate, not only those reportable events of which they become aware in the normal course of business, but inaccurate allegations by confused investors or their counsel that a particular claim should have been reported on the Uniform Forms.

B. NASD Web Page for Attorneys and Investors

Equally problematic is the proposed website through which "investors, attorneys or others can report instances where they believe a particular disclosure event that is required to be reported . . . has not been reported." SIA believes such a website is not only ripe for abuse, it will force firms and the NASD to respond to inaccurate claims by confused investors who mistakenly believe that claims or complaints should have been, but were not, reported on the PD Program. As stated above, this will require firms to expend significant administrative and economic resources to ensure that a proper infrastructure is in place to monitor, review and respond to these claims. We are also concerned that the website will unwittingly invite customers to recast their complaints for strategic purposes (*i.e.*, in order to inflict maximum damage on an associated person's CRD record) rather than simply reporting their alleged complaint. In light of the foregoing, we cannot support either proposal at this time, but would be willing to work with the NASD to reach a workable solution that advances the objectives of these proposed modifications.

V. E-Mail Notification of Public Disclosure Report Updates

NASD also solicits comment on whether it should add a functionality to the PD Program that would allow any user of the PD Program to request an e-mail update of "significant changes" that occur to the information previously provided to the user through the PD Program. SIA agrees in principle to a mechanism that provides meaningful information updates, but several of the implementation details need further refinement. For example, the *Notice* does not identify what constitutes a "significant change." Often a single occurrence will result in multiple disclosures on the Uniform Forms. Therefore, it is unclear if NASD intends to provide separate and potentially redundant notifications stemming from a single event. In addition, it is unclear at what point the e-mail notification will be sent and whether NASD will conduct any review to ferret out potential erroneous or duplicative filings.

VI. Conclusion

SIA appreciates the opportunity to provide comments on NASD's public information review initiative. We commend NASD for its efforts to undertake this comprehensive review and echo the principle that any effort to broaden the scope of public disclosure must be tempered by fundamental privacy considerations. We cannot, however, support many of the proposed modifications, as we believe them to be unjustified, irrelevant and contrary to the stated objectives of enhanced, quality disclosure of meaningful information. Moreover, when viewed in light of NASD's recent curtailment of the expungement remedy, many of the proposed changes to the PD Program will create an unfair disclosure regime that will force associated persons and their employers to operate in an atmosphere tainted by baseless claims of wrongdoing that remain affixed to their permanent records absent court ordered expungement.

We hope this letter has been helpful and look forward to working with NASD to craft practical solutions that meet the important goals of the proposed expansions. If we can provide any further information or clarification of points made in this letter, please contact me or Amal Aly, Associate General Counsel, at (212) 618-0568.

Sincerely,

Stuart J. Kaswell
Senior Vice President and
General Counsel

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