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Broker-Dealer Update

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FINRA Continues to Focus on BrokerCheck and Propose More Stringent Expungement Standards

Over the past several years, the Financial Industry Regulatory Authority (FINRA) has made a number of controversial proposals intended to increase the amount of information available to investors about their brokers and broker-dealers and to inform investors as to how they can access that information on FINRA's BrokerCheck (BrokerCheck).¹ As part of that initiative, FINRA recently received approval to require broker-dealers to include a link to BrokerCheck on their websites. FINRA also has been working to impose more stringent expungement standards through which brokers can have events removed from their BrokerCheck.

FINRA Receives Approval to Require Broker-Dealers to Link to BrokerCheck

In October 2015, FINRA received approval from the Securities and Exchange Commission (SEC or Commission) regarding its proposal to require "each of its member's Web sites to include a readily apparent reference and hyperlink to BrokerCheck on: (1) [t]he initial Web page that the member intends to be viewed by retail investors; and (ii) any other Web page that includes a professional profile of one or more registered persons who conducts business

with retail investors" (BrokerCheck Amendments).² Broader BrokerCheck Amendments had been proposed and withdrawn by FINRA in 2013 after they were heavily criticized by the industry.³ FINRA noted that it "expects member firms to supervise and review for compliance Web sites operated by a registered representative that promote the business of the member and, that for purposes of Rule 2210, views such Web sites to be Web sites of the member firm."⁴ Although the requirements do not apply to third-party Web sites, FINRA added that "hyperlinks and references to BrokerCheck would be required for all Web pages where a registered person's profile information appears, including Web pages on the member's Web site and Web pages on a branch office's Web site."⁵

The Commission noted in its approval order that it "appreciates FINRA's continuing efforts to enhance BrokerCheck and encourages FINRA to continue improving it and to consider the suggestions made by commenters that could result in increased use of BrokerCheck by the investing public."⁶ Three of the comments that the proposal received were to include (1) "deep links" to individual broker profiles, such as those that were proposed and withdrawn by FINRA in 2013, (2) hyperlinks to BrokerCheck on third-party Web sites, and (3) additional information on BrokerCheck that is in the FINRA Central Registration Depository System (CRD) but not currently publicly disclosed. FINRA noted in the

approval order that “it will continue to monitor investors’ awareness and use of BrokerCheck and consider whether to pursue further rulemaking... [and that] it regularly assesses the BrokerCheck program and may consider including additional information in BrokerCheck at a later time.”⁷ Both the Commission and FINRA statements seem to imply that the BrokerCheck Amendments are only the first tranche of amendments and that we should expect additional amendments to BrokerCheck in the coming months and years.⁸

The BrokerCheck Amendments will be effective no later than 180 days after FINRA publishes a regulatory notice, which must be issued by December 7, 2015.

FINRA to Propose Further Limitations on Expungement Process

In conjunction with FINRA’s efforts to increase investors’ awareness of BrokerCheck, FINRA also is making it more difficult for brokers to have customer complaints removed from their BrokerCheck via the expungement process. The FINRA Rules dictate the process through which a broker may have a customer complaint expunged from his or her record including that an arbitrator must make a finding on one of four permissible grounds to order expungement. Due, at least in part, to criticism of the expungement process by certain studies and lawmakers on Capitol Hill, FINRA has recently considered, proposed, and adopted a number of restrictions on expungement of broker records. For example, in 2014, FINRA adopted amendments to FINRA Rule 2081 (Expungement Amendments) that “prohibit member firms and associated persons from conditioning or seeking to condition settlement of a dispute with a customer on, or to otherwise compensate the customer for, the customer’s agreement to consent to, or not to oppose, the firm’s or associated person’s request to expunge such customer dispute information from [BrokerCheck].”⁹ Following the Expungement Amendments, the FINRA Board of Governors recently voted to authorize FINRA “to file

with the SEC proposed amendments to ... the Code of Arbitration Procedures ... [that] would codify the best practices from the Expanded Expungement Guidance [(Guidance)] ... that was issued as a notice to parties and arbitrators in 2013.”¹⁰

The Guidance provides that expungement is “an extraordinary remedy that should be recommended only under appropriate circumstances ... when it has no meaningful investor protection or regulatory value.”¹¹ The Guidance also provides, among other things, that:

- customers and their counsel should be permitted to attend and participate in expungement hearings;
- customers should be provided notice that a broker is seeking expungement of a customer’s claim;
- arbitrators should review a copy of the requesting broker’s BrokerCheck report in connection with an expungement request;
- arbitrators should inquire as to whether a broker has ever been denied expungement in another case, in which case expungement in the immediate case should be denied;
- arbitrators should include a complete explanation as to why expungement should be granted, including information relied upon in making the determination; and
- arbitrators should take into consideration whether the person seeking expungement was ordered to make a payment in connection with an underlying proceeding or if a settlement was conditioned upon the settling party not opposing a request for expungement.

These proposals will be filed with the Commission in the coming months and will likely receive a host of comments.

Future Expansion of BrokerCheck and Restrictions on Expungement

Brokerage firms and brokers should anticipate additional proposals to expand both the breadth of information contained in BrokerCheck and the investor interest in BrokerCheck over the coming

months and years as investors and Capitol Hill lawmakers demand increased access to information about persons entrusted with investor funds. As customers become more aware of BrokerCheck, it may encourage customers to make more complaints, but at the same time FINRA may continue to make expungement of customer complaints more difficult.

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NOTES

- ¹ BrokerCheck is publicly available on the FINRA Web site and provides investors with an overview of their brokers and broker-dealers. For brokers, an investor can view, among other things, the brokers' current and past employers, registrations, states with which they are licensed, and certain disciplinary events, including customer complaints, arbitrations, and regulatory and criminal actions. For broker-dealers, investors can view, among other things, the broker-dealers' self-regulatory organization (SRO) memberships, types of business the firm engages in, direct and indirect owners, certain business relationships, and certain disciplinary events, including certain criminal, civil, regulatory, and financial actions. Disciplinary events can only be removed from a broker's BrokerCheck if they are formally "expunged."
- ² See Securities Exchange Act Release No. 76105 (Oct. 8, 2015) (SR-FINRA-2015-022). FINRA also noted that the requirements will not apply to "a member that does not provide products or services to retail investors, or to a directory or list of registered persons limited to names and contact information." See *id.*

- ³ See Securities Exchange Act Release No. 68700 (Jan. 18, 2013) (SR-FINRA-2013-002) (proposing requirement to "include a prominent description of and link to FINRA BrokerCheck, as prescribed by FINRA, on [member] websites, social media pages and any comparable Internet presence and on Web sites, social media pages and any comparable Internet presence relating to a member's investment banking or securities business maintained by or on behalf of any person associated with a member"). See also Securities Exchange Act Release No. 69440 (Apr. 24, 2013) (SR-FINRA-2013-002) (withdrawing hyperlink proposal).
- ⁴ See Securities Exchange Act Release No. 76105 (Oct. 8, 2015) (SR-FINRA-2015-022).
- ⁵ See *id.*
- ⁶ See *id.*
- ⁷ See *id.*
- ⁸ FINRA also has launched a multimedia advertising campaign intended to raise awareness of BrokerCheck and to encourage investors to research their brokers and brokerage firms before investing with them. FINRA Chairman and Chief Executive Officer, Richard G. Ketchum, stated that "BrokerCheck is a key component to FINRA's ongoing efforts to help investors make informed choices about brokers and brokerage firms... and we hope this campaign will help." See FINRA News Release: "FINRA Launches National Ad Campaign Promoting BrokerCheck" (June 1, 2015). Likewise, FINRA also recently introduced a redesigned BrokerCheck intended to better highlight information about brokers.
- ⁹ See FINRA Regulatory Notice 14-31: "SEC Approves FINRA Rule 2081 Regarding Prohibited Conditions Relating to Expungement of Customer Dispute Information" (July 2014).
- ¹⁰ See Update: FINRA Board of Governors Meeting (Sept. 17, 2015).
- ¹¹ See FINRA Notice to Arbitrators and Parties on Expanded Expungement Guidance (Updated Sept. 2015). High Hopes: Measuring the Volcker Rule Proprietary Trading Provisions Against FSOC and Other Recommendations.

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