

State of Vermont
Department of Financial Regulation
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June 25, 2021

Jennifer Piorko Mitchell
FINRA; Office of the Corporate Secretary
1735 K Street, NW
Washington, DC 20006-1506

Re: Diversity and Inclusion – Regulatory Notice 21-17

To whom it may concern,

On behalf of the Vermont Department of Financial Regulation (the “Department”), thank you for the opportunity to comment on FINRA’s request for comment dated April 29, 2021.

To begin, the Department firmly supports FINRA’s effort to remove barriers to participation in the broker-dealer industry and to open the industry to a more diverse and inclusive population. This is challenging work, but vital. We are gratified that the FINRA Board is so clearly supportive of these efforts, and the effort to better engage traditionally underinvested communities.

Question 3 – What, if any, FINRA operations and administrative processes have a disparate impact on individuals in the broker-dealer industry (on the basis of national origin, language, age, gender, race, color, ethnicity, socioeconomic status, religion or spiritual practice, disability, sexual orientation, gender identity, family structure or veteran status) or discourage participation in the broker-dealer industry?

The Department would suggest that FINRA’s membership and reporting requirements are more onerous than necessary to fully protect consumers and may differentially deter applications from historically marginalized groups. Moreover, these requirements are in growing tension with state-law expungement statutes in Vermont and elsewhere, which are increasingly likely to provide expungement for a broad range of convictions after a period of years. As one example, Vermont’s expungement regime has been liberalized substantially over the past several legislative sessions, each time easing access to expungement. Many states have done likewise and more will follow as more empirical studies suggest that recidivism among those with expunged convictions is quite low and that expungement serves important social-justice and equity goals.¹

¹ See, e.g., Prescott, J.J. & Starr, Sonja B., “Expungement of Criminal Convictions: An Empirical Study,” 133 Harv. L. Rev. (2020); available at <https://repository.law.umich.edu/articles/2165>.



FINRA currently bars from membership any individual who has been convicted of any felony or certain misdemeanors in the past ten years, under authority granted to FINRA under Section 15A(g)(2) of the Securities Exchange Act of 1934. This bar applies to those with certain felony and misdemeanor convictions for a period of ten years following the conviction. It is our understanding that FINRA does allow disqualified individuals to petition for waivers, and these are occasionally granted, often with an emphasis on heightened supervision of the petitioner by another registrant in the same office. This flexibility is warranted and appropriate given the current regime. However, we believe that FINRA could do more to encourage participation from historically marginalized groups, while still protecting the public, by changing the disclosure requirements on Form U4 and taking other steps outlined below.

Form U4, FINRA’s standard registration form for investment professionals, requires reporting of all felony convictions and charges against an applicant “ever.” See Form U-4, Question 14A(1) (“Have you ever: (a) been convicted of or pled guilty or [no contest] . . . to any *felony*? (b) been *charged* with any *felony*?”) (emphasis in original). Form BD requires similar disclosures.

Current FINRA guidance suggests that a Vermont applicant whose convictions have been expunged should still answer “yes” to these questions, but that FINRA might grant a request that the answers not be publicly available on the applicant’s record. See *Form U4 and U5 Interpretive Questions and Answers*, Q2.² As a matter of state law, however, Vermont’s expungement statute has the effect that a person with an expungement “shall be treated in all respects as if she had never been arrested, convicted, or sentenced.” 13 V.S.A. § 7606(b)(1). Accordingly, an applicant might reasonably believe that a Vermont expungement operates as a matter of state law to mean that both the conviction and the charge should not appear anywhere, including on the applicant’s U4.

Vermont’s expungement law, like similar laws in other states, is therefore in some tension with these FINRA applications and guidance (and SEC rules that are to similar effect) and that tension likely causes, at best, applicant confusion. At worst, it may deter from applying Americans with prior arrests and convictions. These are citizens who, statistically, are likely to belong to historically marginalized groups. The current state of affairs certainly sends a signal – particularly to those who are new to the investment world – that those with virtually any prior involvement with the law need not apply.

However, as noted above, there is little connection between “stale” convictions and consumer risk. There is even less connection between a prior arrest that did not result in a conviction and consumer risk. These are, simply put, matters that could be eliminated from consideration in the licensing process, or their importance substantially diminished, without any meaningful increase in risk to consumers.

² <https://www.finra.org/sites/default/files/Interpretive-Guidance-final-03.05.15.pdf>



Organizations similar to FINRA – notably the Federal Deposit Insurance Corporation, which sets employment standards for insured depository institutions – have liberalized their reporting requirements with respect to both arrests and expunged convictions.³ Specifically, FDIC’s 2020 rulemaking made clear neither expunged convictions nor uncharged arrests are a grounds for denying employment. As more and more states, like Vermont, move to expand access to expungement, and as the discriminatory consequences of mandatory reporting of arrests and stale convictions become clearer, this approach makes good sense.

CONCLUSION

As many institutions, like FINRA, confront past and present discrimination and exclusion, it is vital that all those who “hold the keys” to professional advancement be mindful not to inadvertently enshrine and amplify the effects of past discrimination.

Accordingly, the Vermont Department of Financial Regulation suggests that FINRA narrow the matters reportable on forms U4, U5, and BD, in one or all of the following ways:

- 1) Limit the age of offenses that must be reported;
- 2) Eliminate the requirement to report uncharged arrests and charges that did not result in convictions;
- 3) Limit the types of reportable offense to include only those involving dishonesty;
- 4) Expressly state – either in guidance or on the forms themselves – that expunged offenses need not be reported; and/or
- 5) Allow for permanent deletion of newly expunged offenses from professional records.

Thank you for the opportunity to comment on this important initiative and thank you for your work in this area.

Sincerely,



Michael S. Pieciak
Commissioner of Financial Regulation
State of Vermont

Cc: William Carrigan, Deputy Commissioner of Securities

³ See, e.g., 85 Fed. Reg. 51321, § 303.23 (stating expressly that, for FDIC application purposes, neither expunged convictions nor arrests not resulting in conviction must be reported). Available at <https://www.fdic.gov/news/board/2020/2020-07-24-notational-fr-a.pdf>.

