

July 30, 2010

VIA ELECTRONIC DELIVERY (pubcom@finra.org)

Marcia E. Asquith
Senior Vice President and Corporate Secretary
Office of the Corporate Secretary
FINRA
1735 K Street, N.W.
Washington, DC 20006-1500

**Re: FINRA Regulatory Notice 10-25; Registration and Qualification
Requirements for Certain Operations Personnel**

Dear Ms. Asquith:

The Investment Program Association (“IPA”)¹ appreciates this opportunity to respond to the request of the Financial Industry Regulatory Authority, Inc. (“FINRA”). On behalf of the IPA, we commend FINRA in its efforts to ensure the highest qualifications and educational standards of certain Operations Professionals as more fully described and discussed in Regulatory Notice 10-25 (“RN 10-25”), dated May 2010.

We also would like to provide our comments seeking clarification on the impact of RN 10-25 on FINRA Rule 2310 Direct Participation Programs (“Rule 2310”). Specifically, we respectfully request that FINRA clearly state that the salaries of those individuals requiring registration as Operations Professionals under RN 10-25 be categorized as non-transaction-based-compensation. As discussed below, we are also concerned that

¹ The Investment Program Association (IPA) was formed in 1985 to provide the direct investment industry with effective national leadership. Over the years, the IPA has successfully championed the growth of these investment products which have increased in popularity with financial professionals and investors alike. Today, the IPA is the leading advocate for the inclusion of direct investments in a diversified investment portfolio. The mission of the IPA is to advance the unique benefits of direct investments.

ambiguities in Rule 1230(b)(6) could result in certain individuals, not employed by a FINRA member, becoming subject to FINRA registration requirements as Operations Professionals.

It is important to note that Notice to Members 04-07 (“NTM 04-07”) asked for comment relating to fees and expenses in public offerings of real estate investment trusts; direct participation programs, including commodity pools; and closed-end funds.

NTM 04-07 stated that underwriting compensation may not exceed 10 percent of the gross proceeds of an offering, regardless of the source from which it is derived. NTM 04-07 further states that “employees of a member engaged in wholesaling functions will always be deemed to be engaged in underwriting activities.”

Regulatory Notice 08-35, which was issued to provide interpretive guidance relating to what was then Rule 2810 and is now Rule 2310 (“RN 08-35”), further clarifies the concepts in NTM 04-07 by stating that, generally, payments to registered persons will be included as underwriting compensation while payments to unregistered persons will not be included as underwriting compensation. RN 08-35 discusses the exception for non-transaction based compensation to registered persons “whose job functions in connection with the offering are solely and exclusively clerical or ministerial” or whose sales activities in connection with the offering “are *de minimis* and incidental to their clerical or ministerial job functions.”

Our primary concern is that the remuneration received by those individuals affected by the proposed rule may be included in the calculation of the ten percent limitation in which “all items of compensation from whatever source, including compensation paid from offering proceeds and in the form of ‘trail commissions,’ payable to underwriters, broker-dealers, or affiliates thereof exceeds an amount that equals ten percent of the gross proceeds of the offering...” (Rule 2310(b)(4)(B)(ii)). As further discussed below, we respectfully request that the remuneration of individuals to be licensed as Operations Professionals be included in the exception discussed in RN 08-35.

It should be noted that the first two paragraphs on page six of RN 10-25 state that an “Operations Professional would not be expected to know the same level of detail about the products and markets as a product specialist or representative selling products to

customers” and further that Operations Professionals would need to be able to demonstrate broad-based knowledge regarding certain functions required to support a broker-dealer’s business.

Further, in a presentation by FINRA’s Corporate Finance Department, on October 29, 2008, FINRA stated that there are two instances in which non-transaction-based-compensation may be excluded from underwriting. The first instance (also discussed in RN 10-25) is when personnel such as those involved in legal, compliance, and internal audit limit their functions are solely and exclusively related to compliance responsibilities and they are not engaged in soliciting, marketing, distributing or selling securities. Second, when soliciting, marketing, distributing or selling activities are *de minimis* and incidental to their clerical or ministerial functions, non-transaction-based-compensation may be excluded from underwriting compensation. (See Slide 7 of the Corporate Finance Department’s Power Point presentation, dated October 29, 2008.)

Please note that there are other positions which, by their nature, are similar to the three mentioned personnel classifications above (legal, compliance, and internal audit). These include, but are not limited to, operational, financial, and technical support not engaged in soliciting, marketing, distributing or selling securities.

While Rule 2310(b)(4)(C)(ii)(c)(2) excepts from the ten percent limitation “a registered representative whose functions in connection with the offering are solely and exclusively clerical or ministerial,” our concern is that those employees who would be required to register as Operations Professionals would be considered more than exclusively clerical or ministerial and thus subject to the ten percent compensation cap. In seeking clarification, we suggest that, in addition to the legal, compliance, and internal audit classifications, there should be added a blanket exception from underwriting compensation for those individuals licensed as Operations Professionals pursuant to proposed Rule 1230.

We appreciate these clarifications and respectfully request that FINRA clearly state that the salaries of those individuals requiring registration, as discussed in RN 10-25, be categorized as non-transaction-based-compensation.

Finally, it should be noted that we believe there may be an ambiguity in proposed Rule 1230(b)(6)(A)(ii), which requires registration for “supervisors, managers or other persons responsible for approving or authorizing work in direct furtherance of the covered functions in paragraph (b)(6)(B) ... including work of other persons in the covered functions paragraph of (b)(6)(B).” “Work of other persons” could include others not employed by a FINRA member such as third party outside vendors resulting in the unintended consequence of jurisdictional overreach by FINRA; therefore, we respectfully request that the words “work of other persons” be deleted in the final rule. Further, we believe that paragraphs (b)(6)(B)(vi), (vii) and (viii), may also have the unintended consequence of requiring those individuals who may not be employed by the FINRA member² to become subject to FINRA jurisdiction; therefore, we believe that further clarification is required limiting the scope of the proposed rules to only those individuals directly employed by the FINRA member.

We appreciate the opportunity to comment on RN 10-25. If you have any questions concerning these comments, or would like to discuss these comments further, please feel free to contact me at the number above.

Respectfully submitted,



Kevin M. Hogan
Executive Director
Investment Program Association

² It should be noted that paragraph (vi) covers the “capturing of business requirements for sales and trading systems and any other systems related to the covered functions, and validation that these systems meet such business requirements,” while paragraph (vii) includes as a covered function activities “defining and approving business security requirements and policies for information technology (including, but not limited to, systems and data,” and paragraph (viii) covers “defining information entitlement policy in connection with the covered functions.”