Proposed FINRA Rule 4110(c)(2) would prevent carrying, clearing and (k)(2)(i) member firms from withdrawing capital that would reduce the member's equity (in any rolling 35-day calendar-day period, on a net basis) by more than 10 percent of the member's excess net capital without prior written approval of FINRA. This provision would be a new requirement for non-NYSE members.

Non-NYSE member firms currently enjoy the right to withdraw up to $500,000 per quarter without prior written approval of FINRA. This $500,000 de minimus exception would apparently be eliminated under the proposed Rule 4110(c)(2). This elimination may be unduly burdensome to smaller carrying, clearing and (k)(2)(i) member firms in the routine conduct of their business, particularly in the case of member firms operating as partnerships and LLCs.

For example, a (k)(2)(i) member firm operating as an LLC is subject to a minimum capital requirement of $100,000. The member firm's commission business is sufficient to cover normal monthly expenses, keeping its net capital consistently stable around $200,000. Occasionally, the member firm closes a direct participation program which results in about $1,000,000 of extra fee revenue at closing. The firm desires to pay out 100% of the $1,000,000 extra fee revenue to its LLC members (some of whom view it as compensation for their efforts in closing the direct participation program). Generally, the compensation paid to partners and LLC members is characterized for accounting purposes as a capital withdrawal (though it might be characterized under tax language as a "guaranteed payment to partners"). Under current rules, the LLC member firm can pay out up to $500,000 per quarter without prior written approval of FINRA. It therefore requires two quarters and two payments to distribute the entire $1,000,000 to its LLC members.

Under proposed Rule 4110(c)(2), following closing of the direct participation program, member net capital would be $1,200,000, and excess net capital would be $1,100,000. Without prior FINRA written approval, the firm would apparently be limited to a payout (withdrawal of capital) of $110,000 in the first 35 days, $99,000 in the second 35 days, $89,100 in the third 35 days, $80,190 in the fourth 35 days, $72,171 in the fifth 35 days, $64,954 in the sixth 35 days, $58,458 in the seventh 35 days, $52,613 in the seventh 35 days, $47,351 in the eighth 35 days, $42,616 in the ninth 35 days, $38,354 in the tenth 35 days, $34,519 in the eleventh 35 days, $31,067 in the twelfth 35 days, $27,960 in the thirteenth 35 days, $25,165 in the fourteenth 35 days, $22,648 in the fifteenth 35 days, $20,383 in the sixteenth 35 days, $18,345 in the seventeenth 35 days, $16,510 in the eighteenth 35 days, $14,859 in the nineteenth 35 days, $13,373 in the twentieth 35 days, $12,036 in the twenty-first 35 days, and $7,328 in the twenty-second 35 days. In summary, under proposed Rule 4110(c)(2), the member firm would either be forced to involve FINRA in the routine distribution of excess net capital, or alternatively take 22 payments over a period of more than 2 years to accomplish the same objective.

It is my view that "excess net capital" is not "excess" if the firm is not allowed to withdraw it. It is also my view that FINRA does not want to be in the business of providing prior written approval of routine withdrawals of excess net capital.

It is apparent that the existing $500,000 per quarter safe harbor for the withdrawal of excess net capital should be continued to avoid unnecessary FINRA involvement in routine withdrawal of excess net capital by its smaller (k)(2)(i) member firms.

Respectfully,

Stephen R. Kinkade CPA
Financial & Operations Principal