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Ms. Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1700 K Street, N.W.
Washington, D.C. 20006

Re: FINRA Regulatory Notice 25-05
Outside Activities of Associated Persons

Dear Ms. Piorko Mitchell:

I take this opportunity to provide comments on FINRA's proposed new rule regarding the need to reduce unnecessary burdens and simplify requirements regarding Associated Persons' Outside Activities as described in FINRA Regulatory Notice 25-05 dated March 14, 2025.

Commentor's Background

I am an attorney practicing in the securities industry for over 35 years. For over 20 of those years, I served as general counsel and intermittently as the chief compliance officer for a dually registered broker/dealer and investment adviser. Since 2009, I have been in private practice representing multiple broker/dealers, registered investment advisers (both federal and state) and their associated persons and adviser representatives, with emphasis on providing legal and regulatory advice and guidance to my clients. I have had numerous occasions to assist my clients' in determining the applicability of Rules 3270 and 3280 to their associated persons' activities, as well as handling FINRA inquiries and investigations into potential violations of those rules. I am therefore conversant in the topics addressed in RN 25-05 and, I believe uniquely qualified to comment on FINRA's latest proposal.

Comments

At the outset, FINRA's position in identifying "outside activities" is based upon the premise that any activities in which an associated person participates, is tangential or ancillary to the associated persons' activities for their member firm, which is presumed to be their primary focus. While understanding that FINRA's primary mission and goal is to regulate the securities industry and its member firms and associated persons, (both registered and unregistered), the greater world of securities and investment activities takes place in areas outside of FINRA's jurisdiction and stated mission, including registered investment advisers.

Since the introduction of on-line and discount broker/dealers, the compensation of registered representatives has been altered and shifted in ways not previously seen. In order to remain competitive, BD registered representatives have been required to significantly reduce transaction commissions, and/or expand their suite of offerings to provide additional products and services such as investment advice, insurance, (fixed) annuities and non-traditional investments (i.e., real estate). As such, many associated persons' primary sources of income may not be derived from their work as associated persons of their member firms. I wholly agree that a member firms' supervisory program must include a comprehensive and ongoing review and understanding of the representatives' business activities away from the broker/dealer. However, my disagreement is with FINRA's new proposal, and its current interpretation of a member firm's supervisory responsibility for registered representatives' outside activities through an unaffiliated investment adviser firm.

Affiliated Investment Adviser Activities

FINRA correctly excludes from the proposal associated persons' non-BD activity on behalf of an IA which is "affiliated" with the BD, recognizing "members' ability to implement meaningful controls across business line." However, this is only a viable solution if the BD fully owns or controls the affiliated IA; as either a dually registered firm (i.e., the same legal entity registered as both a BD and IA), or in the case where the BD ownership and management is the same though operating as two separate, independent legal entities under common ownership and control.

However, the SEC recognizes as an "affiliate" an IA entity that is owned or controlled by an individual who also owns, controls or is registered as a principal at both entities. In such cases, the BD may not be in a position to exercise control or influence over the management and practices of the "affiliated" IA. In such cases, a potential solution is for the BD to conduct due diligence with respect to the compliance and supervision of the affiliated IA to ensure that it has in place reasonable systems, processes and procedures to achieve compliance with the IA laws, rules and regulations under which it operates. That should satisfy the BD's oversight obligations and eliminate the requirement for the BD to directly supervise the activity or record the IA's business transactions on its books and records.

Unaffiliated Investment Adviser Activities

As FINRA well knows, its regulatory mandate is derived from the Securities and Exchange Commission as promulgated under the Securities Exchange Act of 1934, as amended and the rules and regulations promulgated thereunder. FINRA's authority is therefore limited to its oversight and enforcement of those entities and individuals under its jurisdiction to test compliance with, and sanction violations of, the Securities Act of 1933, as amended, the Securities and Exchange

Act of 1934, as amended, as well as FINRA, NASD and MSRB rules, and interpretations. There is no ability to regulate, inspect or enforce compliance with the Investment Advisers Act of 1940, as amended, (the "Advisers Act") nor the adoptive rules and regulations promulgated thereunder. Nor is there any authority or jurisdiction for FINRA to sanction a firm or individual for any alleged violations of the Advisers Act.

The industry is well aware of FINRA's attempts to lobby the SEC (and Congress) to expand its mandate to become the primary regulatory authority for RIAs, in addition to broker/dealers. It is true that no such independent regulator serves in that role, leaving it to the Commission and the various state securities regulators. Should FINRA succeed in its attempt to gain such authority, this analysis and my views on this matter would necessarily change. However, in the absence of such authority, I believe it is a mistake for FINRA to require its member firms to be responsible for the oversight and supervision of its affiliated persons conducting investment advisory business through unaffiliated, registered IAs. The reasons are as follows:

- As stated by other commentators and as referenced in the Notice itself, BDs and IAs are governed under separate and distinct statutory regimes. What may be permissible activity by an associated person acting in the capacity as an IA representative, may be prohibited under SEC laws or FINRA rules.
- BD compliance personnel may not be trained or knowledgeable in the rules of the road for registered IAs and requiring them to supervise and monitor those activities, may be unduly burdensome and fraught, causing potential risk to the BD firm and/or its supervisory and compliance personnel. That isn't the job they signed up for, and many may be unable or unwilling to fulfill those responsibilities.

- Small or mid-sized BDs may not have adequate systems and surveillance programs, procedures or policies to properly oversee those activities, leaving them either inadequately supervised or totally ignored. Requiring those firms to implement additional processes, procedures and add personnel to fulfill those responsibilities, may be too burdensome and/or expensive.
- A BD required to conduct this additional oversight may skew the financial and compensation arrangements between the firms and their affiliated representatives. This is particularly true for many smaller and mid-sized BDs who may treat their representatives as independent contractors who receive a larger share of earned commissions and fees than more traditional BD arrangements. That may require the representative to compensate the BD for the additional resources needed to properly supervise and track this outside activity.
- Many registered IA's serve as advisers to private funds, family offices, REITS or other types of financial institutions with complex investment strategies which may be outside the purview of even the most seasoned BD compliance personnel. Relying on them to properly oversee this outside business, may result in a false sense of security that this work is being done adequately regardless of those individuals' best intentions and efforts.
- Both the SEC and each states' securities commissions routinely examine and bring enforcement actions against IA firms to ensure compliance with applicable laws, rules and regulations, and punish violators. While some commentators decry the inadequacies of those enforcement efforts, there is nothing to ensure that a BD's

compliance efforts related to outside IA activities and FINRA enforcement of any potential failures, would fare any better in an industry that has its differences and distinctions from those of a broker/dealer.

- Finally, and speaking from specific experience, FINRA examiners and enforcement personnel may not be adequately trained or experienced to properly examine a BD's compliance and surveillance efforts of investment advisory activities, and potential sanction it for any perceived failures for the same reasons as stated above.

Conclusion

Understanding the need for and importance of proper and ongoing supervision and oversight of associated persons' outside activities that involve securities transactions, FINRA should exempt from the proposed revised rule any requirement for outside activities conducted through an investment adviser, which is registered either with the SEC or any particular state (or states) from supervision by the associated persons' member firm. An associated person clearly must be required to provide written advance notice of this proposed activity and receive permission from the member firm to engage in before it begins. A suggested additional requirement should be for the associated person to obtain a written attestation from the IA firm confirming that they have in place an adequate and reliable compliance and supervisory system over the IA activities of the associated person through their firm and permit the FINRA member to maintain and rely upon this attestation. Should the member firm (or FINRA) have reason to question the adequacy of the IA firm's supervisory protocol, they should be encouraged to contact the IA's primary regulator to review and take action against any supervisory lapses. This simple step should

ensure that clients and the investing public's interests are adequately protected without the needs for duplicative supervisory and sometimes conflicting regulatory requirements.

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Respectfully submitted,

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