

December 28, 2009

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

RE: Regulatory Notice 09-63, Discretionary Accounts and Transactions

Dear Ms. Asquith,

On November 12, 2009, the Financial Industry Regulatory Authority (FINRA) published Regulatory Notice 09-63 seeking comments on its proposal to amend its rules governing discretionary accounts and transactions (Proposed Rule)¹. The Proposed Rule seeks to transfer NASD Rule 2510 into the Consolidated FINRA Rulebook as FINRA Rule 3260 with certain changes that take into account requirements under NYSE Rule 408. The Financial Services Institute² (FSI) generally supports the Proposed Rule, but we do have concerns with the removal of a provision from NASD Rule 2510 that allows customers' to provide written limited discretionary authority over the price and time of a securities order. These concerns are described below.

Background on FSI Members

The independent broker-dealer (IBD) community has been an important and active part of the lives of American investors for more than 30 years. The IBD business model focuses on comprehensive financial planning services and unbiased investment advice. IBD firms also share a number of other similar business characteristics. They generally clear their securities business on a fully disclosed basis; primarily engage in the sale of packaged products, such as mutual funds and variable insurance products; take a comprehensive approach to their clients' financial goals and objectives; and provide investment advisory services through either affiliated registered investment adviser firms or such firms owned by their registered representatives. Due to their unique business model, IBDs and their affiliated financial advisors are especially well positioned to provide middle-class Americans with the financial advice, products, and services necessary to achieve their financial goals and objectives.

In the U.S., approximately 98,000 independent financial advisors – or approximately 42.3% percent of all practicing registered representatives – operate in the IBD channel.³ These financial

¹ See FINRA Regulatory Notice 09-63, available at

<http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p120369.pdf>

² The Financial Services Institute, Voice of Independent Broker-Dealers and Independent Financial Advisors, was formed on January 1, 2004. Our members are broker-dealers, often dually registered as federal investment advisers, and their independent contractor registered representatives. FSI has 116 Broker-Dealer member firms that have more than 152,000 affiliated registered representatives serving more than 14 million American households. FSI also has more than 14,000 Financial Advisor members.

³ Cerulli Associates Quantitative Update: Advisor Metrics 2007, Exhibit 2.04. Please note that this figure represents a subset of independent contractor financial advisors. In fact, more than 138,000 financial advisors are affiliated with FSI member firms. Cerulli Associates categorizes the majority of these additional advisors as part of the bank or insurance channel.

advisors are self-employed independent contractors, rather than employees of the IBD firms. These financial advisors provide comprehensive and affordable financial services that help millions of individuals, families, small businesses, associations, organizations, and retirement plans with financial education, planning, implementation, and investment monitoring. Clients of independent financial advisors are typically “main street America” – it is, in fact, almost part of the “charter” of the independent channel. The core market of advisors affiliated with IBDs is clients who have tens and hundreds of thousands as opposed to millions of dollars to invest. Independent financial advisors are entrepreneurial business owners who typically have strong ties, visibility, and individual name recognition within their communities and client base. Most of their new clients come through referrals from existing clients or other centers of influence.⁴ Independent financial advisors get to know their clients personally and provide them investment advice in face-to-face meetings. Due to their close ties to the communities in which they operate their small businesses, we believe these financial advisors have a strong incentive to make the achievement of their clients’ investment objectives their primary goal.

FSI is the advocacy organization for IBDs and independent financial advisors. Member firms formed FSI to improve their compliance efforts and promote the IBD business model. FSI is committed to preserving the valuable role that IBDs and independent advisors play in helping Americans plan for and achieve their financial goals. FSI’s mission is to ensure our members operate in a regulatory environment that is fair and balanced. FSI’s advocacy efforts on behalf of our members include industry surveys, research, and outreach to legislators, regulators, and policymakers. FSI also provides our members with an appropriate forum to share best practices in an effort to improve their compliance, operations, and marketing efforts.

Comments on the Proposed Rule

As stated above, FSI has concern with the removal of a provision from NASD Rule 2510.⁵ Specifically, NASD Rule 2510(d)(1) allows a customer to provide verbal authorization to a financial advisor to exercise limited discretionary authority over the price and time of a transaction within a single trading session. This verbal discretionary authority ends at the close of the trading session on the day that it was granted. If the customer desires the authority over the price and time of a securities transaction to last beyond the close of the trading session, the customer must draft, sign, and date a written statement evidencing their instructions. The pertinent part of NASD Rule 2510 provides the following:

“discretion as to the price at which or the time when an order given by a customer for the purchase or sale of a definite amount of a specified security shall be executed, except that the authority to exercise time and price discretion will be considered to be in effect only until the end of the business day on which the customer granted such discretion, absent a specific, written contrary indication signed and dated by the customer.”

Proposed FINRA Rule 3260(c) provides that, subject to certain conditions, a customer’s financial advisor can exercise time or price discretion. The Proposed Rule allows for verbal authorization of discretion as to the time or price of the execution of an order for the purchase or sale of a definite dollar amount or quantity of a specified security. This verbal discretionary authority will last during a normal trading session, if the verbal discretion is given during a trading session. It

⁴ These “centers of influence” may include lawyers, accountants, human resources managers, or other trusted advisors.

⁵ NASD Rule 2510, available at http://finra.complinet.com/en/display/display.html?rbid=2403&record_id=4344&element_id=3667&highlight=2510#r4344

would also extend to the next trading session, if the verbal discretion is given after the close of a normal trading session. However, under proposed FINRA Rule 3260(c)(1)(A), a customer would no longer be able to provide written authorization that survives the end of the next trading session, regardless of the customer's desire to have it extend past the next session.

FSI believes that the Proposed Rule should preserve a customer's ability to provide written limited price and time discretionary authority that survives a single trading session. We believe that this slight change in the Proposed Rule will provide greater flexibility to customers in pursuit of their investment objectives, will provide for proper documentation of the authorization by the client, and give clear instructions to independent broker-dealers seeking to fulfill their compliance duties. Below you will find proposed language in subsection (c) that would achieve this goal.

(c) Specific Discretionary Activities; Extent Permissible

(1) Notwithstanding the requirements of paragraph (a) of this Rule, members may:

(A)(i) Exercise discretion as to the time or price of execution of an order for the purchase or sale of a definite dollar amount or quantity of a specified security given by a customer:

- a. during a normal trading session, provided that such time or price discretion shall be in effect only until the end of that normal trading session; or
- b. after a normal trading session, provided that such time or price discretion shall be in effect only during the next normal trading session; or
- c. during a normal trading session, or after a normal trading session, provided that such time or price discretion is in writing, signed, and dated by the customer. Authority granted under this subsection will not have a trading limitation as to trading period, unless specified in the customer's written authorization.

Conclusion

In summary, we applaud FINRA's efforts to allow verbal instructions on the time or price of the execution of an order for the purchase or sale of a definite dollar amount or quantity of a specified security beyond the current trading session. We believe however, that the Proposed Rule should include the ability for a financial advisor to receive discretionary authority over the time or price of the execution of an order that would last past that trading session if the authority is provided in writing from the client.

We are committed to constructive engagement in the regulatory process and, therefore, welcome the opportunity to work with you to enhance investor protection and broker-dealer compliance efforts.

Thank you for your consideration of our comments. Should you have any questions, please contact me at 770 980-8487.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Dale Brown". The signature is fluid and cursive, with the first name "Dale" and last name "Brown" clearly distinguishable.

Dale E. Brown, CAE
President & CEO