



Financial Industry Regulatory Authority

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January 16, 2008

Ms. Nancy M. Morris

Secretary

U.S. Securities and Exchange Commission

100 F Street, N.E.

Washington, DC 20549-1090

Re: File No. SR-FINRA-2007-010 – Response to Comments

Dear Ms. Morris:

This letter responds to comments received by the Securities and Exchange Commission (“SEC” or “Commission”) to the above-referenced rule filing, a proposed rule change to amend an exemption to NASD Rule 1050 and NYSE Rule Interpretation 344/02 for certain research analysts employed by a member’s foreign affiliate who contribute to the preparation of a member’s research report. The proposed rule change was published for comment in the Federal Register on September 26, 2007.¹

The Commission received two comment letters to the proposed rule change.² Both commenters support the proposal generally, but also suggest FINRA make two modifications to it. Wilmer further seeks a clarification and interpretation regarding the proposal. First, both commenters object to the requirement that the proposed disclosures that are a condition for the exemption appear on the front page of the research report. The commenters note that with respect to other important disclosures required by current FINRA research analyst conflict of interest rules, FINRA permits members to direct investors in a clear and prominent manner on the front page of the report as to the page where the disclosures can be found. And with respect to electronic research reports, members may provide a hyperlink to the disclosures. The commenters argue that the same standard should apply with respect to the disclosures required as a condition of the proposed exemption from the research analyst

¹ Exchange Release No. 34-56481 (September 20, 2007), 72 FR 54700 (September 26, 2007).

² Securities Industry and Financial Markets Association (“SIFMA”) letter dated October 17, 2007; WilmerHale letter dated October 19, 2007, on behalf of Credit Suisse Securities (USA), LLC; Goldman, Sachs & Co.; J.P. Morgan Securities Inc.; Lehman Brothers Inc.; Merrill Lynch, Pierce, Fenner & Smith Incorporated; and UBS Securities LLC.

registration and qualification requirements. FINRA agrees and will amend the proposal accordingly.³

Second, the commenters take issue with language in the rule text that would create an inference of certain rule violations for failure to maintain adequate records in support of compliance with the conditions of the exemption. Specifically, the proposal would require member firms to establish and maintain records that identify those individuals who have availed themselves of the exemption, the basis for the exemption, and evidence with compliance with the conditions of the exemption. Failure to do so would create an inference of a violation of NASD Rule 1050 and NYSE Rule Interpretation 344/02, the underlying rules that, but for the exemption, would require certain foreign research analysts to register as such and pass a qualification examination. Similarly, the proposal would require firms claiming the exemption to establish and maintain records that evidence compliance with the applicable content, disclosure and supervision provisions of NASD Rule 2711 and NYSE Rule 472. Failure to do so would create an inference of a violation of those rules.

The commenters believe it unfair that failure to maintain records in support of an exemption should infer a violation of underlying rules, particularly in circumstances where the failure may be inadvertent or temporary. FINRA disagrees. FINRA believes the inference language is necessary because much of the documentation – and, potentially, the testimony – needed by FINRA to establish a violation of the underlying rules likely resides with entities or individuals that may be beyond FINRA's jurisdictional reach. Thus, the recordkeeping requirement may be the only means for FINRA to enforce the conditions of the exemption.

For example, two of the conditions of the exemption are that a foreign analyst must be an employee of a non-member foreign affiliate and reside outside of the United States. If the member does not maintain records to establish those criteria are met, FINRA likely could not compel the non-member affiliate to produce records of employment, nor the analyst to produce records to establish residency.

FINRA further notes that an inference, unlike a presumption, does not shift the burden of proof in an enforcement case. The language in the proposed rule change would permit, but not compel, the trier of fact to infer from the lack of documentation certain facts probative of whether a violation of the underlying rule has occurred.

Wilmer also seeks clarification on two issues. First, Wilmer asks whether a globally-branded research report that is produced by a mixed-team of foreign research

³ SIFMA further notes that FINRA has pending with the Commission a proposal to allow members to direct readers to a web site where certain of the required disclosures can be found, irrespective of whether the research report is electronic and receptive to hyperlinks. *See* SR-NASD-2006-113. If such proposal is approved by the Commission, FINRA will consider amending the proposed exemption to permit similar web-based disclosure.

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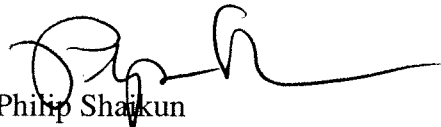
analysts and employees of the member qualifies for the exemption if all conditions are satisfied. It does. However, a mixed-team research report of the member that is not globally-branded is not eligible for the exemption.

Second, Wilmer seeks an interpretation that a member that distributes a globally-branded research report of its foreign affiliates may treat such research as third-party research in accordance with NASD Rule 2711(h)(13) and NYSE Rule 472(k)(4). As set forth generally in the March 2004 NASD and New York Stock Exchange Joint Memorandum (NASD Notice Members 04-18 and NYSE Information Memo 04-10), a globally-branded research report is considered to be a member's research report, and therefore subject to all of the provisions of NASD Rule 2711 and NYSE Rule 472, unless the member makes it clear and unambiguous to recipients that the research being distributed is wholly the product of a third party. The fact that a member avails itself of the proposed exemption from the registration requirements of NASD Rule 1050 and NYSE Rule Interpretation 344/02 in connection with a particular globally-branded research report has no bearing on whether the research report is considered third-party research for the purposes of NASD Rule 2711 and NYSE Rule 472. Thus, if the member is not crystalline in identifying the report as being the product solely of its foreign affiliate, FINRA will continue to treat the research report as being that of the member, rather than third-party research.

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FINRA believes that the foregoing responds to the material issues raised by the commenters to this rule filing. If you have any questions, please contact either me at (202) 728-8451 or Erika Lazar at (212) 656-4591.

Very truly yours,



Philip Shaikun
Associate Vice President and
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cc: James Brigagliano (Securities and Exchange Commission)