

VIA ELECTRONIC MAIL

June 5, 2009

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, N.W.
Washington, D.C. 20006-1506

RE: FINRA Regulatory Notice 09-22: Personal Securities Transactions

Dear Ms. Asquith:

On April 21, the Financial Industry Regulatory Authority, Inc. (FINRA) published Regulatory Notice 09-22 requesting comment on proposed FINRA Rule 3210 (Proposed Rule).¹ If adopted, the Proposed Rule would combine and streamline certain provisions of NASD Rule 3050 and NYSE Rule 407, adopt additional requirements, and attempt to promote more effective oversight of the personal trading activities of associated persons of member firms.

The Financial Services Institute² (FSI) recognizes that combining the rulebooks of the predecessor regulatory authorities represents a significant challenge. We commend FINRA for recognizing in the rulebook consolidation process an opportunity to develop a new organizational framework for the rules, consider new approaches to regulatory concerns, and delete obsolete rules. With so many changes in the structure and substance of the rulebook being considered, we believe industry input is more important than ever. We, therefore, praise FINRA for seeking industry comment on the Proposed Rule prior to submitting it to the SEC.

While FSI appreciates FINRA's efforts to obtain industry feedback, we are very concerned about the potential unintended consequences of the Proposed Rule. While we understand FINRA's desire for more effective oversight of personal trading activities, we believe the Proposed Rule will actually undermine broker-dealer firms' supervision of such accounts by mandating the form of these surveillance efforts. As a result, we suggest certain modifications to the Proposed Rule that we believe will achieve FINRA's objectives while enhancing broker-dealer firms' ability to comply with its terms. Our specific comments are contained in this letter.

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

¹ See the proposing release at

<http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p118524.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 118 Broker-Dealer member firms that have more than 138,000 affiliated registered representatives serving more than 14 million American households. FSI also has more than 10,000 Financial Advisor members.

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 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 for financial 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

The Proposed Rule is of particular interest to FSI because it will make significant changes to broker-dealers’ supervisory obligations with regard to the personal trading of associated persons. Currently, IBD firms comply with the requirements of NASD Rule 3050 which obligates broker-dealers to use reasonable diligence in determining whether executed transactions in the accounts of associated persons of another member firm, or accounts in which the associated person has discretionary authority, will adversely affect the interests of the employer member.⁵ In order to comply with these requirements, IBDs have carefully developed written policies and procedures governing the surveillance of the outside brokerage accounts of their financial advisors and other associated persons. While these policies and procedures vary from firm-to-firm, in many cases they involve trained staff receiving and reviewing the periodic account statements of the outside

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.

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

⁵ Although FSI member firms have an independent contractor relationship with their affiliated financial advisors, we will use the term “employer member” throughout this comment letter to remain consistent with the language used by FINRA in Regulatory Notice 09-22.

brokerage accounts of their associated persons. In most cases, the account statement information is received by the IBD in hard copy form, not through an electronic data feed. As a result, the review of account statements is an arduous and time-consuming process. Despite these challenges, this methodology has proven to be an effective means for the supervision of personal trading by associated persons of IBD firms.

The Proposed Rule attempts to promote more effective oversight of personal trading activities by making material changes to the existing regulatory requirements. While FSI understands FINRA's rationale for these changes, we are concerned that the Proposed Rule undermines its own purposes by mandating a specific mode of surveillance that is unduly burdensome for independent broker-dealer firms, provides little or no additional customer protection benefits, and will detract from other important compliance efforts. We discuss our specific concerns in detail below:

- Proposed Rule Fails to Recognize the Diversity of FINRA's Membership – The Proposed Rule requires that, prior to providing written consent to an associated person's request to establish an account at an executing member, the employer member must instruct the associated person to have the executing member provide duplicate account statements and confirmations. This new requirement represents a significant departure from the current requirements of NASD Rule 3050. This NASD Rule states, in relevant part, that executing members shall "...upon written request by the employer member, transmit duplicate copies of confirmations, statements, or other information with respect to such account." NASD Notice to Members 91-27 describes the purpose of the NASD Rule as the prevention of "instances in which trades may be made by associated persons on inside information because the employer member was not aware of the existence of the account with another member."⁶

FSI recognizes the importance of this regulatory goal and supports FINRA's reasonable efforts to promote effective oversight of personal trading. However, we are concerned that the Proposed Rule inappropriately mandates a one-size-fits-all approach to surveillance of these activities. In the context of the typical IBD firm, the risk of insider trading is extremely low because the firm does not engage in market making, participate in securities underwriting, or have research analysts.⁷ We believe the Proposed Rule should recognize the diversity of FINRA's membership by allowing firms to adopt effective compliance policies and supervisory systems appropriate for their firm's business activities rather than mandating policies that would be appropriate for firms involved in research, market making, or underwriting activities.

- Proposed Rule Places the Responsibility for Communicating Documentation Needs on the Wrong Party – Section (a) of the Proposed Rule places the associated person in the role of messenger delivering one broker-dealer firm's request for account documentation to the other firm. We believe this is an inappropriate role for associated persons who may fail to fully understand and appreciate the compliance requirements and regulatory purposes of the Proposed Rule. Instead, we believe most IBD firms would prefer to assign this task to a specific department or trained individual who is directly responsible to the employer member for insuring its completion. As a result, we believe it is desirable

⁶ NASD Notice to Members 91-27 - SEC Approval of Amendment to Article III, Section 28 of the Rules of Fair Practice Re: Associated Person Notifying Employer Prior to Opening Securities Account With Another Member. See at http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=1200.

⁷ Please note, some IBD firms do have "Research Departments" that provide access to third-party research services. However, the vast majority of IBDs do not employ research analysts as defined by NASD Rule 2711.

to retain NASD Rule 3050's reliance on the employer member to provide a written request for account documentation to the executing member.

- **Supplementary Material .01 Imposes an Unrealistic Timeframe to Achieve Compliance –** Supplementary Material .01 to the Proposed Rule states that “if the account was opened or otherwise established prior to the person’s association with the employer member, the associated person, within fifteen business days of becoming so associated, shall obtain the written consent of the employer member to maintain the account and shall notify in writing the executing member or other financial institution of his or her association with the employer member and personal financial interest.” This represents a significant and unexplained change from the current requirement of NASD Rule 3050 for the associated person to provide prompt written notification to both broker-dealers. IBD firms are concerned with their ability to compel compliance with this seemingly arbitrary deadline and note that the transition period for any financial advisor is already an extremely busy and hectic period. In addition, it is difficult to imagine what customer protection benefits are derived from obtaining the required consent on the 15th day versus the 16th or 20th. The prompt written notification requirement of the NASD Rule effectively tiers the timeframe for the written consent requirement since what may be determined to be reasonable at a firm involved in extensive securities research or underwriting activities will likely be different from that for firms who do not engage in such activities. As a result, we urge FINRA to amend the Proposed Rule so that it retains NASD Rule 3050’s prompt written consent requirement.
- **Supplementary Material .03 Should Exempt the Specified Transactions and Accounts from the Requirements of the Proposed Rule –** NASD Rule 3050(f) clearly indicates that the requirements of the rule do not apply to transactions in unit investment trusts, variable contracts, redeemable securities of companies registered under the Investment Company Act of 1940, or to accounts which are limited to transactions in such securities. Unfortunately, Supplementary Material .03 to the Proposed Rule fails to provide the same level of clarity. We see very little danger of insider trading or other actions that may adversely affect the interests of the employer member in such transactions or accounts. We, therefore, request that FINRA amend the language of Supplementary Material .03 to state clearly that such transactions and accounts are exempt from each of the Proposed Rule’s requirements. For these same reasons, we also request that municipal fund securities (i.e., 529 plans) be added to the excluded transaction and account types.
- **Supplementary Material .04 Should Impose Requirements on the Executing Member –** Supplementary Material .04 specifies the obligations of the employer member firm when it does not receive the requested duplicate statements and confirmation in a timely manner. Specifically, it requires an employer member who has revoked its consent for the associated person to maintain the outside account to promptly obtain account records from the executing member. We believe the Supplementary Material places these obligations on the wrong broker-dealer firm. Instead, we believe the executing broker-dealer should be required by the Proposed Rule to promptly close the account and provide the account records to the employer member firm. This change will improve the Proposed Rule by placing these obligations on the firm in the best position to complete the required task.
- **Proposed Rule Must Clearly Define the Scope of the Term “Personal Financial Interest” –** The Proposed Rule fails to clearly define the term “personal financial interest,” saying

only that “as a general matter, the associated person would have a personal financial interest in his spouse’s accounts.”⁸ We believe more guidance is necessary in order for firms to have the necessary clarity to design compliant supervisory policies and procedures. Since FINRA is seeking better oversight of accounts over which the associated person exercises either direct or indirect control we believe the definition of “personal financial interest” should be limited to those accounts over which the associated person has the ability to direct trading activity.

- Proposed Rule Should State Clearly that Account Documentation can be Received in Electronic Format – As described above, most IBD firms currently comply with the requirements of NASD Rule 3050 by reviewing hard copies of account statements. However, a number of IBD firms use electronic data feeds provided by the executing member to obtain transaction activity and account statement information on outside accounts. We believe that the Proposed Rule should support these technological efforts. Unfortunately, the Proposed Rule fails to expressly allow electronic data feeds to meet its requirements thereby imposing unnecessary costs and recordkeeping burdens on these members. We suggest adding language to the Supplementary Material to the Proposed Rule that explicitly states firms can achieve compliance by obtaining hard copy confirmations, statements, other account information or the electronic equivalent of these documents.
- Implementation Period Should be Extended – Our members report that, in its current form, the Proposed Rule will require substantial changes to their policies and procedures. It may also require the hiring of additional staff or creation of new systems. As a result, we request an extended implementation period to allow IBD firms the ability to make the necessary changes to achieve compliance. We recommend that FINRA allow for a six-month implementation period.

The changes recommended herein would require the following amendments to the Proposed Rule:

3210. Personal Securities Transactions for or by Associated Persons

(a) No person associated with a member shall, without the prior written consent of the member (“employer member”), open or otherwise establish at a member other than the employer member (“executing member”), or at any other financial institution, any account in which securities transactions can be effected directed by such associated person and in which such associated person has a personal financial interest. ~~As a condition to such prior written consent, the employer member must instruct the associated person to have the executing member provide duplicate account statements and confirmations to the employer member~~ The executing member shall upon written request by the employer member, transmit duplicate copies of confirmations, statements, or other information with respect to such account.

(b) Any associated person, prior to opening or otherwise establishing an account pursuant to paragraph (a) of this Rule, shall notify in writing the executing member, or other financial institution, of his or her association with the employer member and shall state in such notice that he or she has a personal financial interest in the account.

⁸ See page 3 of Regulatory Notice 09-22.

(c) When an executing member has actual notice that an associated person of an employer member has a personal financial interest in any account opened or otherwise established at the executing member, such executing member shall not execute any securities transactions in that account unless it has obtained the employer member's prior written consent. In addition, such executing member shall promptly obtain and implement an instruction from the ~~associated person~~ employer member directing that duplicate account statements, ~~and~~ confirmations, or other account information be provided to the employer member.

• • • Supplementary Material: _____

.01 Account Opened Prior to Association With Employer Member.— For the purposes of paragraphs (a) and (b) of this Rule, if the account was opened or otherwise established prior to the person's association with the employer member, the associated person, ~~within fifteen business days of becoming so associated,~~ shall promptly obtain the written consent of the employer member to maintain the account and shall notify in writing the executing member or other financial institution of his or her association with the employer member and personal financial interest. ~~The associated person shall instruct the executing member or other financial institution to provide to the employer member duplicate account statements and confirmations as of the date of his or her association with the employer member. The executing member shall upon written request by the employer member, transmit duplicate copies of confirmations, statements, or other information with respect to such account.~~

.02 Account at Financial Institution Other Than a Member.— For the purposes of paragraph (c) of this Rule, with respect to any account opened or otherwise established at a financial institution other than a member, it shall be the obligation of the associated person to instruct the financial institution to provide duplicate account statements and confirmations to the employer member.

.03 Duplicate Account Statements and Confirmations.— The requirements ~~to provide to the employer member duplicate account statements and confirmations~~ of this Rule shall not be applicable to transactions in unit investment trusts, municipal fund securities and variable contracts or redeemable securities of companies registered under the Investment Company Act, as amended, or to accounts that are limited to transactions in such securities, or to Monthly Investment Plan type accounts, unless the employer member requests receipt of such duplicate account statements and confirmations.

.04 Failure to Receive Duplicate Account Statements and Confirmations.— If an employer member does not receive the duplicate account statements and confirmations required pursuant to this Rule in a timely manner, the employer member shall revoke its consent to maintain the account, and shall so notify the executing member or other financial institution in writing. ~~The employer executing member shall promptly close the account and obtain provide the requested account records from to the executing employer member that the account was closed.~~

.05 Other Financial Institution.— For the purposes of this Rule, the terms "other financial institution" and "financial institution other than a member" include, but are not limited to, any broker-dealer that is registered pursuant to Section 15(b)(11) of the Exchange Act, domestic or foreign non-member broker-dealer, investment adviser, bank, insurance company, trust company, credit union and investment company.

.06 Electronic Transmission of Transaction and Account Data.— For the purposes of this Rule, the terms "confirmations", "statements", or "other information with respect to such

account" refer to hard copy confirmations, statements, other account information or the electronic equivalent of these documents.

Conclusion

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

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", written in a cursive style.

Dale E. Brown, CAE
President & CEO