

February 26, 2010

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 09-70, Registration and Qualification Requirements

Dear Ms. Asquith,

On December 3, 2009, the Financial Industry Regulatory Authority (FINRA) published Regulatory Notice 09-70 seeking comments on its proposal regarding registration and qualification requirements (Proposed Rules)¹. The Proposed Rules seek comments on three new rules that replace and substantially revise the existing rules regarding principal and representative registration. The Proposed Rules mark a significant change in FINRA's views on registration and recognizes the benefit of having more individuals registered. The Proposed Rules also reorganizes and consolidates materials that were previously presented in several different NASD and NYSE rules.

The Financial Services Institute² (FSI) generally supports the Proposed Rules as an improvement to the existing rules given the much broader range of individuals who may hold registrations and the elimination of the prohibition on "parking" registrations. However, the Proposed Rules present a complicated and expensive system in which compliance is costly and difficult. More specifically, we would like to comment on the complexity of the Retained Associate's ten-year clock, the circumstances under which an individual may act as a principal before passing the required registration exams, the Chief Compliance Officer examination, proposed language related to retaking failed examinations, and adding a provision related to grandfathering certain individuals who have lapsed registrations. These concerns are discussed more fully below.

Comments on the Proposed Rules

As stated above, FSI generally supports FINRA's Proposed Rules as a helpful improvement to the current rules. However, we are concerned that the Proposed Rules replace an overly restrictive registration system with an overly complicated one. FSI's specific comments are outlined below.

- 1. Complicated and Expensive Compliance Burdens** – We are concerned that the unnecessary complexity of the Proposed Rules may actually limit, rather than enable, firms to register affiliated employees with the broker-dealer. It appears that broker-dealers would have to evaluate and designate a registration status for each employee. Moreover, we are concerned with the increased compliance burdens related to:

¹ See FINRA Regulatory Notice 09-70, available at <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p120490.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 119 Broker-Dealer member firms that have more than 178,000 affiliated registered representatives serving more than 15 million American households. FSI also has more than 13,700 Financial Advisor members.

- Tracking the 12 month requirements for individuals that move in between registration status;
- Tracking the 10 year period for Retained Associates; and
- Tracking training and continuing education credits of active, inactive and retained associates.

Additionally, with the expansion of active, inactive and retained associate categories, it appears that there will be a substantial increase in the core infrastructure obligations in the areas of supervision, oversight, training/education, tracking, systems, and overall licensing costs. The Proposed Rules have significant implications for individuals and firms that fail to follow the Proposed Rules and thus create liability exposure for firms and the individuals that work for these firms. We raise this issue and suggest that FINRA reconsider the onerous and expensive compliance obligations that are created in the Proposed Rules and request that FINRA create a simpler system with cost and efficiency in mind.

2. Retained Associate's Ten-Year Clock is Complicated and Unfair – Proposed FINRA Rule 1210 (a) - (c) provide three different types of registrations for individuals who work with or for FINRA member firms. These three types of individual registrations include:

- Active registration;
- Inactive registration (persons engaged in a bona fide business purpose of a member); and
- Retained associate (persons engaged in the business of a financial services industry affiliate of a member).

Proposed FINRA Rule 1210 (c) provides that a person may be designated as a retained associate with one or more members for a period not to exceed ten consecutive years commencing on the date the person is initially designated as a retained associate. The Proposed Rule then sets out four sub-sections that impact the timing of the retained associate's ten-year period. These four sub-sections provide the following:

“(A) If such person subsequently registers pursuant to paragraphs (a) or (b) of this Rule, such person shall be required to remain in such registration(s) for at least a consecutive twelve-month period to be eligible for any years that may be remaining on the ten-year period set forth in this subparagraph (2). This twelve-month period may be divided among members subject to the requirements of subparagraph (2)(D);

(B) FINRA shall toll the ten-year period set forth in this subparagraph (2) for each day that such person is in active registration pursuant to paragraph (a) of this Rule, provided that the person is in active registration for at least a consecutive twelve-month period and FINRA is properly notified of such person's period of active registration. This twelve-month period may be divided among members subject to the requirements of subparagraph (2)(D);

(C) If such person subsequently engages in any other business activities instead of those that require registration pursuant to paragraph (a) of this Rule or permit registration pursuant to

paragraph (b) of this Rule or this paragraph (c), such person shall forfeit any years that may be remaining on the ten-year period set forth in this subparagraph (2); and
(D) Such person shall have no more than thirty days following the submission of a Form U5 to register with another member pursuant to this paragraph (c), or paragraphs (a) or (b) of this Rule, to be eligible for any years that may be remaining on the ten-year period set forth in this subparagraph (2)."

FSI is pleased to see that FINRA has taken the organizational structure of larger financial institutions into consideration in drafting the Proposed Rules. The Proposed Rules will provide firms greater flexibility in managing staff within a broker-dealer and between a broker-dealer and positions at other affiliated financial services businesses. However, the cost of this new flexibility is an extremely complicated system of time periods and tolling provisions that contain forfeiture penalties for failure to follow the new rules.

We believe the Proposed Rules are unreasonable in not tolling the retained associate ten-year clock if the individual transitions into inactive registration status. Even if the period spent as a retained associate is short, the ten year retained associate clock starts and then continues to run throughout the time the individual holds an inactive registration. Additionally, we believe the forfeiture provisions are, at times, punitive in nature. For example, if an individual is laid off by a member firm and cannot find appropriate new employment within 30 days, they would lose their ten-year retained associate window and forfeit their registration status. For an individual who triggers the forfeiture provisions, there is no clear way offered by the Proposed Rules to restart the ten-year clock. We suggest that the Proposed Rules should address this easily anticipated scenario and provide guidance on how an individual can re-start of the retained associate ten-year clock if their registration is forfeited.

- 3. Principal Registration For a Limited Period** - The Proposed Rules change the circumstance under which an individual who is either not registered with the member or is registered solely as a securities representative may act as a principal before passing the necessary registration exams. Under the current rule³, these individuals can act as a principal for up to 90 days while they satisfy the examination requirements. Under the Proposed Rules, a person who wishes to act as a principal prior to passing the requisite exams must have held an active registration for at least 18 months at any time during five years before he or she is designated to serve as a principal.⁴

We applaud FINRA on expanding the window of time to act as a principal without taking an examination from 90 days to 120.⁵ However, the changes requiring an individual to have an active registration for at least 18 months at any time during five years before he or she is designated to serve as a principal is extremely restrictive and could pose a challenge to smaller broker-dealers that have limited size and/or resources. As a result, we suggest that the Proposed Rules incorporate an exception to this requirement for firms of limited size and resources, so these firms can take advantage of the limited principal registration.

³ NASD Rule 1021(d)

⁴ FINRA Rule 1220(g)

⁵ *Id.*

4. **Chief Compliance Officer Examination** – The Proposed Rules will require all persons designated as Chief Compliance Officer (CCO) on Schedule A of Form BD to register as Compliance Officers and pass the Compliance Officer examination before their registrations can become effective⁶. FINRA provides three scenarios where the CCO examination would not be required and these include the following:
- A. A person designated as a CCO on Schedule A of Form BD, or registered as a Compliance Official, immediately prior to the effective date of the proposed rule will be qualified to register as a Compliance Officer without having to pass the Compliance Officer examination.
 - B. A person designated as a CCO on Schedule A of Form BD after the effective date of the proposed rule, but before the introduction of the Compliance Officer examination, will be required to pass the General Securities Principal examination (and the General Securities Representative, United Kingdom Securities Representative or Canada Securities Representative prerequisite) to qualify to register as a Compliance Officer. This requirement will apply to all members. Such persons will not be required to pass the Compliance Officer examination after its introduction.
 - C. A person designated as a CCO on Schedule A of Form BD after the effective date of the proposed rule and the introduction of the Compliance Officer examination will be required to pass the Compliance Officer examination to qualify to register as a Compliance Officer, unless such person has earned the FINRA Institute at Wharton Certified Regulatory and Compliance Professional™ (CRCP™) designation.

While we acknowledge that testing and examinations could play a role in ensuring competency in a CCO, we believe broker-dealer firms are sufficiently motivated to hire appropriate individuals to serve as their CCO. In addition, we are concerned that the Proposed Rules do not take into consideration an individual's experience and tenure prior to their appointment as CCO. We believe this requirement could make it difficult for firms to recruit and/or pursue qualified and competent CCO candidates. We suggest that FINRA reevaluate the requirements related to the CCO examination and provide an exemption based on experience and tenure in the industry.

5. **Chief Compliance Officer Transition to Other Areas** – The language on FINRA Rule 1210(b)(4) provides that a person "may have an active or inactive registration with respect to such [Compliance Officer] registration, provided, however, that such person shall be engaged in compliance activities at the member to be eligible to have an active registration."

We seek clarification on the situation where an individual who is registered as a Compliance Officer and has an active registration, but subsequently leaves the compliance department to work in a different department within the firm. It is unclear if this person would have to relinquish his Compliance Officer registration and potentially let it lapse, or if he can retain this registration and have an active registration with the firm although he is not "engaged in compliance activities at the member". We request that FINRA clarify the outcome of this situation.

⁶ FINRA Rule 1230(a)(4)(A)

6. **Retaking Failed Examinations** – FINRA Rule 1220(d) provides that, “[a]ny person who fails to pass a qualification examination prescribed by FINRA shall be permitted to take the examination again after a period of 30 calendar days has elapsed from the date of the prior examination, except that any person who fails to pass an examination three or more times in succession shall be prohibited from again taking such examination until a period of 180 calendar days has elapsed from the date of such person’s last attempt to pass the examination.”

We seek clarification of the term “in succession” as used above. An example will better demonstrate our request: An individual takes and fails an examination on day 1, takes and fails an examination on day 31 and takes and takes and fails an examination on day 365. Arguably, the Proposed Rules would require this individual to wait an additional 180 calendar days from his last attempt to retake the examination, even though more than 180 calendar days have passed since his second attempt. We believe that this potential penalty/issue would be resolved if the term “in succession” is better defined in the Proposed Rules.

We suggest that at the end of FINRA Rule 1220(d) the following new language be added to the Proposed Rules:

“For the purposes of this sub-section only, the term ‘in succession’ means one after another within a 30 day period.”

7. **Grandfather Provision for Lapsed Registrations** – Proposed FINRA Rule 1220(d) provides the following:

“Pursuant to the Rule 9600 Series, FINRA may, in exceptional cases and where good cause is shown, waive the applicable qualification examination and accept other standards as evidence of an applicant’s qualifications for registration. Age or disability will not individually of themselves constitute sufficient grounds to waive a qualification examination. Experience in fields ancillary to the investment banking or securities business may constitute sufficient grounds to waive a qualification examination.”

Many individuals at FINRA member firms, including independent broker-dealers, have allowed their current registrations to lapse pursuant to the “parking rules” contained in NASD Conduct Rule 1031. Many of these individuals may be able to have inactive registration status or retained associate registration status under the Proposed Rules. It is anticipated that these individuals will seek a waiver from FINRA pursuant to the NASD 9600 Rule Series, in an effort to avoid retaking qualification examinations. We expect that the result will be a significant volume of waiver requests. Instead of creating this demand for a waiver, we recommend a grandfathering provision. Specifically, we suggest that FINRA allow individuals who have had their license lapse within the past five (5) years from the effective date of the Proposed Rules be allowed to re-register with a member firm using their expired Central Registration Depository Number, contingent upon the person completing specified Continuing Education requirements in lieu of the waiver process (if they would now qualify to have an inactive registration status or retained associate registration status). We believe that this accommodation would be equitable to those former registered representatives who can now, under the Proposed

Rules, be properly registered as inactive or retained associates, and would now have to apply for a waiver pursuant to the NASD 9600 Rule Series.

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 180,000 financial advisors – or approximately 61.7% percent of all practicing registered representatives – operate as self-employed independent contractors, rather than employees, of their affiliated broker-dealer firm.⁷ 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 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.⁸ 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.

Conclusion

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.

⁷ Cerulli Associates at <http://www.cerulli.com/>.

⁸ These "centers of influence" may include lawyers, accountants, human resources managers, or other trusted advisors.

Thank you for your consideration of our comments. Should you have any questions, please contact me at 202 379-0943.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Dale E. Brown". The signature is fluid and cursive, with the first name "Dale" being the most prominent.

Dale E. Brown, CAE
President & CEO