



June 13, 2008

Via E-Mail
Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1500

Re: Regulatory Notice 08-24 - Proposed Consolidated FINRA Rules Governing
Supervision and Supervisory Controls

Dear Ms. Asquith:

Nationwide Financial Services, Inc. (the “Company”)¹ appreciates the opportunity to submit its comments concerning the proposed consolidated FINRA rules set forth in the above-referenced Regulatory Notice. Specifically, FINRA is proposing to adopt new Rules 3110 and 3120 for the new FINRA consolidated rulebook, based in part on existing NASD Rules 3010 and 3012, and NYSE Rule 342.

The Company appreciates and supports FINRA’s efforts in connection with its development of a consolidated rulebook that seeks to harmonize and streamline existing rules. The Company supports rewriting the existing supervision and supervisory control rules to reflect more flexible, principles-based regulation while preserving FINRA’s core mission of investor protection and market integrity. The Company believes, however, that several provisions require further consideration and modification. Accordingly, the Company would like to offer the following comments.

The Comment Process

The Company believes that it is important to afford FINRA members and other interested parties ample time to analyze and comment upon these rule proposals. In that regard, we respectfully urge the FINRA staff to give due consideration to all comment letters that are submitted subsequent to June 13, 2008. We would also request that the FINRA staff take this into consideration when determining comment periods for any subsequent rule proposals involving the new consolidated rulebook.

Proposed Rule 3110(a) – Supervisory System

The introductory language states that each member shall establish and maintain a system to supervise the activities of each associated person that is reasonably designed to achieve

¹ The Company is submitting this comment letter on behalf of its broker-dealer affiliates, each of which is a FINRA member firm.

compliance with applicable securities laws and regulations, and with FINRA and Municipal Securities Rulemaking Board rules. We note that FINRA has deleted references to “registered representative” and “registered principal” and has chosen to use the broader term “associated person.”² This proposed language change raises serious concerns about the scope of the supervisory rules. In that regard, we are very concerned about the extension of FINRA rules beyond traditional jurisdictional limits to member firm affiliates that are already subject to oversight and supervision by other regulators. Thus, we request that FINRA clarify the use of the term “associated person.” In that regard, the Company believes that the extension of the supervisory rules to include an obligation to establish and maintain supervisory systems for non-member affiliates’ businesses and employees would be inappropriate and extremely burdensome.

Paragraph (2) of this proposed rule requires the designation of an appropriately registered principal(s) with authority to carry out the supervisory responsibilities of the member for each type of business in which it engages. The Regulatory Notice indicates that this proposal references each type of business in which the firm engages, regardless of whether registration as a broker-dealer is required for that activity.

The Company is extremely concerned about the breadth of the proposed rule language and strongly recommends that it be modified. The language should refer to each type of business in which the firm engages *for which registration as a broker-dealer is required* (emphasis added).

For firms that conduct numerous business activities that do not require registration as a broker-dealer, the proposed amendment would represent a significant expansion of the current rule that implicates several practical and jurisdictional concerns. If, for example, a member firm engages in investment advisory, insurance or real estate businesses, such businesses would not be subject to regulatory oversight by FINRA but, rather, would fall under the jurisdiction of other regulatory authorities. Imposing yet another regulatory overlay for members that engage in these types of activities within the broker-dealer entity is redundant, potentially conflicting, and at odds with current regulatory and governmental efforts to modernize the regulatory structure and eliminate costly duplication.

We would reiterate these concerns in the context of approved outside business activities. The distinction between firm securities business and approved outside business activities is an important distinction for purposes of determining (i) appropriate firm supervisory responsibilities and (ii) activities over which FINRA can and should exercise jurisdiction. The lines cannot and should not be blurred when making this distinction. For those registered representatives (“RRs”) who choose to pursue business activities that are outside the scope of their broker-dealers’ securities business (whether or not such activities are part of a business that is conducted by an affiliate of the member firm), it is

² The Company notes that FINRA made the same language change to proposed Rule 3110(b)(1) where it similarly eliminates the words “registered representatives, registered principals and other” from the text. The Company incorporates by reference the same comments made herein to proposed Rule 3110(b)(1).

appropriate for such RRs to seek and obtain prior approval from the firm or, absent such approval, refrain from pursuing the business activity. It is also appropriate for the firm to take a sensible, risk-based approach toward monitoring approved outside business activities on a periodic basis. It is not appropriate to create a regulatory regime that fails to properly distinguish between (i) firm business, on the one hand, and (ii) a business activity that (A) is not part of the firm's business and (B) is engaged in by RRs as an approved outside business activity. Likewise, it is not appropriate to treat outside business activities as part of the firm's business. The Company notes that recent press reports indicate that certain insurance regulators share these concerns.³

Proposed Rule 3110 (b) – Written Procedures

(1) General Requirements

Please see footnote 2 above, which incorporates by reference our earlier comments.

(2) Review of Member's Investment Banking and Securities Business

This portion of the proposed rule should clearly state that the firm's supervisory procedures for review of investment banking and securities business may be risk based. This language is contained in the Supplementary Material but we believe that it should appear in the rule itself.

(3) Supervision of Outside Securities Activities

FINRA proposes to delete existing NASD Rule 3040 and replace it with Proposed Rule 3110(b)(3), which would state that:

Unless a member provides prior written approval, no associated person may conduct any investment banking or securities business outside the scope of the member's business. If the member gives such approval, such activity is within the scope of the member's business and shall be supervised in accordance with this Rule, subject to the exceptions set forth in subparagraph (B).

As drafted, the current proposal is much broader than NASD Rule 3040 and, unless modified, could have adverse consequences to broker-dealers. We believe that this proposed rule represents a significant departure from the guidance provided in NASD Notice to Members 94-44 and NASD Notice to Members 96-33. Moreover, we believe that this existing guidance should remain in effect and urge FINRA to incorporate such guidance into the proposed rule. Consistent with the foregoing, the Company requests that FINRA clarify the status of existing NASD Rule 3030 (Outside Business Activities of Associated Persons). Certain outside business activities do not constitute an outside private securities transaction or the conducting of an outside investment banking or

³ See "FINRA Is Overreaching, Some Say", by Sara Hansard of Investment News (June 2, 2008).

securities business and thus should not be included within the scope of this proposed rule. Firms have developed policies and procedures relating to outside business activities and will need to know how Proposed Rule 3110(b)(3) affects, if at all, existing Rule 3030. Our recommendation would be to clearly indicate that the provisions of existing Rule 3030 would be carried over into the consolidated rulebook and would be separate and apart from the proposed rule provisions governing outside investment banking or securities business.

(4) Review of Correspondence and Internal Communications

The phrase “supervisory procedures must ensure” should be replaced by the phrase “supervisory procedures must be reasonably designed to ensure” in order to make the provision consistent with traditional concepts of appropriate supervisory standards. In addition, the requirement for a registered principal to review “correspondence with the public and internal communications” should clearly state that such review could be risk-based and delegated to appropriate personnel. This language is part of Supplementary Material .09 and .11 and should be included within the proposed rule itself. Finally, the Company would like to suggest that greater effectiveness and clarity would be gained by establishing separate standards for internal communications and by placing them in a separate rule distinct from the requirements relating to external correspondence.

(6) Documentation and Supervision of Supervisory Personnel

The Company recommends that paragraph (C) of this proposed rule be modified to clearly indicate that home office employees are exempt from the requirement. In addition, supplementary material should be adopted that explains that the receipt of commission overrides does not equate to having one’s compensation “determined by” a person who is supervised.

The Company further recommends that paragraph (D) of this proposed rule be modified, as well. The phrase “procedures preventing the supervision required by this Rule from being lessened in any manner” imposes an unrealistic standard upon member firms. As an alternative, we would recommend the use of the phrase “procedures reasonably designed to achieve compliance with this Rule.”

Proposed Rule 3110 (c) – Internal Inspections

The Company believes that subsection 3110(c)(3)(A) should exempt the firm’s home office staff so that firms are not obligated to hire outside consultants to perform inspections of these individuals’ activities. With respect to subsection 3110(c)(3)(B), we would once again suggest that the phrase “procedures preventing the supervision required by this Rule from being lessened in any manner” be replaced by the phrase “procedures reasonably designed to achieve compliance with this Rule.”

Proposed Rule 3110 (d)(2) – Definitions: “Branch Office”

With regard to the definition of “branch office” in proposed rule 3110(d)(2)(A), the Company has concerns related to the non-retail business model of broker-dealers operating as wholesale product distributors. As currently written and as proposed, the definition of branch office broadly captures certain home office arrangements utilized by individuals such as wholesalers who are registered representatives of a broker-dealer acting in a wholesaler/distributor capacity. Such wholesalers may operate out of their primary residences, traveling almost exclusively to represent the product distributor with regard to third-party unaffiliated broker-dealers. Thus, the wholesalers would otherwise satisfy all of the exemptive criteria of subsection (ii), but for the fact that wholesalers may refer to their residential office address on their business cards and similar materials. Inclusion in the current definition creates significant travel cost and inspection burdens on wholesale broker-dealers. Therefore, the Company respectfully requests that FINRA consider revising the definition to provide an exemption from the definition of branch office for associated persons such as wholesalers who do not meet with customers at their residential office, but nevertheless must refer to their residence as their office for business purposes. At a minimum, in lieu of such an exemption, we would request that a risk-based approach to branch office inspections be utilized, particularly for persons such as wholesalers.

We appreciate the opportunity to provide our comments. Please let us know if we can provide any further assistance. If you have any question, please contact me at (614) 677-1643.

Very truly yours,

James Rabenstine
Vice President, Broker-Dealer Operations
Office of Compliance