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Via E-Mail: To pubcom@finra.org

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

RE: FINRA Regulatory Notice 09-69, Payments to Unregistered Persons

Dear Ms. Asquith:

On December 2, 2009, the Financial Industry Regulatory Authority (FINRA) published Regulatory Notice 09-69 (Regulatory Notice) seeking comments on its proposal to amend its rules governing payments to unregistered persons through a proposed FINRA Rule 2040 (Proposed Rule); which is available at http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p120480.pdf. As stated by FINRA in the Regulatory Notice, the Proposed Rule is meant to streamline the provisions of current: (i) NASD Rule 1060(b) (Persons Exempt from Registration); (ii) Rule 2410 (Net Prices to Persons Not in Investment Banking or Securities Business); (iii) Rule 2420 (Dealing with Non-Members); (iv) IM-2420-1 (Transactions Between Members and Non-Members) and IM-2420-2 (Continuing Commissions Policy); NYSE Rule 353 (Rebates and Compensation); and (v) NYSE Rule Interpretations 345(a)(i)/01 (Compensation to Non-Registered Persons); /02 (Compensation Paid for Advisory Solicitations); and /03 (Compensation to Non-Registered Foreign Persons Acting as Finders).

While the intent of the Proposed Rule may generally more directly align the rules on the payments made by a FINRA member firm to a non-member firm with that of the SEC and SEC staff interpretations of broker-dealer registration requirements, our clients have expressed a number of concerns that are discussed below.

Cash Solicitation for Investment Advisory Activities

There has been substantial confusion related to the regulation of broker-dealers and investment advisers that were dually registered with the SEC ("Dual Registrants") in recent history, both as to who would ultimately have regulatory oversight, and how the Investment Advisers Act of 1940 (the "Act") would be interpreted by FINRA, whose primary rules are subject to The Securities Act of 1934 ("34 Act"). As a result of that confusion, member firms have faced uncertainty as to FINRA's interpretation of certain rules and definitions set forth in the Act where the definitions and or guidelines differ between the Act and the 34 Act. For example, the definition of custody on the advisory side has resulted in dual registrants being required to become a $250,000 net capital firm due to being deemed to have custody as an advisor, which can occur by invoicing in advance, and or to the advisor forwarding a security held for an advisory client to their clearing firm. It appears that by eliminating NYSE Rule Interpretations 345(a)(i) 02 (Compensation Paid for Advisory Solicitations), FINRA may be

creating even further confusion in this area for dual registrants. Thus, while SEC Rule 206(4)-3 allows for the cash payment to a solicitor under certain circumstances, the Proposed Rule would also require that such payment complies with all applicable federal securities laws, including specifically FINRA rules. Without the Interpretation, it will increase the difficulty for a FINRA member firm, who is an investment adviser, to assure itself that the activities of a solicitor that it works with do not amount to "effecting" transactions in securities which will potentially result in FINRA determining that it is paying a person who should be registered as a broker-dealer.

While the potential for confusion may be an unintended consequence of the Proposed Rule, the effect has the unfortunate potential to create another mine field for a member firm to have to navigate as it attempts to comply with the Act, the 34 Act and FINRA Rules. As a result, we would recommend that FINRA clarify the Proposed Rule to address the handling of conflicts that arise between interpretations of the Act, the 34 Act and FINRA rules.

Foreign Finders

Under the Proposed Rule, NASD Rule 1060(b) and NYSE Rule Interpretation 345(a)(i)/03 would be eliminated. These rules have generally allowed a FINRA member firm, under the enumerated conditions, to pay transaction-based compensation to a non-U.S. finder that solicits non-U.S. business for the member. While there were a number of critical components that had to be met with respect to the current rule, two of the fundamental conditions with respect to the payment of compensation to a foreign finder was: (1) that the foreign finder limit its activities so that the finder was not required to register in the U.S. as a broker-dealer; and (2) that the compensation arrangement not violate applicable foreign law. The implication being that the foreign finder was subject to the jurisdiction of a foreign securities authority.

These finders have provided an important and necessary service in that they have introduced foreign customers to U.S. markets, which is consistent with the transition of the financial markets to be international in nature. Foreign finders have an integral knowledge of their customers that are referred to FINRA member firms, including suitability and investment needs, and they are subject to the regulatory structure of their respective countries. Member firms are still required to confirm suitability, supervise the sales activity to the foreign customer, including the recommendation of U.S. securities to such customers, and effect the transaction. FINRA member firms should be able to rely on clear guidance with respect to these activities, and the current rule gave that guidance to membership. If the finder is properly licensed in the jurisdiction where they reside, they comply with the conditions set forth in the current rule, they comply with local laws, and FINRA member firms could pay them for the referral. While relying on the SEC guidance is helpful with respect to the sale of securities with in the U.S., the SEC's position on the payment of foreign finders is not clear, and as such, will result in additional confusion for regulatory compliance professionals and member firms.

Additionally, to the extent a broker-dealer was or is a Dual Registrant as discussed above, it is unclear as to whether a firm could pay investment advisory solicitor fees to a foreign finder without conflicting with the Proposed Rule.

Therefore, we would recommend that the current NASD Rule 1060(b) be retained and or the Proposed Rule be amended to address the utilization of foreign finders. Section 15(a) does not take into consideration transactions between a U.S. broker-dealer and one that is licensed by a foreign securities authority where it is domiciled. This is basically a dealer to dealer transaction where the foreign

broker-dealer refers a customer to the U.S. broker-dealer based upon the relationship the foreign broker-dealer has with the customer. The foreign broker-dealer has a reasonable expectation to be compensated for the administration and supervision of the foreign finders who actually have the relationships.

Foreign Dealer Relationships

We believe that with the increased focus on the internationalization of the securities markets and the ability of foreign broker-dealers to bring their non-U.S. customers into the U.S. market through FINRA member firms is critical; and the ability of broker-dealers to pay such offshore broker-dealers is an integral part of that process. To that end, Section 15(a) fails to take into consideration transactions between a U.S. broker-dealer and one that is licensed by a foreign securities authority where it is domiciled and engaged in a securities business.

With that said, the proposed rule needs to clarify these relationships. While the Proposed Rule relies on Rule 15a-6 of the Act to exempt a foreign broker-dealer from sections 15(a)(1) or 15B(a)(1), that occurs only if the foreign broker-dealer effects transactions in securities with or for persons that have not been solicited by the foreign broker-dealer or conducts business with U.S. institutional investors or major U.S. institutional investors (including providing research under certain circumstances). The exception does not contemplate a foreign broker-dealer introducing its non-U.S. customers to a FINRA member firm to make recommendations and affect transactions on behalf of those customers, while simultaneously paying the foreign broker-dealer compensation for such referrals and introductions.

We would recommend that the Proposed Rule be amended to integrate the concept of registration or membership in or with a Foreign Financial Regulatory Authority, which would include any non-U.S. securities authority; other government body or foreign equivalent of a U.S. self-regulatory organization that is empowered by a non U.S. government to administer or enforce the laws relating to the regulation of investment-related activities, or membership organization, a function of which is to regulate the participation of its members in investment-related activities. That would provide clarity to those FINRA member firms who would engage in representing non-U.S. customers that are introduced by a foreign broker-dealer.

State Law

The Proposed Rule clearly anticipates that the proper venue for determining who should or shouldn't be registered as a broker-dealer is the SEC. While this will more directly align the rule with SEC and SEC staff interpretations of broker-dealer registration requirements, it does not address those FINRA member firms who engage in primarily an intra-state business, and the state of their domicile recognizes statutory exemptions for the payment of compensation in limited circumstances for certain finders. Without the ability to reasonably rely on the state statutes where a firm is domiciled and engaged in business with individuals who are also domiciled in the respective state, those FINRA member firms will be faced with increased compliance costs in that they will have to substantiate their reliance on federal law, rather than state law. We would recommend that FINRA review the Proposed Rule to provide for the ability to reasonably rely on state statutes where a member firm clearly operates a local, intra-state business.

Regulatory Burden

Requiring FINRA member firms to look to SEC no-action letters to determine whether the activities in question require registration as a broker-dealer, it is inconsistent with the concept of "Transparency in

Financial Markets", and require FINRA member firms to step back in time with respect to the rules governing its activities. By not providing clear guidance, FINRA is placing additional regulatory uncertainty on FINRA member firms and further hampering their efforts to obtain meaningful compliance.

While the Proposed Rule would not require a member to obtain a specific, no-action letter from the SEC, the proposal does focus on the receipt of payment as the potential trigger of the registration requirement. This could create challenging interpretive issues for FINRA member firms in determining whether a payment may be made to an unregistered person. Specifically, while SEC guidance generally views receipt of transaction-based compensation as a powerful indicator that a person is "engaged in the business of effecting transactions in securities" and therefore, are required to register as a broker-dealer, the SEC and courts give this factor and others varying weight in different situations. These interpretive issues become even more problematic when viewed in light of the fact that the Proposed Rule does not contain a "reasonable belief" standard. Thus, short of a no-action letter, absolute comfort will be difficult to attain, and that comfort will be expensive. Thus requiring broker-dealers to additionally document their decisions by having to hire attorneys to support such positions through SEC rules, regulations or other guidance, such as no-action letters, is placing a substantial cost on FINRA member firms, both in terms of time as well as money.

Finally, neither the Regulatory Notice nor the Proposed Rule specify how the FINRA member firm should determine that broker-dealer registration is not required, We all are aware that the ultimate determination of whether a particular payment subjects a person to registration as a broker-dealer is dependent on the facts and circumstances of each particular transaction. As a result, SEC guidance on this issue may not always be conclusive, and in fact, in Dinosaur Securities, LLC, SEC No-Action Letter (June 23, 2006), available at http://www.sec.gov/divisions/marketreg/ mr-oaction/dinosaur062306.htm, the SEC staff declined to consider whether intended payment recipients would be exempt from registration for the purposes of satisfying NASD rules and noting that *the SEC does not "as a matter of practice" provide no-action relief in this context, despite the NASD advising members that they obtain such relief.*

Based upon the costs and uncertainty related to obtaining SEC no-action guidance, we would recommend that FINRA review the issues and either amend the Proposed Rule to address and clarify the regulatory concerns, or provide interpretive relief with respect to these matters.

Conclusion

In summary, we believe that goals set forth in the Regulatory Notice regarding the Proposed Rule are important and critical to the financial industry, but we also believe that FINRA member firms need clear direction on these issues so that resources can remain focused on market protection, rather than "papering the file". Thank you for your consideration of our comments. Should you have any questions, please contact the undersigned at 281-367-2454.

Respectfully submitted,

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