Wells Fargo Advisors

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April 27, 2018

Submitted via e-mail at: pubcom@finra.org

Jennifer Piorka Mitchell
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: Regulatory Notice 18-08: FINRA Requests Comment on Proposed New Rule Governing Outside Business Activities and Private Securities Transactions

Dear Ms. Mitchell:

Wells Fargo Advisors ("WFA") appreciates the opportunity to comment on Financial Industry Regulatory Authority's ("FINRA") above-referenced Regulatory Notice proposing new FINRA Rule 3290 (Outside Business Activities), which consolidates existing FINRA Rules 3270 (Outside Business Activities of Registered Persons) and 3280 (Private Securities Transactions of an Associated Person) (the "Proposal").[1]

WFA is a dually registered broker-dealer and investment adviser that administers approximately $1.6 trillion in client assets. We provide investment advice and guidance to help clients achieve their financial goals through 14,544 Financial Advisors in Wells Fargo branches across the U.S.[2]

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[1] FINRA Regulatory Notice 2018-08: Outside Business Activities (February 26, 2018); *available at*: http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-18-08.pdf.

[2] "Wells Fargo Advisors" is the trade name for Wells Fargo Clearing Services, LLC ("WFCS"), a dually-registered broker-dealer and investment adviser, member FINRA/SIPC, and a separate non-bank affiliate of Wells Fargo & Co. "First Clearing" is the trade name for WFCS's clearing business, providing services to unaffiliated introducing broker-dealers. WFCS is affiliated with Wells Fargo Advisors Financial Network ("FiNet"), a broker-dealer also providing advisory and brokerage services. For the ease of this discussion, this letter will use WFA to refer to all of these brokerage operations.

I. WFA IS SUPPORTIVE OF FINRA'S EFFORTS

WFA supports FINRA's efforts to consolidate existing FINRA Rules 3270 and 3280 governing outside business activities and private securities transactions into a single FINRA rule. Proposed FINRA Rule 3290 not only better aligns the substantive portions of the prior rules, but also permits firms to adopt a more risk-based approach for supervision of such activities. Focusing on activities that pose the most risk to investors is consistent with FINRA's continued commitment towards strengthening the regulatory environment and enhancing investor protection.

We do, however, recommend that FINRA provide additional clarity or guidance regarding (1) the types of activities proposed to be included or excluded within the definition of "investment-related activity" in proposed Rule 3290, and (2) the distinction between strictly business vs. personal activities. Additional insight into FINRA's supervisory expectations over registered persons when limitations and conditions are placed on the approval of certain business activities would also benefit firms when conducting supervisory oversight.

We are also concerned with the Proposal's provision around third-party unaffiliated investment advisory business conducted by a registered person. The absence of supervisory obligations does not appear consistent with enhancing FINRA's goal of protecting investors. We believe unsupervised activities in certain situations could compromise a registered person's responsibilities to investors if assets are moved to a less regulated environment.

II. DISCUSSION

A. FINRA Should Further Clarify the Definition of "Investment-related Activity" under Proposed Rule 3290.02(c).

In the Proposal, FINRA looks to an existing definition used for U4 filings to define what constitutes "investment-related activity."[3] By going further in defining this term, member firms will be better equipped to focus on higher risk activities and to differentiate between investment-related and noninvestment-related activities. While WFA appreciates the consistent definition of "investment-related activity" between the proposed rule and Form U4, we believe that the definition is too broad and could encompass activities that fall outside the scope and intended purpose of the Proposal.

To better understand what should be included in the new rule, we've highlighted a few specific examples herein. First, circumstances where a registered person provides notice to serve as a trustee for an immediate family member presents confusion for firms in terms of the type of compensation that might be received for such services. We ask FINRA to clarify the meaning of "transaction-related compensation" included in proposed Rule 3290.01(b), which creates a carve-out for transactions on behalf of a registered person's immediate family member for which the registered person receives no transaction-related compensation.

[3] FINRA Form U4 Explanation of Terms, pg2.

Second, the Proposal includes both "real estate" and "banking" within the definition of "investment-related activities." The definition of "real estate" is an incredibly expansive term that could encompass numerous activities, many of which do not pose a serious risk to investors. Some examples include: renting out a home the registered person owns through Airbnb; renting out property not in an LLC or by someone who serves as a minority partner in an LLC. Would these situations constitute an "investment-related activity" and does such activity pose serious harm to investors such that member firms must supervise the activity? Since these situations are becoming more prevalent, we believe the Proposal should go further in specifying the particular real estate activities that are to be included or excluded from the definition. Focusing on creating a clearer distinction between passive vs active investments may also assist in clarifying the definition.

"Banking" is another term included in the definition of "investment-related activity," which we believe needs further clarity. The Proposal excludes non-broker-dealer related activities conducted on behalf of a dually registered firm, such as investment advisory activities or banking activities because the risk posed to the member and to investors is relatively minimal. In terms of banking activities, licensed bankers are employees of the bank and must be appropriately licensed before they may refer business to a broker-dealer or investment adviser. Does the exclusion for banking activities specifically hinge on whether or not the broker-dealer or investment adviser is affiliated with the bank?

Thirdly, additional clarity is needed around the exclusion of "a registered person's personal investments," described in the Proposal as "buying away." On its face, "buying away" could include a registered person making a passive investment. However, should it make a difference of whether the registered person is making an investment on their own or with others? What if the other people involved in the investment are clients? While arguably easier to supervise, additional details about the outside investments should be known to assist firms in making a determination of whether to approve and/or supervise the activities. Thus, firms would be in a better position to protect investors if the exclusion was narrowed and clarified.

Finally, Form U4 specifically excludes disclosure of noninvestment-related activities and indicates these activities generally include those that are "charitable, civic, religious or fraternal and are recognized as tax-exempt."[4] This creates ambiguity in situations where a registered person serves on the board of directors of a charitable organization. For example, if a registered person sits on a charitable board of a not-for-profit, that seems to fall within this exclusion. However, if they serve on a subset of the board (e.g. the finance committee), does that constitute "investment-related activity" not intended to be excluded? There are certainly a number of instances where the answer of what constitutes an "investment-related activity" is gray. Therefore, we request additional guidance on how FINRA believes firms should proceed with making this determination, particularly as it relates to instances of registered persons becoming involved with charitable organizations.

[4] FINRA Form U4 Explanation of Terms, p. 2.

B. FINRA Should Clarify Supervisory Expectations.

The Proposal would impose supervisory obligations in two situations; if the member imposes conditions or limitations on a registered person's participation in an investment-related activity; and, in situations where a registered person's participation in the investment-related activity would require registration as a broker or dealer. We request additional guidance on what FINRA would consider appropriate supervision of certain registered person's activities that fall under the Proposal. For example, if a member firm approved a registered person to serve on a board (charitable or otherwise), would the expectation be that the member firm review the meeting minutes? What if there are no minutes of the meeting? Would it matter whether the board made financial decisions? What if those financial decisions didn't include investment decisions? The number of potential scenarios is practically endless, therefore firms would be well served if FINRA could provide additional guidance on how to approach the analysis and further provide examples of what supervision might be expected in various scenarios.

C. FINRA Should Not Remove Supervisory Obligations of Non-Affiliated Registered Investment Advisers.

Currently, member firms have supervisory obligations over third-party investment advisory activities of registered persons as set forth by NTM 94-44[5] and NTM 96-33[6] which, in the circumstance where a registered person participates in the execution of a securities transaction, require the member to record transactions on its books and records and supervise activity as if it were its own.

Under the Proposal, investment advisory activity conducted by a registered person through a third-party non-affiliated investment adviser would constitute "investment-related activity" and would be subject to prior written notice. The member firm would then be required to conduct a risk assessment and complete the subsequent approval process to: approve; approve with conditions or limitations; or, disapprove the activity. However, the member's obligations would end there as supervision of that activity would not be required by the member unless the member attaches conditions or limitations to the approval.

WFA has concerns that the Proposal significantly weakens the investor protection scheme currently created by NTM 94-44 and NTM 96-33. If a member approves a registered person to engage in investment advisory activities through a third-party non-affiliated investment adviser without limitation, that activity is supervised only by the third-party investment adviser itself. Often these investment advisers do not have the resources to develop and maintain

[5] NASD Notice to Members 94-44, Board Approves Clarification On Applicability Of Article III, Section 40 Of Rules Of Fair Practice To Investment Advisory Activities Of Registered Representatives; available at: http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=1489.
[6] NASD Notice to Members 99-33, NASD Clarifies Rules Governing RR/IAs; available at: https://www.finra.org/sites/default/files/NoticeDocument/p013792.pdf.

comprehensive and independent supervisory, risk, and oversight control systems that member firms are required to have in place. Additionally, if a member firm does place conditions or limitations on the third-party investment adviser, the Proposal requires the member firm to supervise only those conditions or limitations, leaving the member firm responsible for only a portion of the third-party investment advisory activities.

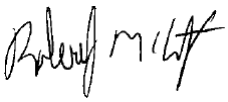
Demonstrated in the 2008 Rand Report *Investor and Industry Perspectives on Investment Advisers and Broker-Dealers,*[7] investors do not understand the difference between broker-dealers and investment advisers and are unlikely to discern which products and services are offered by the member and which are provided separately by the third-party investment adviser. These factors could result in situations whereby clients seek remedy from the member firm for activities that occurred at the third-party investment adviser.

As designed in the Proposal, the issue becomes complex and ultimately places member firms in a precarious position of approving third-party investment advisory activity without supervisory obligations attached. To align with FINRA's goal in strengthening investor protections, the Proposal should require supervision over the activities of a third-party investment adviser.

III. CONCLUSION

WFA appreciates the opportunity to provide feedback to FINRA on Regulatory Notice 18-08. We support FINRA's efforts to consolidate existing rules in this area and believe a risk-based approach provides a sound platform for this process. The suggestions provided above would essentially apply that same risk-based approach throughout the entire process, from initial review to supervision of activities, thus creating an environment that member firms can effectively manage and control while enhancing investor protection. If you would like to discuss this matter further, please feel free to contact me directly at (314) 242-3193 or robert.j.mccarthy@wellsfargoadvisors.com.

Sincerely,



Robert J. McCarthy
Director of Regulatory Policy

[7] 2008 Rand Report *Investor and Industry Perspectives on Investment Advisers and Broker-Dealers, available at:* https://www.sec.gov/news/press/2008/2008-1_randiabdreport.pdf.