January 16, 2009

BY EMAIL 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 08-71,
Reporting Requirements**

Dear Ms. Asquith:

The Self-Regulation and Supervisory Practices Committee of the Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to comment on the above-referenced FINRA Regulatory Notice, which proposes a hybrid approach to reporting requirements under the consolidated FINRA rulebook, combining requirements under existing NASD Rule 3070 with requirements under NYSE Rule 351. We support FINRA's consolidated rulebook efforts, but believe the proposal as currently written could potentially lead to interpretive ambiguity about the reporting requirements as well as over-reporting of less significant events than intended by FINRA.

To avoid these results, we recommend that FINRA adopt in the consolidated rulebook the basic requirements of either NASD Rule 3070 or NYSE Rule 351 and NYSE Information Memo 06-11 rather than creating a hybrid rule. We believe this approach would serve FINRA's policy goals, and would promote clarity and regulatory efficiency by implementing an existing industry standard. In the absence of an enunciated regulatory need to change the current rules, we believe that maintaining one of the two existing standards avoids undue confusion, simplifies implementation issues and provides FINRA with more consistent reporting results from its member firms.

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[1] SIFMA brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

If FINRA chooses to proceed with the proposed hybrid approach, we have three specific suggestions. First, we recommend that with respect to proposed FINRA Rule 4530(a)(3), FINRA incorporate the guidance in NYSE Information Memo 06-11 ("IM 06-11") regarding reporting of internal conclusions of violative conduct that would not otherwise be reportable under proposed Rule 4530(a)(2). Second, we recommend that FINRA use this proposal as an opportunity to eliminate duplicative reporting requirements. Third, we recommend that the calculation of monetary thresholds under proposed Supplementary Material .06 exclude attorneys' fees and interest.

Specific Comments on 08-71

A. Reporting Internal Conclusions: Proposed FINRA Rule 4530(a)(3).

Proposed FINRA Rule 4530(a)(3) would require a member firm to report to FINRA when it has concluded that the firm, or an associated person of the firm, has violated any securities, insurance, commodities, financial or investment-related laws, rules, regulations or standards of conduct of any domestic or foreign regulatory body or SRO. Proposed Supplementary Material .01 to Rule 4530 states that "FINRA does not expect a member to report an isolated violation by the member or an associated person of the member that can be reasonably viewed as a ministerial violation of the applicable rules that did not result in customer harm and was remedied promptly upon discovery." As noted by FINRA in the Regulatory Notice, this requirement is modeled after existing NYSE 351(a)(1) and NYSE Information Memo 06-11.

As described below, SIFMA has two concerns about Supplementary Material .01. First, we are concerned that it could introduce considerable subjectivity to the *determination* of events that must be reported to FINRA, which, in turn, could result in inconsistent disclosures among member firms. Second, as drafted, the proposed Rule and Supplementary Material could lead to increased reporting of internal conclusions of non-systemic violative conduct.

Specifically, SIFMA believes that by substituting the established terms of art contained within IM 06-11 with the phrase "ministerial violation . . . .that did not result in customer harm," in Supplementary Material .01, FINRA could create uncertainty and potentially disparate determinations among firms as to whether or not reporting is required under proposed subsection (a)(3).[2] As currently drafted, Supplementary Material .01 could be construed to require reporting of a member firm's internal conclusion relating to single

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[2] IM 06-11 states: "Isolated or individual exceptions to otherwise effective and regulatory compliant operations are not the sort of matters that would trigger a reporting obligation under the rule. Rather, systemic firm failures involving numerous customers, multiple errors or significant dollar amounts should be reported. In addition, violative conduct by the firm or its employees that is not systemic but has widespread or potential widespread impact to the firm, its customers, or the industry would require the firm to report…"

violation of a rule that resulted in little or no customer harm to a single or a few investor(s).[3] SIFMA does not believe that this is the intent of the proposed Rule.

Second, in contrast to NYSE Rule 351(a) and IM 06-11 and because the rule proposal appears to capture a broad range of internal conclusions, SIFMA is concerned that it could dramatically increase reporting of less significant violations than NYSE member firms would have reported. Such an outcome not only minimizes the usefulness of the disclosures, but also taxes already strained resources at both FINRA and member firms.[4]

Accordingly, SIFMA respectfully recommends that FINRA incorporate into Supplementary Material .01 the guidance contained in NYSE IM 06-11 regarding “widespread or potential widespread impact to the firm, its customers, or industry" in assessing the violative conduct to be reported under proposed 4530(a)(3).

B. Duplicative Reporting: Proposed FINRA Rules 4530(d)

Proposed Rule 4530(d) states expressly that members are required to comply with the reporting obligations “*regardless* of whether the information reported or disclosed pursuant to any other rule or requirement, including reporting requirements in Forms BD, U4, or U5.” (emphasis added). We take note of and appreciate FINRA’s commitment in its Regulatory Notice that FINRA “will work toward the goal of eliminating duplicative reporting of information disclosed on the Uniform Forms.”

We are unclear of the benefit to FINRA for receiving a notice of the violative conduct both under the Proposed Rule 4530 and as necessary through the timely reporting in the appropriate Uniform Form, particularly since, under the proposal, the 30-day period would become the same in both instances.[5] Thus, we recommend that FINRA provide an

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[3] Consider for example a situation where a firm issues a letter of education or letter of caution to a registered representative who takes discretion without written authorization in connection once with a customer, or with a household consisting of four related customers, which instance does not result in customer harm. Under the current NYSE IM 06-11, this event would not be reportable to the NYSE. By contrast, under proposed Rule 4530(a)(3), some firms may conclude that this should be reported; others may not. Another example could be where the firm inadvertently fails to send out confirms to a handful of clients. Here too, it would appear the rule proposal could require reporting because the violation might be viewed as more than ministerial or might be viewed as causing “customer harm.”

[4] Under NYSE IM 06-11: “…if a firm has concluded that an individual has engaged in violative conduct and imposes discipline less severe than that which is required to be reported under NYSE Rule 351(a)(10), then the firm need not make a filing under NYSE Rule 351(a)(1) with the respect that to that employee’s conduct…The reporting guidance discussed above assumes a firm will impose some form of discipline whenever it determines violative conduct, beyond a di mimimus level, has taken place by an individual …”

[5] We support the proposed extension of the reporting period to 30 days from the current 10-day requirement under NASD Rule 3070.

exception in proposed Rule 4530 for information that is subject to reporting on Forms BD, U4, or U5.[6]

C. Calculation of Monetary Thresholds: Proposed Supplementary Material .06

We recommend that the calculation of monetary reporting thresholds exclude "attorneys' fees and interest." Proposed Rule 4530(a)(1)(G) would require reporting of certain litigation, arbitration, or other claims where the judgment, award, or settlement at issue exceeds either $15,000 or $25,000. Proposed Supplementary Material .06 states that member firms would be required to *include* attorneys fees and interest in calculating those thresholds. In our view, the amount of attorneys fees and interest at issue does not provide an accurate indication of whether any material customer harm is involved. Moreover, including attorneys' fees in this instance would be inconsistent with the approach taken under Forms U4 and U5, where FINRA has expressly stated that for purposes of reporting an arbitration or customer complaint that settles for $10,000 or more, attorneys fees should not be included.[7] We also believe the proposed requirement could serve to delay reporting of events to the extent that "attorneys fees and interest" claims become subject to appeals.

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SIFMA appreciates the opportunity to provide comments on FINRA's proposal regarding reporting requirements. If you have any questions or require further information, please contact the undersigned at (212) 313-1268.

Sincerely,

Amal Aly
Managing Director and
Associate General Counsel

cc: Marc Menchel, Executive Vice President and General Counsel for Regulation
Grace Vogel, Executive Vice President, Member Regulation

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[6] To that end, we note that proposed Rule 4530(f) creates an exception from the reporting requirement under proposed Rule 4530(e) for documents that have been the subject or a request by FINRA's Registration and Disclosure staff.

[7] *See* Form U4 and U5 Interpretive Questions, Q10 relating to Question 14I on Form U4. Available at http://www.finra.org/Industry/Compliance/Registration/CRD/FilingGuidance/p005243.