



Carl B. Wilkerson
Vice President & Chief Counsel
Securities & Litigation
(202) 624-2118 t (866) 953-4096 f
carlwilkerson@acli.com

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By e-mail and U.S. mail transmission

Marcia E. Asquith
Office of Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: FINRA Proposed Rule 3210: Personal Securities Transactions

Dear Ms. Asquith:

We greatly appreciate the opportunity to share our views on proposed FINRA Rule 3210, which combines certain provisions of NASD Rule 3050 and NYSE Rule 407, as part of the development of a consolidated rulebook. ACLI is a national trade association with 340 members that account for 93 percent of the industry's total assets, 94 percent of life insurance premiums, and 94 percent of annuity considerations. Many of our members offer and distribute variable annuities through affiliated and independent broker-dealers ("insurance-affiliated broker-dealers"). We have participated in numerous NASD and FINRA rulemakings.

ACLI understands and supports the general objectives of FINRA's consolidation process. It is critical, however, that FINRA continue to recognize structural, operational and product-line distinctions among its broker-dealers as it executes rule consolidation. Proposed FINRA Rule 3210 does not implement these considerations. Indeed, FINRA's rule filing does not explain or justify the need to substantially alter existing procedures to approve and review employee accounts, despite the additional burdens the proposal would create for many broker-dealers.

Existing NASD Rule 3050 provides an appropriate risk-based approach to monitoring associated persons' personal securities transactions that functions well for many broker-dealers, such as insurance-affiliated broker-dealers, that have structures, operation and functions different from, and substantially more limited than, "wire-house" broker-dealers. We strongly urge FINRA to reconsider its initiative, including the proposed elimination of the current exemption for certain employee securities accounts, such as those holding only unit investment trusts ("UITs"), variable contracts or mutual funds, in light of the disproportionate impact the proposed rule would cause for a substantial number of broker-dealers.

As proposed, FINRA Rule 3210 would shift away from the existing risk-based approach and would instead impose mandatory consent, record keeping and monitoring requirements. The proposal will provoke a disproportionate expenditure of compliance resources even though the associated persons of insurance-affiliated broker-dealers have little or no contact with the kinds of material, non-public information that can create a risk of insider trading and other manipulative conduct that is the primary focus of the proposal. For these reasons, ACLI recommends that FINRA reconsider the rule in favor of continuing a risk-based approach, particularly for broker-dealers that are unlikely to be exposed to the problems the proposal seeks to address, due to the limited scope of their functions, products, and operations.

Overview of Proposal

In developing a consolidated rulebook, FINRA has proposed new Rule 3210 to replace existing NASD Rule 3050 and NYSE Rule 407. The proposed rule largely adopts and extends the mandatory consent and record keeping requirements of NYSE Rule 407. For NASD broker-dealers and their associated persons that were *not* NYSE member firms, this will require at least three major changes to procedures and related supervisory systems:

- While current NASD Rule 3050(c) requires associated persons to *notify* their member firm and executing member (or other type of financial institution) in writing of the intention to establish a securities account at the executing member, the proposed rule adopts the approach of NYSE Rule 407(a) by requiring the *consent* of the person's broker-dealer before the account can be opened. In addition, although NASD Rule 3050(f) exempted accounts limited to transactions in UITs, variable contracts, and mutual funds, the proposed rule imposes the consent requirement on such transactions and accounts.
- While NASD Rule 3050(b)(2) requires the executing broker, upon written request of the associated person's member firm, to transmit duplicate copies of confirmations, statements and other written information, the proposed rule adopts the approach of NYSE Rule 407(b) by requiring that duplicate confirmations and statements always be sent.
- While neither NASD Rule 3050 nor NYSE Rule 407 requires a particular kind of regulatory review by the associated person's member firm, the proposed rule requires the member firm to assure that account statements are received and, if not, to revoke its consent to maintain the account and to obtain records from the executing broker confirming that the account was closed.

In proposing these changes, the Notice does not indicate how any of these new requirements will promote more effective oversight or the impact it will have upon certain types of broker-dealers.¹ Nor does it address the distinct differences between broker-dealers that continue to exist and that were explicitly recognized by the different approaches taken on this issue by the NASD for NASD-only firms and by the NYSE for its member firms. This dichotomy occurs

¹ The Notice announcing the rule proposal and seeking member comment states that the new rule "would promote more effective oversight of the personal trading activities of associated persons of member firms." It does not support that statement with any references to examination findings or enforcement actions.

because only 200 of FINRA's 5,400 broker-dealers would have confronted duplicate rule standards as NYSE members.

Statement of Position

One of the major purposes underlying both NYSE Rule 407 and NASD Rule 3050 is to implement Section 15(f) of the Securities Exchange Act of 1934, which requires broker-dealers to implement procedures “*reasonably designed, taking into consideration the nature of such broker or dealer's business, to prevent the misuse in violation of the [Exchange] Act . . . of material, non-public information*” (emphasis added), as well as Section 15A(b)(6) of the Exchange Act, which requires procedures “designed to prevent fraudulent and manipulative acts and practices.” More generally, both rules aim “to prevent conflicts of interest that may arise from members' private security transactions.”²

Thus, embedded in the foundation of FINRA Rule 3210 is a recognition that “one size does not fit all,” a principle regrettably omitted in the proposed rule. Regulators readily recognize that certain areas of the securities business pose a higher risk of presenting conflicts of interest because associated persons may come into more frequent contact with material, non-public information. Examples include investment banking, research, market making, underwriting, proprietary trading, and block equities trading. Other areas, such as the distribution of mutual funds, variable annuities contracts and UITs, pose little, if any, risk that associated persons will come into contact with material, non-public information. This is consistent with the NASD's recognition that transactions in these products were not subject to market manipulation or free-riding and should be exempt from Rule 3050.³

A significant portion of ACLI membership engages in this more limited, low-risk business. Many ACLI members offer a limited range of products and their securities business typically focuses on variable annuity and mutual fund distribution. In addition, life insurers may create and market products and services that constructively address consumers' retirement, estate, tax, and financial planning needs. Over 50% of FINRA's universe of 675,000 registered representative work for broker-dealers affiliated with life insurance companies. These broker-dealers, however, are quite different from wire-house broker-dealers in structure, operation, products and services.

There is no indication that, in proposing FINRA Rule 3210, FINRA considered its diverse membership and the different levels of risk posed by member firms' various business models. The Notice contains no economic impact statement and does not quantify the burdens on member firms.⁴ It does not indicate any deficient supervision under current NASD Rule 3050. Instead, it has adopted the general approach of NYSE Rule 407 and significantly limited the

² See Exchange Act Release 34-30744 (June 5, 1992), and Exchange Act Release 34-19347 (Dec. 30, 1982).

³ See Exchange Act Release 34-23866 (Dec. 15, 1986). It should also be noted that there are other products developed in recent years that are not subject to market manipulation or free-riding which would be appropriate to exempt from the proposed rule, including 529 plans and ETFs.

⁴ Section 23(a) of the Exchange Act requires the SEC to consider the anti-competitive effects of rule changes and to balance any impact against the regulatory benefit to be obtained, while Sections

exemption for transactions in mutual funds, UITs and variable annuities. This will impose a heavy burden on insurance-affiliated broker-dealers to develop and implement an infrastructure to review and approve requests for outside brokerage accounts, as well as to monitor and supervise personal securities transactions where there is little or no risk of conflicts of interest, or misuse of material, non-public information.

The proposed rules governing personal securities transactions should be subject to a flexible, risk-based approach. Mary Schapiro, then Chief Executive Officer of FINRA, stated in testimony to Congress that the process of drafting a combined rulebook would take into account the strengths of each organization. Regarding NASD regulation, its strength was “expertise in the sales practices used in selling products including mutual funds and variable annuities.”⁵ In the same testimony, Chairman Schapiro noted that the consolidated rulebook “does not mean that the smaller broker-dealers will be burdened by rules that are inapplicable to the scope or nature of their business for ease of consolidating rulebooks; rather, we will be careful in calibrating the rules to have an application to appropriate firms.” For this reason, Chairman Schapiro stated that a guiding principle of the rulebook consolidation would be “to tier some rules according to firm size, business model or type of customer.”⁶

Rulemaking regarding the monitoring of personal securities trading is an area where the tiered approach discussed by Chairman Schapiro is most consistent with carrying out the rule’s purpose. It may make sense to impose a consistent framework upon firms and associated persons who engage in the types of business that may bring them into regular contact with material, non-public information. For insurance-affiliated broker-dealers and their associated persons that do not engage in these kinds of business, however, it is prudent to continue the risk-based approach of NASD Regulation, the organization that historically oversaw these firms and had the greater expertise in the sales practices associated with mutual funds and variable annuities.

Under current NASD Rule 3050, insurance-affiliated broker-dealers have already developed effective policies and procedures. Moreover, Rule 3050 already requires executing broker-dealers to provide duplicate confirmations and statements when requested. The rule proposal does not raise any recent examination issues or disciplinary actions that indicate deficiencies in current procedures or suggest that a significant change in approach is necessary.

15A(b)(6) and (9) of the Act require the SEC to evaluate carefully the competitive impact of proposed SRO rules and amendments.

⁵ Mary Schapiro, Testimony before the Committee on Banking, Housing and Urban Affairs Securities, Insurance and Investment Subcommittee United States Senate (May 17, 2007) (<http://www.finra.org/Newsroom/Speeches/Schapiro/P019169>).

⁶ Mary Schapiro, Remarks at CCO Outreach BD National Seminar (Mar. 7, 2008) (<http://www.finra.org/Newsroom/Speeches/Schapiro/P038108>). FINRA responsively revised its inaugural harmonization of Rule 3010 in response to [comments from ACLI](#) and others that the rule would have imposed a detrimental one-size-fits-all on broker-dealers that were not NYSE members, without regard to regulatory need or burden. This rule dealt with the scope of the terms office of supervisory jurisdiction and branch office.

Proposed FINRA Rule 3210 Will Impose Disproportionate Burdens on Insurance-Affiliated Broker-Dealers

As discussed above, the business of insurance-affiliated broker-dealers differs significantly from “wire-house” broker-dealers in their operations, products and services.⁷ For these firms, the proposed rule’s mandatory consent provision imposes significant burdens with little or no purpose. Many of the insurance-affiliated broker-dealers’ associated persons have only a limited involvement supporting the securities business, as their principal responsibility is supporting the insurance business. While their registered representatives seldom have functions that lead them to have material, non-public information, the risk that the firm’s other associated persons will obtain such information is even more remote. Moreover, the rule extends to those accounts in which the associated person has a “personal financial interest,” including “as a general matter,” the person’s spouse. Yet for all of these people, consents must be obtained to open for all kinds of accounts, including those limited to transactions in UITs, variable annuities and mutual funds.

In practical terms, the fifteen business days for the newly associated person to obtain employer consent and notify the other financial institution of his or her association with a member firm in proposed Supplementary Material .01 is not workable in light of all the human resources, benefits, compliance and supervisory steps that occur when a new employee begins working. There are many steps to the new hire process and tasks for the associated person to complete, and within the proposed time frame the executing broker must also process the request for the associated person’s member firm. Consistent with section (c) of the proposed rule, “promptly” would set a more reasonable standard.

The requirement of providing duplicate account statements and confirmations to the insurance-affiliated member also imposes a significant burden with little or no purpose. It is not clear what benefit is obtained by applying this requirement to all associated persons. Whether statements and confirmations are received manually or electronically, the volume may require a substantial investment in technology for storage and monitoring, as well as monitoring that instructions to close the accounts are sent and obeyed if receipt does not occur. These mechanical steps – for it is not clear what, if any transactions would merit substantive review in this context – will take resources away from identifying business risks, regulatory risks, and potential conflicts of interest. For example, in some accounts, such as managed accounts, there may be a high level of trading with no input by the associated member into the selection of securities. There is no rationale for gathering and reviewing these confirmations and requiring the account’s closure if confirmations are not received.

Since most insurance-affiliated broker-dealers are not NYSE members and are not currently required to gather these documents under NASD 3050, they lack the infrastructure to conduct these reviews. ACLI believes that it will take its member firms at least one year to adopt new policies and procedures, develop the necessary technology to manage the documentation and to bring the accounts of current registered representatives in compliance with the proposed

⁷ In fact, most “wire-house” broker-dealers require their associated persons to maintain their securities brokerage accounts with affiliated or captive retail brokerages, thus decreasing the administrative burden on the wire-house members. This is not the case with insurance affiliated members, who are typically not affiliated with retail brokerages.

rule. The logistics, burdens and expense of creating and implementing these practices greatly overshadows the proposal's regulatory need.

Conclusion

Proposed FINRA Rule 3210 will impose a significant administrative burden on insurance-affiliated broker-dealers with little impact on deterring or detecting abusive conduct. ACLI strongly recommends that FINRA reconsider the proposed rule and propose a rule with either a risk-based or, at a minimum, a tiered approach that firms can tailor to their business model and attendant risks.

We appreciate the opportunity to share our views on this proposal. Please let me know if you have any questions, or would like to discuss our position further.

Sincerely,

A handwritten signature in cursive script that reads "Carl B. Wilkerson".

Carl B. Wilkerson