SIFMA
Securities Industry and
Financial Markets Association

June 8, 2009

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

Re: FINRA Regulatory Notice 09-22: Personal Securities Transactions for and by Associated Persons

Dear Ms. Asquith:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to comment on the above-referenced FINRA Regulatory Notice, which proposes to combine certain provisions of NASD Rule 3050 and Incorporated NYSE Rule 407, in addition to adopting new requirements in connection with personal trading activities of associated persons of member firms.

SIFMA commends and supports FINRA's efforts to consolidate, streamline and enhance existing FINRA and Incorporated NYSE rules governing personal trading activities of associated persons. Indeed, many firms already have in place sound supervisory systems that monitor employee trading, including those effected outside of the firm. Based on members' experience, however, SIFMA believes that certain aspects of the rule proposal require reconsideration and modification. Specifically, and as detailed below, SIFMA recommends that FINRA amend the proposal to:

- incorporate the notion of "control" within the scope of the rule and provide additional clarity with respect to the term "personal financial interest;"
- permit employer firms to obtain duplicate confirmations and statements or their equivalents (e.g. electronic data) directly from executing firms on behalf of

[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.

associated persons, or directly from clients for accounts held at non-member firms (such as record keepers or transfer agents);

- expand the timeframe in connection with accounts opened before association from 15 days to 30 calendar days;
- provide an implementation period of 180 days from adoption of the new rules; and
- sponsor a centralized electronic database available to member firms that contains relevant contact information for both employer and executing member firms.

These modifications, we believe, would promote greater certainty regarding the accounts to which the rule applies, facilitate implementation of the new requirements, and alleviate many of the practical difficulties associated with the current proposal without detracting from the rule's overarching policy goals.

I. Scope of the Rule

Based in large part on NYSE Rule 407, proposed FINRA Rule 3210(a) prohibits any associated person from opening or maintaining an outside account "in which securities transactions are effected" and in which the associated person has a "personal financial interest," without the prior written consent of the employer member firm. The proposed rule further adds that the employer member must instruct the associated person to have the executing member or other financial institution provide duplicate account statements and confirmations to the employer member as a condition to granting consent. Proposed Supplementary Material .01 similarly requires newly associated persons, within fifteen business days of becoming associated, to obtain the employer's consent regarding previously opened accounts and to communicate association to the executing firm, together with instructions regarding duplicate account information for covered accounts. Notably, the rule does not define the term "personal financial interest," although FINRA does state in the Notice that it construes spousal accounts generally to fall under the definition.

As a threshold matter, SIFMA believes that the proposed rule's core objectives would be better served if FINRA provides additional guidance as to the scope of the rule, and in particular the term "personal financial interest" in order to more sharply focus on those types of accounts that pose the greatest risk. To that end, SIFMA respectfully recommends that FINRA modify the rule proposal in the following manner.

First, we strongly urge FINRA to incorporate the concept of "control" within the rule so that it would extend to accounts over which the associated person has investment discretion or can exercise direct control (i.e., pursuant to formal trading authorization or fiduciary position such as trustee). Conversely, to the extent an associated person does *not* exercise control over the outside account, that account would be excluded from the rule, notwithstanding the personal financial interest analysis to follow below.

Second, and equally critical, we believe that FINRA should provide greater clarity with respect to the term "personal financial interest" so as to avoid potentially inconsistent

interpretations. In that regard, we recommend that FINRA modify the rule to state that associated persons are deemed to have a *presumptive* personal financial interest in the following types of accounts:

- any account in the name of the associated person, either individually or jointly with another person;
- any account in the name of the associated person's spouse or domestic partner;
- any account of the associated person's minor children; and
- any account of any other immediate family member who resides in the same household as the associated person and is financially dependent on the associated person.

The presumption of a "personal financial interest" would be rebuttable, however, if the employer member firm reasonably concludes, after considering the facts and circumstances, that the associated person has no ability to direct the transactions in the account.[2] Thus, with respect to the aforementioned accounts, including spousal accounts, there would be a rebuttable presumption that the associated person had a personal financial interest in these accounts, unless the employer firm made a determination to the contrary. Inclusion of a rebuttable presumption standard, in conjunction with the other proposed revisions, we believe, would enhance consistency and facilitate more effective risk-based oversight of the personal trading activities of associated persons for possible insider trading violations and other manipulative and deceptive practices.

Finally, we note that Supplementary Material .03 properly excludes certain types of accounts and transactions from the rule's duplicate account statement and confirmation requirement. We ask FINRA to exempt these accounts from the scope of the rule altogether since employees have no ability to engage in insider trading or other manipulative practices through those accounts.[3]

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[2] SIFMA's recommendation is consistent with the Investment Company Act rules provisions governing review of accounts in which persons have "beneficial ownership" wherein " *the presumption of such beneficial ownership may be rebutted* . . . ." See Investment Company Act Rule 17j-1(d)(1)(i)(A) and Exchange Act Rule 16a-1(a)(2) (emphasis added). Similarly, current NYSE Interpretation 407/.01 governing spousal account states that a spousal account is not covered by the rule if "it has been proven to the satisfaction of the member firm that the account is *completely independent*" of the associated person (e.g. pre-nuptial or post-nuptial agreements).

[3] FINRA Rule 3210.03 states that the requirement to provide to the employer member duplicate account statements and confirmations shall not be applicable to transactions in unit investment trusts and variable contracts or redeemable securities of companies registered under the Investment Company Act, or to accounts that are limited to transactions in such securities, or to Monthly Investment Plan type accounts, unless the employer member requests receipt of such duplicate account statements and confirmations. In addition to the types of accounts, SIFMA respectfully requests that FINRA also consider carving out of the rule other types of accounts that have similar characteristics, such 529 Plans.

II. Obligation to Request Duplicate Confirmations and Account Statements

As noted above, FINRA adds several new requirements in both the rule text and Supplementary Materials that obligate associated persons (both currently employed and newly associated) to instruct the outside executing firm or financial institution to send duplicate account statements and confirmations to the employer. While SIFMA fully supports a requirement that employers receive account transaction information, we believe that resting the responsibility with the associated person to arrange for the duplicate documentation is unnecessarily restrictive, and indeed could be counterproductive to timely procurement and review of account activity.

Rather, SIFMA respectfully suggests that employers should have the ability to request duplicate confirmations and statements *or their equivalents* (e.g. electronic data) directly from outside firms. Today, many employer member firms have centralized systems and procedures that provide significant control over outside personal trading activities of their employees. In an effort to improve the efficiency, timeliness, and accuracy of these processes, some firms have built protocols around the collection of information whereby the employer firm communicates directly with executing firm to request transaction information for covered accounts via automated electronic feeds. By placing the obligation on the associated person and requiring that information to be transmitted in the form of confirmations and statements, the proposal could needlessly compromise or delay existing processes.

On the other hand, if the employer were permitted to undertake that responsibility on behalf of the employee, the approval and review process could be streamlined considerably. The employer could contemporaneously notify the executing member or other financial institution that: (i) the associated person has a personal financial interest in certain accounts and identify such accounts;[4] (ii) it approves those accounts; and (iii) it requests transaction data for those accounts in the form of its choosing (e.g. duplicate account statements and confirmations, electronic data feeds, etc.). SIFMA believes that the same principles should apply to cases where an associated person would newly be deemed to have a "personal financial interest" in an account of a related person.

Rather than bifurcate the approval, account identification and document request process, SIFMA's recommended approach therefore would enable both employer and executing firms to build upon already existing systems to create more streamlined approval, tracking and surveillance processes. Accordingly, SIFMA respectfully requests that FINRA amend sections (a), (b) and (c) of the proposed rule, together with Supplementary Materials sections .01 and .02, to include SIFMA's recommended alternatives with respect to the obligation to request account transaction information and the form in which the employer may receive that information from the executing broker.

[4] Member firms would still have to rely on the associated persons in the first instance to identify those accounts in which the associated person has a financial interest.

In addition to the forgoing, SIFMA also believes that flexibility is warranted with respect to accounts held at non-member firms (such as record keepers or transfer agents). Today, because member firms cannot compel non-member firms to provide statements, and because such firms may not have the capacity or the desire to provide statements to anyone other than their customers, employing firms typically obtain statements directly from the associated person or customer. SIFMA therefore respectfully requests that FINRA modify the rule proposal in order to allow employer members to obtain the statement directly from the associated person or customer, as is the common practice today. We recognize, of course, that it would be incumbent on the associated person to ensure that such statements are provided in a timely manner.

III. Accounts Opened Prior to Association - Supplementary Material .01

SIFMA also believes that additional time will be needed beyond the proposed 15 days within Supplemental Material .01 for employer firms and their newly associated persons to complete the account approval and documentation request process. For larger or more complex organizations in particular, the proposed time frame is unduly short and would present significant challenges. For example, the new hire process consists of several moving parts, with many tasks to be completed quickly by the associated person upon hire, such as health and retirement benefits enrollment, registration-related issues, and IT access. At a large firm, it may take several days for an employee to obtain access to relevant firm systems, followed by another week for the employee to receive an electronic notice to disclose account information since firm systems generate information on a rolling basis. After that, it may take another week for the executing firm to identify, process, and provide documentation to the employer. SIFMA therefore suggests that 30 calendar days is a more reasonable time frame, as it would reduce burdens to firms without creating compliance risk.[5]

IV. Revocation of Employer Member's Consent and Account Closure

The proposed rule sets forth a new requirement for the employer member to revoke its consent if it does not receive duplicate statements and confirmations in a timely manner, and to obtain promptly records from the executing member that the account was closed. SIFMA appreciates the underlying rationale for this requirement, but believes, however, that the closure requirement is potentially problematic because of possible harsh adverse consequences to the customer and practical implementation challenges, particularly for accounts with non-member firms. As an alternative, SIFMA recommends that FINRA consider a more principles based approach to achieving the intended purpose. Such a

[5] SIFMA's proposed 30-day time frame is predicated upon our recommendation that FINRA grant the relief requested in section II above, which would facilitate and streamline the information flow between the employer member and executing firm. Should FINRA decline SIFMA's request, we believe additional time would be needed beyond 30 days.

principles-based approach might allow for the executing firm either to retain the account and cease trading, or to transfer the account to the employer where feasible.[6]

At a minimum, SIFMA recommends FINRA amend the rule to require the *executing broke*r to notify the employer member firm of account closure (or transfer, as recommended above), instead of obligating the employer member to "obtain records" from the executing member evidencing account closure following revocation of consent. This approach, we believe, is more efficient and reduces needless administrative costs associated with "following up" by the employer member with the executing firm.

V. Obligations of Executing Members

The proposed rule requires that when an executing member has "actual notice" of an associated person's personal financial interest in an account, the executing member must not execute any securities transactions in that account unless it has obtained the employer member's prior written consent. Since the rule proposal requires the associated person to identify accounts in which he or she has a personal financial interest, we respectfully request that FINRA amend the language contained within Proposed Rule 3210(c) to state that the actual notice referenced in that provision means "actual notice by the associated person or employer," as requested above.

VI. Reasonable Implementation Period

To allow for adequate time for implementation and testing of the new requirements, SIFMA respectfully requests an extended implementation period of no less than 180 days from adoption of the new rules. Firms will need a significant amount of time to change their forms, online applications and processes to comply with the rule proposal, particularly if the definition of "personal financial interest" is expanded. Moreover, it would appear that some non-member firms that function as a record-keeper do not have the operational capability to send statements to two different addresses and would not be able to do so without significant system enhancements (to the extent they elect to make such changes).

VII. Consistency with MSRB Rule G-28 and NYSE Rule 407

SIFMA applauds FINRA's continued efforts and diligence in combing common FINRA and Incorporated NYSE rules in the creation of the single rulebook. We note, however, that unless NYSE revokes or adopts corresponding amendments to Rule 407 within in its stand-alone rulebook, dual member firms will continue be subjected to differing standards, thus undermining the overarching objectives of regulatory consolidation. Similarly, MSRB Rule G-28 also contains requirements governing

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[6] For certain accounts that hold common stock, stock options and other forms of stock ownership, account transfer or closure of the account might not be viable alternatives. Typically, the positions are acquired from a former employer and are subject to vesting or restrictions on transfer that would deem the positions worthless if the employee or spouse were required to surrender any rights to them.

employee transactions, which are inconsistent with FINRA's proposed rule. We therefore urge FINRA to work with NYSE and MSRB in developing a uniform standard for the industry.

VIII. Centralized FINRA Contact Information Database to Help Support and Implement Rule Change

In addition to the forgoing, and to help facilitate efficient implementation of the new requirements, SIFMA recommends that FINRA consider sponsoring a centralized database that contains relevant contact information for both employer and executing member firms. The information could be viewable on-line and available in the electronic feed (e.g. WebCRD) to member firms. Member firms could subscribe to the website and, of course, would be responsible for keeping their contact information current.

Employer member contact information could include the names and contact information for the persons to whom confirms and statements should be sent within the employer members, as well as instructions for delivery. Also, with respect to executing member firms, similar contact information would be available, together with instructions on how to request a freeze on an account (if statements are not received by the employer member) and account closure should the employer member deny or revoke consent. Such centralized contact information would significantly reduce instances of delay or improper revocations due to misdirected communications or other mishaps. It will also likely assist FINRA in its regulatory oversight of the process.

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SIFMA appreciates the opportunity to provide comments on FINRA's proposal regarding personal securities transactions. 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