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January 29, 2009

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). 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, we have a number of concerns that are discussed below.

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.

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440 Louisiana, Suite 1500
Houston, TX 77002 USA
Phone (713) 877 8234 ext. 6601
Desde México 001 (800) 514 2893
Fax (713) 877 8381

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.

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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.

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.

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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.*

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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 the issues of foreign finders and foreign broker/dealers need to be addressed in the revisions to the rules..

Respectfully submitted,

Jorge Ramos
President

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