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July 29, 2009

Elizabeth M. Murphy  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549-1090

**Re: File No. SR-FINRA-2009-039 – Response to Comments**

Dear Ms. Murphy:

This letter responds to comments submitted to the Securities and Exchange Commission (“SEC” or “Commission”) regarding the above-referenced rule filing, a proposed rule change to adopt NASD Rule 3011 (Anti-Money Laundering Compliance Program), without substantive change, as FINRA Rule 3310 (Anti-Money Laundering Compliance Program) and to adopt NASD IM-3011-1 (Independent Testing Requirements), subject to certain amendments, as Supplementary Material .01 (Independent Testing Requirements).<sup>1</sup>

Proposed FINRA Rule 3310 would incorporate, among other things, NASD Rule 3011’s requirement that an annual (on a calendar-year basis) independent test of a member’s anti-money laundering (“AML”) compliance program be conducted by member personnel or a qualified outside party.<sup>2</sup> Proposed Supplementary Material .01 would also incorporate NASD IM-3011-1’s provision prohibiting the independent testing from being conducted by anyone who performs the functions being tested, the AML compliance person, or anyone who reports to these persons. Proposed Supplementary Material .01, however, would not incorporate NASD IM-3011-1’s provision currently permitting, subject to certain conditions, the AML compliance

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<sup>1</sup> See Securities Exchange Act Release No. 60112 (June 15, 2009); 74 FR 29527 (June 22, 2009) (SR-FINRA-2009-039). The proposed rule change also would adopt NASD IM-3011-2 (Review of Anti-Money Laundering Compliance Person Information), without substantive change, as Supplementary Material .02 (Review of Anti-Money Laundering Compliance Person Information).

<sup>2</sup> The rule permits certain members, as described in the rule, to conduct the independent testing every two years (on a calendar basis).

program testing to be conducted by persons who report to either the AML compliance person or persons performing the functions being tested (referred to as the “independent testing exception”).<sup>3</sup>

The Commission received seven comment letters objecting to the elimination of the independent testing exception.<sup>4</sup> The commenters generally raised concerns that many small broker-dealers rely on the exception to permit internal personnel to conduct their annual AML compliance program testing and that its elimination will require those broker-dealers to hire costly outside consultants to conduct their AML compliance program testing. Four of the commenters also stated their belief that FINRA should seek additional member comment on the proposed elimination of the independent testing exception.<sup>5</sup>

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<sup>3</sup> Specifically, NASD IM-3011-1 permits independent testing by someone who reports to either the AML compliance or persons performing the functions being tested if: (1) the member has no other qualified internal personnel to conduct the test; (2) the member establishes written policies and procedures to address conflicts that may arise from allowing the test to be conducted by a person who reports to the person(s) whose activities he or she is testing (e.g., anti-retaliation procedures); (3) to the extent possible, the person conducting the test reports the test results to someone who is senior to the AML compliance person or persons performing the functions being tested; and (4) the member documents its rationale, which must be reasonable, for determining there is no other alternative than to comply in this manner. In addition, if the person does not report the results consistent with (3) above, the member must document a reasonable explanation for not doing so.

<sup>4</sup> Letter from Judy L. Loy, CEO, Nestlerode & Loy, Inc., to Florence Harmon, Deputy Secretary, SEC (July 8, 2009); Letter from Deborah Castiglioni, CEO, Cutter & Co., Inc., to Florence Harmon, Deputy Secretary, SEC (July 9, 2009); Letter from William R. Pictor, President and CCO, Trubee, Collins Co., Inc., to Florence Harmon, Deputy Secretary, SEC (July 10, 2009); Letter from Terri F. Rumans, CCO, Sage Ruddy Co., Inc., to Florence Harmon, Deputy Secretary, SEC (July 13, 2009); Letter from S. Lauren Heyne, CCO, RW Smith & Associates, Inc., to Florence Harmon, Deputy Secretary, SEC (July 13, 2009); Letter from Joe Giordano, President, Joseph James Financial Services, Inc., to Florence Harmon, Deputy Secretary, SEC (July 14, 2009); Letter from Larry Dorn, President, Dorn & Co., Inc. (July 16, 2009).

<sup>5</sup> Letter from Judy L. Loy, CEO, Nestlerode & Loy, Inc., to Florence Harmon, Deputy Secretary, SEC (July 8, 2009); Letter from Deborah Castiglioni, CEO, Cutter & Co., Inc., to Florence Harmon, Deputy Secretary, SEC (July 9, 2009); Letter from S. Lauren Heyne, CCO, RW Smith & Associates, Inc., to Florence Harmon, Deputy Secretary, SEC (July 13, 2009); Letter from Larry Dorn, President, Dorn & Co., Inc. (July 16, 2009).

As FINRA stated in the rule filing, FINRA is proposing to eliminate the independent testing exception because the Financial Crimes Enforcement Network (“FinCEN”), which is responsible for administering the Bank Secrecy Act (“BSA”)<sup>6</sup> and its implementing regulations, has stated that an independent testing exception, such as the one in NASD IM-3011-1, is inconsistent with the independent audit provision of the BSA and FinCEN’s interpretive guidance on the BSA’s independent audit requirement.<sup>7</sup> Accordingly, notwithstanding the commenters’ objections, in order to comply with FinCEN’s guidance, FINRA continues to propose eliminating the independent testing exception in connection with its adoption of proposed FINRA Rule 3310.

FINRA believes that the foregoing responds to the material issues raised in the comment letters to this rule filing. If you have any questions, please contact me at (202) 728-8026.

Sincerely,



Patricia Albrecht  
Assistant General Counsel

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<sup>6</sup> See 31 U.S.C. 5311, et seq.

<sup>7</sup> See Letter from Jamal El-Hindi, Associate Director, Regulatory Policy & Programs Division, FinCEN, to Nancy M. Morris, Secretary, SEC (August 22, 2007). FinCEN submitted the letter to the SEC in response to the New York Stock Exchange’s (“NYSE’s”) “omnibus filing,” a rule filing that sought to achieve greater harmonization between the NYSE and NASD rules, including the AML compliance program rules (SR-NYSE-2007-22).