Financial Industry Regulatory Authority

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February 5, 2010

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File No. SR-FINRA-2009-047 – 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,[1] to adopt FINRA Rule 3160 (Networking Arrangements Between Members and Financial Institutions) in the consolidated FINRA rulebook. The Commission received five comment letters in response to the proposal.[2]

The proposed rule change would adopt NASD Rule 2350 into the consolidated FINRA rulebook as FINRA Rule 3160, subject to certain amendments to streamline the rule and to reflect applicable provisions of the Gramm-Leach-Bliley Act of 1999 ("GLB") and Regulation R. Among other things, the proposed rule change would amend the scope of the rule to conform to the networking exception in GLB so that, with only limited exceptions, proposed FINRA Rule 3160 would apply to a member that is a party to a networking arrangement with a financial institution under which the member offers broker-dealer services on *or off* the premises of a financial institution. Proposed FINRA Rule 3160 would clarify that networking agreements must include all broker-dealer obligations, as applicable, in Rule 701 of Regulation R and that independent of their contractual obligations, members must comply with all such

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1 See Securities Exchange Act Release No. 60475 (August 11, 2009), 74 FR 41774 (August 18, 2009) (Notice of Filing; File No. SR-FINRA-2009-047).

2 Letter from Frederick T. Greene, Woodforest Financial Services, Inc., dated September 4, 2009 ("Woodforest"); letter from William A. Jacobson and Eric D. Johnson, Cornell Securities Law Clinic, dated September 8, 2009 ("Cornell"); letter from Dale E. Brown, Financial Services Institute, Inc., dated September 8, 2009 ("FSI"); letter from Jill I. Gross and Ed Pekarek, Pace University School of Law Investor Rights Clinic, operating through John Jay Legal Services, Inc., dated September 8, 2009 ("PIRC"); Ronald C. Long, Wells Fargo Advisors, dated September 18, 2009 ("WFA").

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broker-dealer obligations. Also, the requirement that members make a reasonable effort to obtain from customers a written acknowledgement of the receipt of required disclosures would not transfer as part of proposed FINRA Rule 3160. The comments received by the Commission on proposed FINRA Rule 3160 and FINRA's responses to the comments are discussed in detail below.

Networking Arrangements on and off the Premises of Financial Institutions

One commenter[3] believes that the application of proposed FINRA Rule 3160 to broker-dealer services off the premises of a financial institution unreasonably expands the requirement to provide certain disclosures orally and in writing to customers beyond bank brokerage clients to include all other customers of the broker-dealer, including institutional clients, on-line brokerage clients and off-shore clients. The commenter requests an explanation by FINRA regarding its proposal to expand the scope of the proposed rule to align with GLB and notes further that there is nothing in GLB that requires FINRA to use the precise GLB language. Moreover, the commenter requests that the SEC remove the "off the premises" language from the proposed rule. According to the commenter, the proposed rule would be easier to follow if FINRA issues an interpretation that explains that the "off the premises" language is limited in its application to financial institution clients who may learn of the members' brokerage services at locations other than the financial institution.

Irrespective of whether the proposed rule changes are compelled by statute, FINRA believes that extending proposed FINRA Rule 3160 to apply to member conduct pursuant to a networking arrangement, regardless of where such activities take place, will enhance investor protection. However, in light of comments received regarding the application of the proposed rule to customer accounts that are not opened as a result of a member's networking arrangement with a financial institution, FINRA will amend the proposal to require that oral disclosures only be provided at or prior to the time that a customer account is opened *on the premises of a financial institution* by a member that is a party to a networking arrangement with the financial institution. Written disclosures would still be required as set forth in the original proposal. FINRA believes that this change will retain the benefits of applying the rule to member conduct on or off the premises of a financial institution without imposing potentially unnecessary oral disclosures to customers whose account openings may be wholly unrelated to the networking arrangement.[4]

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3 WFA

4 FINRA notes that Regulation R Rule 701 does not require oral disclosures to a customer regarding incentive compensation arrangements for referrals by a bank employee to its broker-dealer networking partner of high net worth or institutional customers.

One commenter[5] suggests that if a member's networking agreement with a financial institution does not explicitly address off premises brokerage services to be provided by the member, then the member does not have to comply with the proposed rule in its application to off premises activities. FINRA disagrees with this interpretation of the proposed rule. Proposed FINRA Rule 3160 would apply to a member conducting broker-dealer services under a networking arrangement off the premises of a financial institution, regardless of the specific contractual agreements between the parties. The proposed rule aims to impose certain requirements on members in networking arrangements that apply notwithstanding any contractual obligations of the parties.

One commenter[6] opposes proposed FINRA Rule 3160 because it appears designed to maintain the status quo. The commenter believes that the proposed rule is insufficient and does not adequately protect investors. The commenter specifically notes that senior citizens are often confused regarding the role of financial institutions with respect to securities activities through networking arrangements.

As noted above, the proposed rule change expands existing requirements to encompass activities of a broker-dealer operating under a networking agreement with a financial institution occurring off the premises of a financial institution. Moreover, FINRA's examination and enforcement mechanisms will continue to bolster the application of FINRA's requirements governing members' networking arrangements with financial institutions. As such, FINRA does not believe that the proposed rule maintains the status quo.

Written Acknowledgement of Receipt of Disclosures

Certain commenters[7] suggest that FINRA maintain in proposed FINRA Rule 3160 a requirement that a member make a reasonable effort to obtain from each customer during the account opening process a written acknowledgement of receipt of the disclosures required under the rule. One commenter[8] notes that by eliminating this requirement, members have less incentive to ensure that associated persons are making the required disclosures. Another commenter[9] believes that FINRA's reasons for removing the acknowledgement requirement are unpersuasive. This commenter suggests that members have the technology to obtain adequate written

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5 WFA

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7 Woodforest, Cornell and PIRC

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acknowledgement from customers, and any administrative burden imposed upon members by a written acknowledgment requirement is greatly outweighed by the benefit of reducing customer confusion. One commenter[10] asserts that notwithstanding the current requirement to obtain written acknowledgment from customers, many investors do not know that they are getting into a securities product as opposed to a bank product. Additionally, one commenter[11] notes that FINRA's proposal may conflict with the *Interagency Statement on Retail Sales of Nondeposit Investment Products*, which requires firms to obtain written acknowledgement for the receipt of nondepository product disclosures. While the commenter does not oppose FINRA's proposal in this respect, it views it as an opportunity for regulatory harmonization in this area.

FINRA continues to believe that retaining a written acknowledgement in its rule is unnecessary. Moreover, compliance with FINRA's proposal does not conflict with a firm's obligations under the *Interagency Statement*, and a written acknowledgement is not required under GLB or Regulation R.

Setting Provision

One commenter[12] notes that it is common industry practice for a registered representative to use conference rooms at a bank location to meet with customers since banking regulations often do not allow customers to enter into the areas of the financial institution designated for securities business. The commenter[13] suggests that FINRA eliminate proposed FINRA Rule 3160(a)(1)(B), which requires members to conduct broker-dealer activities in an area that clearly displays the member's name so that the use of shared conference rooms may continue. Another commenter[14] adds that the "to the extent practicable" language in the setting provision is problematic because it invites a subjective and self-serving interpretation of this provision by the financial institution and the member. One commenter[15] believes that proposed FINRA Rule 3160 carves out electronic broker-dealer activities and notes that the setting provision ignores that bank deposits are often done electronically.

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FINRA does not believe that the proposed rule prevents a registered person from using a conference room at a financial institution inasmuch as each of the elements of paragraph (a)(1) of the proposed rule, including the signage requirement in subparagraph (B), can be satisfied. FINRA also notes that the language "to the extent practicable" exists in current NASD Rule 2350 and has not been amended under the proposal. Additionally, GLB includes identical language in a corresponding provision.[16] Finally, although the provisions of proposed FINRA Rule 3160(a)(1) provide specific guidance for physical separation on the premises of a financial institution, other provisions in the proposed rule (i.e., paragraphs (a)(3) and (a)(4)) address potential customer confusion for electronic or otherwise off premises broker-dealer conduct. With respect to electronic deposits made on the premises of a financial institution, FINRA notes that the "retail deposit-taking area" would include areas that have ATMs where electronic deposits are made.

Disclosures on Advertisements and Sales Literature

One commenter[17] suggests clarifying proposed FINRA Rule 3160(a)(4)(B) because, according to the commenter, it seems to require financial institutions to include disclosures on advertisements that do not reference the broker-dealer or its services. FINRA notes that proposed FINRA Rule 3160 would apply to the conduct and communications of a FINRA member in a networking arrangement, not to the activities or communications of a financial institution that are unrelated to the networking arrangement. As such, FINRA does not intend to amend the proposal as suggested by the commenter.

Proposed FINRA Rule 3160(a)(4)(C) provides a list of certain advertisements and sales literature that do not have to include the disclosures required under the proposed rule. One commenter[18] recommends adding business cards of a registered representative that are printed on a standard size 2" x 3" card to this list, since it is difficult to fit the disclosures on such communications. FINRA does not intend to amend proposed FINRA Rule 3160(a)(4)(C) to exclude business cards from the required disclosures. FINRA believes to the extent business cards are sales literature,[19] disclosures should be provided to assist customers in recognizing the distinctions between the brokerage services offered by the member and the banking

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16 See Exchange Act Section 3(a)(4)(B)(i)(II).

17 FSI

18 Woodforest

19 See FINRA Interpretive Letter to Tamara K. Salmon, Investment Company Institute (September 6, 2007).

services offered by the financial institution. Members may use the short form legend as provided in proposed FINRA Rule 3160(a)(4)(B) on business cards.

If you have any questions, please contact me at (202) 728-8104 or at gary.goldsholle@finra.org or Erika Lazar at (202) 728-8013 or at erika.lazar@finra.org.

Very truly yours,

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