



FINANCIAL SERVICES
FOR THE GREATER GOOD*

Pam Lewis Marlborough
Associate General Counsel
Tel: 303.626.4535
Fax: 303.626.4050

April 8, 2011

VIA ELECTRONIC DELIVERY

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

Re: File No: SR-FINRA-2011-013
Proposed Rule Change to Establish a Registration Category,
Qualification Examination and Continuing Education Requirements
for Certain Operations Personnel, and Adopt FINRA Rule 1250 in the
Consolidated FINRA Rulebook

Dear Ms. Murphy:

TIAA-CREF Individual & Institutional Services, LLC (“T-C Services”)¹ appreciates the opportunity to comment on the proposed rule change to adopt Rules 1230(b)(6) and 1250 in the Financial Industry Regulatory Authority, Inc. (“FINRA”) consolidated rule book (the “Proposal”). The Proposal would establish a new registration category, qualifications examination and continuing education requirements for certain operations personnel (“Operations Professionals”).

FINRA initially proposed the Operational Professional registration requirement in May 2010 in its Regulatory Notice 10-25. FINRA received 49 comment letters in response to the Proposal. The vast majority of the comments were submitted by member firms, and groups representing member firms, with significant concerns about the Proposal. Several letters raised concerns about imprecise and confusing language in the Proposal as to depth of personnel and scope of covered functions.² Many letters also expressed the belief that the Proposal, as drafted, was overly broad in application and more burdensome than necessary to achieve its

¹ T-C Services is a registered broker-dealer that is wholly owned by Teachers Insurance and Annuity Association of America (“TIAA”). T-C Services and TIAA are members of the TIAA-CREF group of companies which comprise one of the world’s largest retirement plan systems. For over 90 years, TIAA-CREF has helped people in the academic, research, medical and cultural fields plan for and live through retirement.

² See footnotes 19, 32, 36, 38 and 44 of the Proposal.

objective.³ In response, FINRA made only isolated changes to the Proposal which do not address many of the concerns raised.

We understand and appreciate the Proposal's objective of enhancing the regulatory structure surrounding a member firm's back-office operations through the registration and qualification of certain operations personnel. We are concerned, however, that the Proposal, as presently drafted, remains confusing and over-reaching – potentially extending to numerous levels of individuals, some of whom only have immaterial involvement with a covered function.

Additionally, the Proposal does not consider the potential cost, timing and resource impacts to member firms. In the current period of heightened economic pressure and unprecedented regulatory reform initiatives with concomitant cost and resource considerations to financial services firms, it is more important than ever that rule making proposals be carefully designed to appropriately balance perceived regulatory benefits against potential burdens to member firms.

The following reflects our thoughts on how to better refine the Proposal to strike an appropriate balance between investor protection concerns and providing a practical Operations Professional registration regime. As submitted, however, we believe the Proposal is inconsistent with the requirements of the Securities Exchange Act of 1934 ("Exchange Act") and, therefore, the Securities and Exchange Commission ("Commission") should institute proceedings to disapprove the proposed rule change.

* * *

I. The Proposal Should Be More Precisely Tailored to Capture Individuals with Substantive Decision Making and/or Oversight Authority over Key Broker-Dealer Back Office Functions.

As currently drafted, the Proposal would require three categories of covered persons to register with FINRA as Operations Professionals: (1) Senior management with responsibility over the covered functions; (2) Supervisors, managers or other persons responsible for approving and authorizing work, including the work of other persons, in direct furtherance of the covered functions; and (3) Persons with the authority or discretion materially to commit a member's capital in direct furtherance of the covered functions or to commit a member to any material contract or agreement (written or oral) in direct furtherance of the covered functions.

We commend FINRA for including supplementary materials in the Proposal memorializing that persons performing supportive, ancillary or administrative activities for a covered function will not be required to register as Operations Professionals. We agree that such individuals should not be subject to Operations Professional registration.

³ See footnotes 19, 25, 37 and 39-42 of the Proposal.

We are concerned, however, that other statements within the body of the Proposal call into question the application of the supplementary materials. Specifically, FINRA indicates in the Proposal that “covered functions generally would not include a person who engages in administrative responsibilities, such as an initial drafter or code developer. A person who supervises or approves such activities, however, generally would be required to register as an Operations Professional.”⁴ This statement runs directly counter to the supportive, ancillary and administrative activity exclusion in the supplementary materials to the extent such supervisor or approver does not have primary responsibility for a covered function. As such, clarification is needed on this point.

We also commend FINRA for revising the third depth of personnel category to include a materiality threshold. The remaining two categories, however, remain ambiguous and over-reaching. T-C Services recommendations for revising the depth of personnel criteria and other aspects of the Proposal are described below.

A. The Senior Management Category Should be Limited to Senior Management Directly Responsible for Supervising or Overseeing Covered Functions.

FINRA indicates in the Proposal that it would consider any senior manager in the chain of command responsible for a covered function to be subject to the proposed rule. This statement is sweeping in its effect. The depth of personnel criteria and covered functions as currently defined in the Proposal are so loosely worded as to potentially capture activities performed in a number of areas of a member firm, including but not limited to Operations, Finance, Treasury, Information Technology (“IT”), Information Security (“IS”), Marketing and Sales.

Certain C-level and other executive officers that traditionally have not been viewed as performing roles requiring licensing and registration, such as a member firm’s Chief Technology Officer and other technology or information security executives now may be deemed senior management responsible for a covered function even though their roles are supportive in nature. Such individuals or the chain of command below them may not possess active securities licenses today.

Additionally, other senior managers already subject to securities licensing and qualification (such as Marketing and Sales executives) now may be subject to yet another layer of licensing – for example, senior managers involved in designing the look and feel of a customer confirmation or assisting in the collection of data from a customer in connection with account opening. If such individuals are viewed as subject to Operations Professional registration, then it follows that individuals down their respective chains of command also would be subject to the requirements. We believe this is redundant and unnecessary.

⁴ Proposal at page 37.

To reduce the need for member firms to license and qualify countless layers of personnel in multiple areas at great time and expense to member firms, we believe the Proposal should be modified to capture the more well-defined universe of “Senior management directly responsible for supervising or overseeing the covered functions to ensure integrity and compliance with the federal securities laws and regulations and FINRA rules” (additions noted through underlining).

Additionally, the definitions of the following covered functions should be revised to capture more accurately those business areas responsible for the covered function and avoid inadvertently capturing ancillary business areas involved in the process:

Financial Regulatory Reports: We note FINRA has expanded the covered function relating to financial regulatory reporting from that set forth in Regulatory Notice 10-25. The category now captures not only the function of preparing such reports but also those functions that contribute to the process of preparing such reports. The interjection of the term “contributing to the process” has the potential to capture numerous areas that merely provide a support function, including IT, legal and compliance and any area of a member firm that provides information included within the report. Individuals that supervise supportive functions, including the senior management of such support areas, should not be subject to Operations Professional licensing merely as a result of their contributing role. As such, the phrase “contributing to the process of” should be deleted.

Defining and Approving Requirements: Covered functions (xiii), (xiv) and (xv) address defining and approving business requirements for covered function systems, as well as business security requirements and information technology and entitlement policies. Senior management and other supervisors, managers and other similarly situated individuals in the IT and IS areas should not be captured to the extent they are merely executing the instructions of an area with an appropriately staffed Operations Professional chain of command. As such, the above three covered functions should be qualified to specifically exclude executing technical requirements defined and approved by individuals who are supervised by one or more Operations Professionals.

B. The Supervisor, Manager and Authorizer/Approver Category Should be Precisely Defined to Capture Key Individuals that are Responsible for Ensuring Integrity and Compliance with Applicable Broker-Dealer Laws, Rules and Regulations.

FINRA received numerous comments to Regulatory Notice 10-25 indicating that the proposed description of the second category of depth of personnel was vague over-reaching and difficult to apply given its inclusion of the phrase “approving and authorizing work, including the work of other persons.”⁵ This criticism was echoed in the comments of member firms with varied operating models: introducing broker-

⁵ See footnotes 36-42 of Proposal.

dealers, self-clearing members and broker-dealers that are part of a multi-subsidary financial institution.⁶

In its response, FINRA states that it believes the provision is clear as proposed and believes member firms will be able to identify supervisors, managers or other persons responsible for approving or authorizing work in direct furtherance of the covered functions based on their functions and responsibilities.⁷ FINRA further states “The phrases ‘approve or authorize work’ and ‘work of other persons’ are not legal terms of art but, rather, comport with commercially understood operating terms and do not require clarification.”⁸ Respectfully, we submit that there is, in fact, confusion among member firms on this point. More precise and limiting terminology is needed. Moreover, based on our experience it is not the case that they are “commercially understood operating terms.”

There are many layers of individuals that could be deemed to “approve or authorize work.” Work in direct furtherance of a covered function may be supportive in nature (such as ordering paper stock, performing quality assurance work or a vendor authorizing its employees to perform work under its contract with the member firm) or substantive (such as determining the processes for delivery of confirmations or performing supervision over a covered function). In some cases the individuals authorizing or approving work may even be peers of the individuals performing the work rather than supervisors. Additionally, in the case of a large multi-subsidary financial institution, authorization and approval processes may extend across multiple layers of individuals supporting various subsidiaries and include processes that do not necessarily involve the broker-dealer’s operations. Each individual in such authorization and approval chain should not be captured by the Operations Professional requirement. Rather, licensing and qualification should be limited to the individuals charged with supervising and overseeing the member firm’s compliance with securities laws and regulations and FINRA rules applicable to the covered functions.

To help address such confusion, T-C Services recommends that paragraph (b)(6)(A)(ii) of proposed Rule 1230 be revised to state: “supervisors, managers and other similarly situated persons responsible for approving and authorizing work, including the work of other persons, in direct furtherance of the covered functions to ensure integrity and compliance with the federal securities laws and regulations and FINRA rules” (additions noted through underlining). We believe this revised language would enable member firms to identify Operations Professionals as those individuals charged with overseeing the member firm’s compliance with specific securities laws and regulations and FINRA rules applicable to the member firm’s operations. The foregoing revisions uses similar language as FINRA has newly incorporated into the description of covered function in paragraph (a)(6)(B)(xvi) relating to a member firm’s books and records.

⁶ Id.

⁷ Proposal at page 29.

⁸ Id.

II. Cost, Timing and Resource Burdens to Member Firms Will Be Significant and Weigh Heavily In Favor of a More Targeted Application of the Operations Professional Registration Requirement.

A. Potential Costs.

The Proposal, as presently structured, has the potential to capture hundreds of individuals spread across multiple areas of T-C Services and its affiliates. Many potentially impacted individuals do not currently hold active applicable securities licenses. T-C Services, like many firms, has avoided maintaining permissive licenses for its personnel given the associated costs and perceived regulatory scrutiny of potential parking violations. As a general matter, the associated costs of the Proposal imposed on T-C Services, and other member firms, will magnify based on the number of individuals and areas of the firm impacted. These costs could be significant.

Although the licensing costs have not been articulated by FINRA, we estimate that the initial FINRA fees alone could run between \$200 and \$500 per impacted individual.⁹ This does not include the costs of study materials and exam preparation courses, nor does it include the additional costs associated with maintaining the registrations, including continuing education¹⁰ and costs associated with staffing and systems enhancements needed to accommodate additional Form U-4 and U-5 filings and tracking of personnel that are deemed Operations Professionals. Furthermore, there will be costs to T-C Services of the time away from work that such individuals must spend to prepare for and take the exam. We also must assume that some individuals will need to take the exam more than once.

B. Timing Considerations.

While a 12 month window for Day One Operations Professionals to study for and take the exam, on its face, seems like a reasonable time frame, the associated resource pressures on firms becomes compressed as the number of individuals and areas of a firm subject to the registration increases. T-C Services may need to stagger the period of time that its personnel are out of the office to ensure that its business continues to operate smoothly and clients are not adversely impacted. In the event the Commission approves the Proposal as presently drafted, we believe an 18 to 24 month window is more practical and will be less disruptive.

Additionally, we believe at least 90 to 120 days will be needed to identify Day One Professionals and make the necessary Form U-4 filings. This lengthier time

⁹ We assume the initial per person exam fees will be approximately \$85 to \$265 based on the exam fees associated with the Series 6 and 7 exams. Additionally, FINRA assesses general registration fees of \$85 per person, annual processing fees of \$30 per person, fingerprint processing fees of \$30.25 per person, disclosure processing fees of \$95.

¹⁰ \$100 per person for FINRA regulatory continuing education.

period will allow firms to determine who is impacted and devote appropriate resources to making the associated filings.

Finally, we believe Non-Day-One Professionals should be provided with some reasonable window of time to sit for and take the exam. They should be permitted to operate in their intended functions prior to that time if supervised by an Operations Professional regardless of whether they are associated with an introducing or self-clearing firm. Such a window is necessary to ensure that member firms are adequately staffed both during peak capacity periods and in the event of an unforeseen business disruption.

C. Resource Burdens.

In the event the Proposal is approved as proposed, member firms may be challenged to balance capacity needs with the need to register various reporting lines in various areas as Operations Professionals as noted above. Moving other individuals into those positions on an interim basis may not be an option given the limited Day One relief.

Additionally, the inclusion of IT and IS personnel within the ambit of the Operations Professional registration requirement will limit the pool of potential applicants available to member firms. T-C Services, like other member firms, often uses contingent workers to fulfill IT needs which tend to ebb and flow depending on capacity, business needs and regulatory initiatives. Individuals with specific technology skill sets are often sought. Such experience may likely have been acquired at firms outside of the securities industry. We believe that most IT and IS professionals today do not hold securities licenses.

III. The Proposal Does Not Contain the Necessary Analysis of the Competitive Burdens and Should Not Be Approved as Proposed.

We appreciate that FINRA has the ability, pursuant to Section 15A(g) of the Exchange Act and Section 2, Article III of FINRA's Bylaws to prescribe standards of training, experience and competence to which member firms' associated persons are subject. For the reasons described above, however, we do not believe that the broad reach of the Proposal in its current form achieves the appropriate balance between protection of the public interest and reducing burdens on competition.

Not only does FINRA bear the burden of establishing that its rulemaking initiatives are designed to prevent fraudulent and manipulative acts, but such rulemaking must not impose undue burden upon member firms.¹¹ The instructions to Form 19b-4 require that FINRA explain in detail why the proposed rule change does not unduly burden competition or efficiency. Such an analysis is noticeably absent from the Proposal. FINRA has not attempted to outline even in brief terms the economic impact of the proposal on member firms.

¹¹ Section 15A(b)(6) and (9) of the Exchange Act.

FINRA indicates in the Proposal that it consulted with industry representatives in developing the Proposal. Importantly, however, it does not appear to have undertaken any sort formal assessment of the burdens of the Proposal on competition and efficiency. Moreover, it is unclear whether FINRA's informal efforts included a representative cross-sample of member firms, how many firms were consulted and whether FINRA addressed any concerns raised by the participants. FINRA has not provided visibility into such discussions. Furthermore, FINRA has not outlined the fees member firms may bear in registering Operations Professionals and the associated revenue FINRA expects to receive from this initiative.¹² These factors are not only important considerations, but information that the Commission is required to take into account in determining whether to approve or disapprove the Proposal.¹³

Absent such an effort, the proposed changes to Rules 1230(b)(6) and 1250, and the Commission's approval of them, may be subject to challenge based on a failure to take into account associated burdens on competition. Although not identical in application, the United States Court of Appeals (D.C. Circuit) recently remanded Rule 151A of the Securities Act of 1933, as amended ("Securities Act") to the Commission for further consideration on the basis that the Commission failed to fulfill its statutory obligation under the Securities Act to consider the effects of the new rule on efficiency, competition and capital formation. (Rule 151A was later vacated by the same court).¹⁴ Note also past Court action remanding Commission approved self-regulatory organization rulemaking to the Commission for further explanation based on a vagueness challenge.¹⁵ Given the Proposal could be subject to review by the same Court, a comparable analysis under applicable laws is warranted.

* * *

¹² Section 15A(b)(5) of the Exchange Act provides that FINRA rules must "provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system which the association operates or controls."

¹³ See Sections 6(b)(8) and 15A(b)(6) and (9) of the Exchange Act which require, among other things, a determination by the Commission that FINRA rules do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of Title 15. See also Section 19(b) of the Exchange Act which requires the Commission to disapprove a rule if it cannot make such a finding.

¹⁴ *American Equity Investment Life Insurance Company v. Securities and Exchange Commission*, 572 F.3d 923 (D.C. Cir., July 21, 2009), reissued at 2010 U.S. App. LEXIS 14249 (D.C. Cir., July 12, 2010).

¹⁵ *Timpanero v. Securities and Exchange Commission*, 2 F.3d 453 (D.C. Cir., Aug. 13, 1993).

Elizabeth M. Murphy
April 8, 2011
Page 9 of 9

We would welcome the opportunity to meet with FINRA and/or Commission staff in person or via telephone to discuss our concerns and recommended changes to the Proposal. If you have any questions, please contact me at 303.626.4535.

Very truly yours,

A handwritten signature in black ink that reads "Pamela Lewis Marlborough". The signature is written in a cursive, flowing style.

Pamela Lewis Marlborough
Associate General Counsel

cc: Robert Cook, Director of Division of Trading and Markets

