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May 4, 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”)<sup>1</sup> submits this letter as a supplement to our previous comment letter, dated April 8, 2011, regarding the above-referenced proposed rule change (“Proposal”).

We believe the recent comments of Richard Ketchum, Chairman and Chief Executive Officer of the Financial Industry Regulatory Authority (“FINRA”), are relevant to the Securities and Exchange Commission’s (the “Commission’s”) consideration of the Proposal. Chairman Ketchum underscores repeatedly in a recent published interview that the intent of the Proposal is to target individuals with significant and substantial involvement with covered functions – specifically, individuals he describes as having “very significant responsibility” and “substantial decision-making responsibility.” A copy of the interview with Chairman Ketchum’s comments is attached for your reference.

We agree with the FINRA Chairman that the Proposal should be limited to individuals with very significant responsibility and substantial decision-making

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<sup>1</sup> 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 private 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.

responsibility. We remain concerned, however, that despite his recent comments, the plain language of the Proposal exceeds this mandate and has an unnecessarily broad application. T-C Services, and other industry participants, have raised this as a significant concern in their comments on the Proposal. These concerns have been largely dismissed by FINRA.

We respectfully request that FINRA revise the Proposal to better capture the more appropriately targeted universe of Operations Professionals described by Chairman Ketchum (i.e., those individuals with very significant responsibilities and substantial decision-making responsibility). Our previous comment letter, as well as the comments of many other member firms, sets forth several practical suggestions in this regard. We again emphasize the statutory importance of balancing perceived regulatory benefits against burdens to member firms.<sup>2</sup> Unfortunately, we do not believe the Proposal as submitted achieves this balance and should not be approved by the Commission in its current form unless revised to be specifically limited to those individuals with significant responsibilities or substantial decision-making authority regarding operational issues.

Thank you for your consideration of our comments. We would welcome the opportunity to further discuss our concerns with representatives of FINRA or the Commission.

Very truly yours,

A handwritten signature in black ink, reading "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

Attachment: *SmartBlog on Finance* interview with Chairman Ketchum

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<sup>2</sup> See Sections 6(b)(8) and 15A(b)(6) and (9) of the Securities Exchange Act of 1934 ("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. Note prior Court action overturning self-regulatory rulemaking approved by the Commission that failed to meet such statutory obligations (*Timpanero v. Securities and Exchange Commission*, 2 F.3d 453 (D.C. Cir., Aug. 13, 1993)).

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## Q-and-A with FINRA Chairman and CEO Richard Ketchum

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*Richard Ketchum has been the chairman and chief executive of the Financial Industry Regulatory Authority since 2009. In this exclusive interview, Mr. Ketchum shares his thoughts on some of the key regulatory issues the industry is currently facing.*

### **1. Why do you think FINRA should become the regulatory agency for investment advisers?**

There isn't the level of oversight on the investment adviser side that should exist. The recent SEC report, which evaluated their [the SEC's] own capabilities from the standpoint of investment adviser oversight, concluded that unless substantial changes occur to their budget, the SEC simply does not have the resources to do the job that's necessary. Currently, they are only able to provide exams of 9% of investment advisers per year, and frankly, the demands for the SEC only stand to increase with respect to their oversight responsibilities of hedge funds and OTC derivatives. I think that one or more SROs is a proven way to be able to leverage the government resources and to provide the needed oversight.

Why should FINRA at least be part of the solution? To begin with, we already have the infrastructure in place. As the SRO for broker-dealers, we have the experience with

respect to oversight of many of these firms because they're both broker-dealers and investment advisers-88% of the individuals registered as investment advisers are affiliated with entities that are both broker-dealers and investment advisers. Therefore, FINRA can most effectively work in partnership with the SEC to provide the needed oversight. We hear the concerns of the investment adviser community that there shouldn't be a wholesale application of broker-dealer requirements on investment advisers, and we take these concerns very seriously. If FINRA was to gain responsibility in this area, we would look to have separate governance. We would look to have an affiliate board supervising investment adviser oversight that was composed of a majority of public members and a minority of industry members with a strong background in the investment adviser business. We would also add staff with particular knowledge and experience with investment adviser issues. So we recognize we would need to supplement, but FINRA has the infrastructure and experience to be able to deliver an effective exam program.

## **2. Why do you think it is important to regulate investment advisers and broker-dealers differently?**

Just as there are many different broker-dealer models, investment advisers raise different risks. Investment advisers are subject to a fiduciary standard; they don't have trading businesses or investment banking businesses, therefore, you really need to have a program that focuses specifically on the business from an adviser standpoint. That's not to say that regulatory concerns related to investment advisers are not related to many of the customer issues from the broker-dealer side, but it does necessitate a different treatment from the standpoint of advisers. It still works better if they're looked at together because in the end, the business is one business and for so many firms, the business is maintained as a single business across both their adviser and broker-dealer activities.

## **3. What motivated FINRA's push to require registration of back-office personnel? How do you respond to those in the industry who think such a move would be too onerous?**

Back-office personnel, which include technology and administrative staff, interact in areas of the firm that have substantial customer contact and are involved in significant decisions that can raise compliance issues. Given how significant these personnel are and how integrated they are into everything a firm does, back office managers should have a fundamental understanding of the compliance risks and requirements the firm is subject to. That's really the fundamental purpose of the rule. Back-office managers are critical cogs involved in decisions that can put the firm in jeopardy from a regulatory standpoint and they should, like other areas, be sensitized to the issues there.

With regard to the move being too onerous, FINRA has worked closely with SIFMA committees to carefully design a definition that focuses on those individuals with very significant responsibility. There has been great effort from a definitional standpoint to target only people who have substantial decision-making responsibility. In particular,

with respect to smaller firms, I believe most of the people who meet the back office definition will turn out to be already registered.

**4. Were you satisfied with the findings of the investigation into the market event of May 6, 2010? Why do you think the limit-up limit-down proposal is the best solution to prevent such an event from happening again?**

I think the joint study of the SEC and CFTC set out the facts very clearly. To begin with, it evidenced that there's not a fundamental market structure weakness, but there is fragility in times of tremendous pressure. The SEC should be praised for working with the exchanges and FINRA to implement an interim solution immediately with respect to a 5-minute pause for actively traded securities. The pause was the only effective short-term solution to deal with the reality of automated trading-that any liquidity can be virtually instantaneously removed. In that environment, there's a real risk of extraordinary volatility like we saw on the flash crash day.

Limit-up limit-down supplemented with pauses is a far better long-term solution for a couple of reasons. First, the problem with the pause is that it didn't catch the initial trade so you could have an error which was way away from the market. Secondly, even in situations where any liquidity issues were immediately righted, you had a 5-minute delay before trading could resume.

In most situations, you have one erroneous program or the like where liquidity immediately returns to the market after the trade and that's what a limit-up limit-down addresses more effectively. It allows for trading to begin immediately if liquidity returns in a few seconds. You only move to a pause if that liquidity hasn't returned in a few seconds. So what you have is a system that is more protective from unacceptable volatility and bad customer executions, while at the same time is far more efficient by allowing, in most cases, the market to immediately resume.

**5. What are some of the strongest aspects of Dodd-Frank?**

I think certainly from FINRA's perspective, first and foremost, the step to have the SEC move to a single fiduciary standard was an important step from Dodd-Frank. We have a customer facing business that is fundamentally integrated so it makes sense to have a single standard, albeit one that is carefully crafted, and I think that is the process currently underway.

Secondly, I think it's critical that Dodd-Frank moved to fill the gap that exists from the standpoint of regulatory oversight of OTC derivatives and the absence of an effective clearing environment. The SEC and CFTC are working in the OTC derivative area to have an environment that creates far less systemic risk, and has far better oversight and far better controls in place.

**6. There has been a lot of focus on the hundreds of rules policymakers need to write and implement as a part of Dodd-Frank, but is there anything Dodd-Frank might**

**have missed? Any issue Dodd-Frank fails to address or a provision that should have been included and wasn't?**

I think Dodd Frank did deal with key points, including addressing regulatory gaps. However, I wish there was greater clarity from the standpoint of capital and leverage requirements in the industry. I am hopeful that Basel III results in an environment where there's consistency across countries, and where the importance of maintaining sufficient capital and having the correct controls over leverage are properly addressed.