I am writing to express concern that many member firms with a limited business model who are intended to be exempt from new tiered rule provisions will be subjected to the more demanding tiered rules intended only for firms who carry and clear customer securities transactions, solely because they have a history of checking the (k)(2)(i) exemptive box on the FOCUS report.

It is clear that many new provisions have been tiered to apply only to:

(1) firms that clear or carry customer accounts, or
(2) firms that operate pursuant to the exemptive provisions of Rule 15c3-3(k)(2)(i), referred to as "(k)(2)(i) members".

It is also clear that such provisions are not intended to apply to:

(1) introducing firms, or
(2) firms with limited business models,

which together are referred to as "non-clearing firms". Examples of firms with limited business models include firms which engage exclusively in subscription-basis mutual fund transactions, direct participation programs, and/or mergers and acquistions activitities. Additional limited business models not specifically listed in Notice 08-23 would apparently include firms which might also (in addition to the listed activities) engage in placement of long-term leveraged leases, private placements, and investment banking advisory services (with securities transaction-based "success fees"), or which temporarily conduct no securities business at all.

It is NOT clear how FINRA expects to identify which firms are "non-clearing firms" when such firms have a limited business model but are not introducing firms.

The FOCUS report filed by substantially all firms subject to FINRA jurisdiction would presumably be the tool used to segregate "non-clearing firms" from "carrying, clearing or (k)(2)(i) member firms". Unfortunately, the FOCUS section entitled "Exemptive Provisions" allows firms to claim Rule 15c3-3 exemption using only four alternatives:

A. (k)(1)--Limited business (mutual funds and/or variable annuities only)
B. (k)(2)(i)--"Special Account for the Exclusive Benefit of Customers" maintained
C. (k)(2)(ii)--All customer transactions cleared through another broker-dealer on a fully disclosed basis
D. (k)(3)--Exempted by order of the Commission

These limited categories have long been obsolete in relation to the actual categories of business conducted by member firms:

1. Firms which introduce transactions to another broker-dealer usually check (k)(2)(ii), even if such firms also conduct mutual fund business on a subscription basis, and/or sell direct participation programs, or engage in other "non-clearing" activities away from the broker-dealer

who clears their stock and bond transactions on a fully disclosed basis.

2. Few members check (k)(1) because few firms do mutual fund and/or variable annuity business ONLY.

3. Few members check (k)(3) because virtually no guidance has ever been given as to any "order of the Commission".

4. Most firms with a limited business model ("non-clearing firms") check (k)(2)(i), not because they actually have any "Special Account for the Exclusive Benefit of Customers", and not because they transact any business at all using a (k)(2)(i) account, but because they can rely on a decades-old SEC interpretation which stated that they could claim such exemption from Rule 15c3-3 if they agreed to open a (k)(2)(i) account in the event that they ever received customer funds (and they don't ever receive customer funds).

I am concerned that firms with a limited business model, who are not intended to be subjected to the application of many tiered rule provisions, will be subjected to such rules only because they checked exemptive provision (k)(2)(i) on their FOCUS report.

It is noted that, for many years, no guidance has been provided to suggest that the historical practices described above in checking the exemptive provisions boxes on the FOCUS reports have in any way been inappropriate.

It appears clear that the "(k)(2)(i) firms" to which the new tiered provisions are intended to apply are the firms which actually use a (k)(2)(i) bank account to clear securities transactions, and not the many firms who do not use such an account, but who do check the (k)(2)(i) box in the exemptive provisions section of the FOCUS report.

Therefore some form of regulatory guidance is needed prior to implementation of Notice 08-23... That guidance might be in the form of instruction to all "non-clearing firms" (including direct participation program and investment banking advisory and private placement and leasing firms) to cease checking the (k)(2)(i) box and to instead check the (k)(1) box in spite of the parenthetical description "mutual funds and/or variable annuities only".

Alternatively, the obsolete categories of "exemptive provisions" might be updated to coincide with the new tier descriptions:

A. (k)(1) Firms with limited business models ("non-clearing firms"), including subscription-based mutual fund transaction, direct participation programs, merger and acquistions activities, private placements, leasing, and investment banking advisory services.

B. (k)(2)(i) Firms who clear customer transactions using a "Special Account for the Exclusive Benefit of Customers"

C. (k)(2)(ii) Firms who clear stock and bond transactions through another broker-dealer on a fully disclosed basis.

D. (k)(3) Firms exempted by order of the Commission.

Alternatively, the obsolete categories could remain unchanged if the Commission would publish an order which allows/instucts all "non-clearing firms" (as described above) to check exemptive box (k)(3) in the future.

Alternatively, the tiered provisions could be amended so that they do NOT apply to (k)(2)(i) firms.

In summary, it is clear that regulatory guidance is needed to eliminate confusion in the implementation of Notice 08-23. Specifically, prior to implementation of Notice 08-23, guidance is needed in order to clarify how FINRA will identify and exempt from many tiered rule provisions those firms with limited business models ("non-clearing firms") who currently check the (k)(2)(i) exemptive provision on their FOCUS reports.

Respectfully,

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(whose clients include seven member firms with limited business models who currently check the (k)(2)(i) exemptive provision)