June 13, 2008

Via e-mail

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: Proposed Consolidated FINRA Rules Governing Supervision and Supervisory Controls, Regulatory Notice 08-24

Dear Ms. Asquith:

The American Bankers Association,[1] the ABA Securities Association,[2] and The Clearing House Association L.L.C.[3] (hereinafter referred collectively as "the Associations") appreciate the opportunity to comment on the proposed consolidated FINRA rules governing Supervision and Supervisory Controls.[4] The Associations are particularly interested in that aspect of the proposal that addresses the extent to which FINRA rules apply to individuals that are dually employed by banks and broker-dealers. Since August 2001, ABA and ABASA have had pending with the then-NASD a request for interpretive guidance that NASD Rule 3040[5] should not apply to dual

[1] The American Bankers Association brings together banks of all sizes and charters into one association. ABA works to enhance the competitiveness of the nation's banking industry and strengthen America's economy and communities. Its members—the majority of which are banks with less than $125 million in assets—represent over 95 percent of the industry's $13.3 trillion in assets and employ more than two million men and women.

[2] ABASA is a separately chartered affiliate of the ABA representing those holding company members of the ABA that are most actively engaged in capital markets, investment banking and broker-dealer activities.

[3] The members of The Clearing House Association L.L.C. are ABN AMRO Bank N.V.; Bank of America, National Association; The Bank of New York; Citibank, N.A.; Deutsche Bank Trust Company Americas; HSBC Bank USA, National Association; JP Morgan Chase Bank, National Association; UBS AG; U.S. Bank National Association; Wachovia Bank, National Association; and Wells Fargo Bank, National Association.

[4] Regulatory Notice 08-24.

[5] Rule 3040, Private Securities Transactions of An Associated Person, generally requires associated persons to seek approval from the member firm prior to engaging in any private securities transaction for which they may receive

bank broker-dealer employees when they are performing securities activities in the bank that are exempt from broker-dealer registration. Our position was based on the fact that in enacting Title II of the Gramm-Leach-Bliley Act (GLBA), Congress recognized that certain securities activities conducted in the bank are appropriately regulated by the federal banking regulators; that the activities ought not to be subject to additional regulatory oversight by national securities authorities, and, accordingly, exempted these activities from broker-dealer registration.

GLBA was intended to facilitate the provision of multiple financial services by financial firms that heretofore had been separated by the securities, banking and insurance laws. Financial institutions, like the Associations' members firms, have responded to GLBA, as well as to other trends in the financial services industry, by adopting business models that allow seamless delivery of financial services products to the customer. The essence of that model is the designation of a "relationship manager" to address the full gamut of a client's financial services needs. Under the "functional regulation" approach adopted under GLBA, the use of dual employees has become vital to implementation of this business model in a manner consistent with GLBA's provisions. Dual employees permit financial service institutions to comply with GLBA and the differing requirements of the functional regulators while consolidating in one relationship manager the delivery of several types of financial services and products to customers. Many of the benefits of this approach are undermined, however, to the extent that different functional regulators impose conflicting and-/or redundant regulatory requirements on such dual employees.

While the Associations are pleased that FINRA has determined that it is appropriate to except from member firm supervisory oversight those bank securities activities that are exempt, by statute or regulation, from broker-dealer registration and regulation, we are disappointed that FINRA has determined to condition the exception on numerous requirements. Recognizing that these bank securities activities are appropriately regulated by the banking industry's functional regulators, Congress exempted these activities from broker-dealer registration and regulation. We would have hoped that FINRA would have acted in a similar fashion and exempted, without condition, bank securities activities from the general supervisory requirements of proposed Rule 3110. Nevertheless, because it is vitally important that the issues involving supervisory responsibilities of member firms *vis-à-vis* bank securities activities are resolved to everyone's satisfaction before Regulation R[6] becomes effective for most banking organizations on January 1, 2009, we believe, without withdrawing our view that a simple, straightforward unconditional exemption is what is necessary, that the proposed exemption, subject to our comments below, should be workable for our members.

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compensation. In addition, the rule requires the member firm to supervise the associated persons' activities and to keep duplicate books and records of those persons' activities.

[6] Regulation R, jointly adopted by the Securities and Exchange Commission and the Board of Governors of the Federal Reserve System, defines terms used in Title II of GLBA and provides additional exemptions from broker-dealer registration for bank securities activities.

DISCUSSION

As a general matter, the proposal would eliminate Rule 3040 and, instead, replace it with new streamlined provisions in proposed Rule 3110(b)(3) that would require an associated person to obtain the member firm's prior written approval before engaging in any outside investment banking or securities business. If the member firm gives its written approval, the outside securities activity is within the scope of the member firm's business and must be supervised by the firm in accordance with Rule 3110.

FINRA has proposed to except from the general supervisory requirements of Rule 3110 those bank securities activities that are exempt from securities regulation and oversight under either GLBA or Regulation R. A number of conditions to the exemption would apply, however.

First, proposed Rule 3110(b)(3)(B) exempts dual employees from the Rule's general supervisory requirements for outside securities activities, so long as the member firm receives written notice of the employee's activities and has approved these activities. A "dual employee" is defined, under the proposal, to mean "a natural person who has prior written approval from the member [broker-dealer firm] to perform as both an associated person of a member and a bank employee."

Second, the proposed Rule would prohibit a member firm from approving such activities unless the member firm has written assurance that the bank or a supervised bank affiliate will:

- Have a comprehensive view of the dual employee's securities activities;
- Employ policies and procedures reasonably designed to achieve compliance with the anti-fraud provisions of the federal securities laws; and
- Give prompt notice to the member firm of any dual employee's violation of such policies and procedures.[7]

Comprehensive View

Many of our member banks that offer customers access to securities products through affiliated broker-dealers are part of larger banking organizations that are subject to consolidated supervision by either the Board of Governors of the Federal Reserve System (FRB) or the Office of Thrift Supervision (OTS). Other members offer customers these products and services through broker-dealer subsidiaries of banks that are subject to direct supervision by one of the federal banking regulators and, if they are part of a holding company, to consolidated supervision by the FRB or the OTS. Finally, other member banks offer customers securities products or services through an agreement with unaffiliated third-party brokerage firms. Again, the bank is

[7] Two additional conditions apply. If a member firm receives such a notice, the member firm must assure itself that the policies and procedures of the bank or bank affiliate are reasonably designed to achieve compliance with the anti-fraud provisions of the federal securities laws or, alternatively, have been amended to achieve such compliance. If the member firm does not receive the required assurance, it must revoke its approval of the dual employee's bank-related securities activities. Supplementary material accompanying the rule proposal makes clear that one-time violations of bank policies and procedures should not necessarily lead to a conclusion that the bank's supervisory system is insufficient or improperly designed.

supervised by one of the federal banking regulators and possibly the FRB or OTS if it is part of a holding company.

Our member banks understand the need for coordinated supervision to ensure that dual employees' conduct of securities activities in two legal entities does not result in inadequate supervision that would increase the risk of violations of the anti-fraud provisions of the federal securities laws. As a result, when our member banks and their FINRA-regulated partners establish dual employee relationships, they collectively take steps to ensure that their respective compliance programs are designed to work in tandem to prevent such a result. Individual organizations, however, have different ways of achieving this result. Some may rely on a fully integrated compliance function that serves the entire organization, including both the bank and the FINRA member firm; some develop mechanisms for communication and cooperation between the compliance functions of the bank and of the FINRA member firm; and others have developed other mechanisms, including placing a greater reliance on the compliance function of the FINRA member firm.

The Associations believe that it is important that our members retain this flexibility to structure their compliance functions in a manner that best fits the structure and operations of their particular businesses. In our view, requiring an organization to structure its compliance function in a particular way could actually increase the risk of compliance failure. For the reasons we outline below, we are concerned that the proposal could interfere with this flexibility.

Specifically, proposed Rule 3110(b)(3)(B)(ii) provides that the member firm must receive assurance that the bank or a supervised bank affiliate has responsibility for ensuring compliance with the anti-fraud provisions of the federal securities laws. We are concerned that this language could be read to preclude a broker-dealer from assuming any role in supervising the aggregate of the dual employee's securities activities, whether conducted in a bank or in a broker-dealer firm, for compliance with the anti-fraud provisions of the federal securities laws. As we discussed above, it is not uncommon for some banking organizations to place a greater reliance on their FINRA-regulated partners.

In addition, some bank holding companies have more than one bank and non-bank subsidiary within the organization. The term "supervised bank affiliate" could be read to refer only to a bank affiliate of the bank and FINRA member firm that are dually employing the individual. We assume that this is not what FINRA intended but believe that the proposed rule should be revised to make clear that dual employee arrangements are permissible, subject to the FINRA member firm ensuring that arrangements are in place whereby either the member firm, one of its affiliates that is subject to regulation by one of the Federal banking agencies (including a non-bank affiliate regulated under the Bank Holding Company Act) or some combination of the foregoing have a comprehensive view of the dual employee's securities activities. We believe that this clarification could be accomplished by revising the definition to make clear that the term "supervised bank affiliate" is intended to mean any supervised affiliate of a bank that is supervised by either a bank regulator or by FINRA itself. With this revision, the Associations believe that their members should be able to comply with the proposed rule.

Other

In this connection, we would like to raise two other issues for consideration. Proposed Rule 3110(a) states that a member shall establish and maintain a supervisory system to achieve compliance with the federal securities laws and applicable FINRA regulations, as well as those of the Municipal Securities Rulemaking Board (MSRB). For those banks that conduct their municipal securities business activities within the bank, enforcement of MSRB rules properly lies with the bank's primary federal regulator, i.e., the Office of the Comptroller of the Currency, the FRB, the OTS or the Federal Deposit Insurance Corporation. Member firms that are affiliated with banks that have opted to conduct their municipal securities business within the bank should not be required to supervise in-bank municipal securities activities.

Finally, the Associations request that FINRA reaffirm the ability of a previously licensed individual for whom the two year grace period has expired to seek a waiver from re-taking the qualification examination for representatives if the individual has been employed in the securities business at a bank.[8] Many banks hire individuals who hold FINRA licenses to work in various divisions of the bank that engage in securities activities, such as the bank's trust or custody and safekeeping departments. In addition, we believe that many banks will choose to offer bank customers the opportunity to acquire money market mutual funds through the bank as permitted under Regulation R[9] and might very well prefer to do so through the hiring of individuals holding FINRA qualifying licenses. While it is true, that these individuals would not lose their licenses if they were appropriately employed as dual employees of an affiliated or third party broker-dealer, it is not uncommon for some banks to have a business model that completely separates the bank and its employees from those of an affiliated broker-dealer. If the employee can demonstrate that he or she, while employed at the bank, engaged in the type of securities business relating to the registration category or categories for which he or she seeks an examination waiver under FINRA Rule 1070, a waiver should be granted.

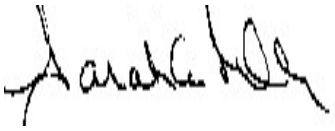
[8] See Letter from Gary Goldsholle to Alan E. Sorcher, Securities Industry Association, and Sarah Miller, American Bankers Association and ABA Securities Association, dated October 27, 2000.

[9] See Rule 741 of Regulation R.

CONCLUSION

In conclusion, the Associations are pleased that FINRA has proposed to except dual bank broker-dealer employees from the supervisory responsibilities of member firms. It is most important that this issue is addressed before Title II of GLBA and Regulation R become effective. We believe with the clarifications we have suggested that the exception for dual bank broker-dealer employers should be workable for our combined membership.

Sincerely,



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