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April 10, 2025

Ms. Jennifer Piorko Mitchell
Office of Corporate Secretary
FINRA1700 K Street, NW
Washington, DC 20006

Re: Comment on Regulatory Notice 25-05 and Proposed Rule 3290

Dear Ms. Mitchell,

PKS appreciates the opportunity to comment on the recently published Regulatory Notice 25-05. Staff categorizes this Regulatory Notice as a "Proposal to Reduce Unnecessary Burdens and Simplify Requirements Regarding Associated Persons Outside Activities." However, contrary to its title, the proposed Rule and guidance proffered in the Regulatory Notice will not serve to achieve either of the stated goals, but rather will add additional ambiguity and burdens on both member firms and unaffiliated Registered Investment Advisory firms ("RIAs").

Regulatory Notice 25-05 states[1] that "the proposal does not alter members' obligations for outside IA activities." The Rule and its guidance and Appendix, in fact, completely alters a member's obligations and ignores existing Rules and guidance to effect the new standard of oversight that Regulatory Notice 25-05 would impose. Further, Regulatory Notice 25-05 represents a virtual about-face from its predecessor, Regulatory Notice 18-08, which actually did seek to "reduce unnecessary burdens while strengthening investor protections." [2]

Further, in an unprecedented expansion of FINRA jurisdiction, Regulatory Notice 25-05 would enhance FINRA's regulatory purview into business lines wholly unrelated to the activities of broker-dealers, such as real estate, banking and insurance. Given that each of these business lines, particularly banking, are complex, and banking in particular is already heavily regulated, we respectfully but forcefully disagree with that stance.

In Regulatory Notice 25-05, FINRA maintains that the guidance in the Notices to Members issued in the 1990s [3] would remain in effect as interpretive guidance with reference to the new rule. PKS maintains that if FINRA is going to rely on these Notices to Members, FINRA is bound by them. In this regard, (1) FINRA cannot mandate that broker-dealers supervise the advisory activities at an unaffiliated RIA; (2) existing Rules and Regulations, as well as legal precedent, prohibit a broker-dealer from executing such supervisory mandate; (3) execution of

[1] See Regulatory Notice 25-05, footnote 8 thereof.
[2] Regulatory Notice 18-08.
[3] Notices to Members 91-32, 94-44 and 96-33. Also referred to as "1990's notices."

such a mandate is impracticable if not impossible; (4) FINRA cannot mandate supervision of business lines not itself provided by a broker-dealer or its affiliate;[4] and, (5) FINRA cannot require broker-dealer supervision of non-securities activities such as real estate, banking and insurance.

We have organized our position in nine sections, as follows:

I. **Cryptocurrencies, Real Estate, Fixed Insurance and Banking are not securities and this contemplated Rule constitutes an unprecedented extension of the prior Rules and Notices regarding Private Securities Transactions and Outside Business Activities.**

II. **With respect to broker-dealer supervision of unaffiliated RIA activities, the proposed Rule is in conflict with interpretive guidance that will remain in effect.**

III. **Regulatory Notice 25-05 requiring supervision of advisory activities is improper, because IAs, in their capacity as such, do not receive selling compensation.**

IV. **The revocation of NASD Rule 3050 removes the authority of an employer broker-dealer to demand transactional data from an unaffiliated executing broker-dealer.**

V. **The proposed Rule and its guidance conflicts with clearly stated guidance provided in Regulatory Notice 18-08 as well as other guidance and legal opinions.**

VI. **Regulatory Notice 25-05 is in conflict with Regulatory Notice 20-38 and FINRA Rule 3241.**

VII. **Regulation Best Interest monitoring restrictions are incompatible with broker-dealer supervision of unaffiliated RIA recommendations.**

VIII. **SEC Regulation S-P makes it illegal for a broker-dealer to access RIA Client Information necessary to supervise recommendations by an unaffiliated RIA.**

IX. **The Rule 3110 definition of mandated oversight of accounts conflicts with Regulatory Notice 25-05 and proposed Rule 3290.**

X. **Regulatory Notice 25-05, its guidance and proposed Rule 3290 violates Section 208(d) of the Advisors Act of 1940.**

[4] Broker-dealers can only offer advice in connection with the products they offer.

I. Cryptocurrencies, Real Estate and Fixed Insurance are not securities and this contemplated Rule constitutes an unprecedented extension of the prior Rules and Notices regarding Private Securities Transactions and Outside Business Activities.

Commodities, like gold, oil, or agricultural products, are generally not considered securities because they represent tangible assets or raw materials, not ownership or debt in a company or financial instrument.

The Commodity Futures Trading Commission (CFTC) considers Bitcoin a commodity, not a security, and asserts that it holds regulatory authority over BTC under the Commodity Exchange Act. FINRA cannot claim jurisdiction over these assets, nor mandate supervision of these assets for broker-dealers not-themselves licensed with the CTFC.

When real estate interests are packaged with leases, operating or service agreements, especially if coupled with promises of cash flow, they may be securities. Issuers and investors should not assume that the offering of real estate is not a security when the sale is coupled with other agreements. Regulatory Notice 25-05's assertion that broker-dealers "need to dedicate resources"[5] to real estate activities[6] implies a mandate that is overly broad, and could apply (at the very least) to managing the business of a real estate agency.

Fixed annuities are not securities, and should not be subject to broker-dealer oversight unless written through the broker-dealer itself. The Harkin Amendment, part of the Dodd-Frank Act, exempts certain index products (like indexed annuities) from federal securities regulation, provided they meet specific conditions, effectively giving states more control over their regulation.

Life Insurance is not a security, and should not be subject to oversight by an unaffiliated broker-dealer unless the product is sold through the broker-dealer.

Regulatory Notice 25-05 further extends its definition of "investment-related activity" to include "banking." Any suggestion that a broker/dealer's purview into banking activities extends beyond third-party networking arrangements[7] cannot be supported under Federal Reserve Policy under any circumstances.[8]

II. With respect to broker-dealer supervision of unaffiliated RIA activities, the proposed Rule is in conflict with interpretive guidance that will remain in effect.

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[5] Regulatory Notice 25-05 p.4.

[6] As well as insurance and other non-securities.

[7] See SEC Regulation R. Also see SEC No-Action Letter to Chubb Securities 1994.

[8] See [8] Federal Reserve publication: Understanding Federal Reserve Supervision: About Bank Supervision. See also FDIC Privacy Rule Handbook, updated August 23, 2023.

Regulatory Notice 25-05 states, in relevant part, that the 1990s guidance [9] with respect to an associated person's investment advisory activities "would remain in effect under the Proposal." [10] Attachment C to 25-05 further provides that a "dually registered person who, away from a member, provides more than mere securities advice as an IA (i.e., effects or places a securities order)" must be supervised by the employing broker-dealer under the Proposed Rule 3290 in accordance with the 1990s notices.[11]

PKS submits that Regulatory Notice 25-05, with respect to its statements regarding the supervision of dually registered persons' unaffiliated advisory activities, is in conflict with the 1990s guidance it purports to rely on.

Notice to Members 94-44, clarifies the analysis that members must follow to determine whether the activity of an RR/IA falls within the parameters of Section 40.[12] "Fundamental to this analysis is whether the RR/IA **participates in the execution (emphasis added)** of a securities transaction such that his or her actions go beyond a mere recommendation, thereby triggering the recordkeeping and supervision requirements of Section 40."[13]

In its analysis within Attachment C,[14] Regulatory Notice 25-05 ignores the operative term "execution" and replaces it with the term "effects or places a securities order." The two terms, as demonstrated *infra,* have dramatically different meanings.

Regulatory Notice 25-05 also applies the same incorrect terminology[15] to include all advisory business, as opposed to the limited scope of business discussed in the 1990s Notices to Members [16] which are specific to Private Securities Transactions (henceforth "PSTs"). As discussed *infra,* the 1990s Notices were not intended to include RIA/IAR activities not related to actual Private Securities.[17]

PKS maintains that no person not licensed with PKS could possibly be involved in the execution of a trade at our firm, and that this logic would extend to other broker-dealers. We have conducted some research to determine if our opinion is correct, which we submit for your review below. We first went to several investor websites for their definition, then to the SEC website, and finally to FINRA's published guidance on "Executing Party."

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[9] NASD Notices to Members 91-32, 94-44 and 96-33. Collectively the "1990s Guidance" or "1990's Notices."
[10] Regulatory Notice 25-05, page 7.
[11] Regulatory Notice 25-05, Attachment C, page 2.
[12] Section 40 has been recodified as Rule 3040 and subsequently (and currently) Rule 3280.
[13] See also FINRA NTM 96-33.Please note that 96-33 was drafted for the express purpose of further-clarifying potential ambiguities contained within NTM 94-44.
[14] Scenario's 5 and 6.
[15] The term "effects or places a securities order."
[16] NTMs 94-44 and 96-33.
[17] See Section IV, Revocation of NASD Rule 3050, *infra.*

"Execution is the completion of a buy or sell order for a security. The execution of an order occurs when it gets filled, not when the investor places it. When the investor[18] submits the trade, it is sent to a broker, who then determines the best way for it to be executed."[19]

"Many investors who trade through online brokerage accounts assume they have a direct connection to the securities markets. But they do not. When you push that enter key, your order is sent over the Internet to your broker, who in turn decides which market to send it to for execution."[20]

That some confusion might exist surrounding execution, given that the IAR is dually licensed as a Registered Representative, we consulted Section 205: Determining "Executing Party."[21]

Our read of each question-and-answer specific to Regulatory Notice 25-05, even arguendo that the IAR could be placing an order as a broker and not in his/her advisory capacity,[22] the IAR/RR is not the executing party through a non-employer broker-dealer. FINRA's guidance is specific on that point, and the Section 205 guidance covers almost every conceivable trade scenario. We could find no instance where the IAR/RR or even a broker-dealer itself, when placing an order at another broker-dealer, is defined as the "executing party."

"Where the RR/IA does not participate in the **execution** (emphasis added) of securities transactions, Notice to Members 94-44, reminds members and their RR/IAs that while Section 40[23] may not apply, the activity, nonetheless, may be subject to the notification provisions of Article III, Section 43.[24] That section required an RR to provide written notice to the NASD member with which he or she is associated of any proposed employment or outside business activity pursuant to which he or she will receive compensation from others."[25]

This guidance was reiterated in an NASD Interpretative Letter written to Walter Janssen on July 30, 1997, which states in part, "the RR/IA is not involved with the execution of the portfolio transactions, which are handled through another broker-dealer firm. Notice to Members 94-44 stated that, under this scenario,[26] the wrap fee program activity would be subject to Rule 3030 rather than Rule 3040."[27]

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[18] The IAR acts as POA for the customer in this case.
[19] Investopedia.
[20] U.S. Securities and Exchange Commission, "Trade Execution," published Jan 16, 2013.
[21] FINRA publication: "Section 205: Trade Reporting: Frequently Asked Questions."
[22] Specifically outlined in FINRA NTM 00-46, discussed *infra*.
[23] Recodified as Rule 3040 and further recodified as Rule 3280.
[24] Recodified as Rule 3030 and further recodified as Rule 3270.
[25] FINRA NTM 96-33.
[26] From NTM 94-44, Analysis Point 3. "Some asset management firms offer "wrap fee" programs to registered investment advisers. The "wrap fee" includes a fee for management, accounting, and reporting. This fee is shared with the investment adviser who is also a registered representative. Portfolio transactions are handled through a broker-dealer firm at substantial discounts and are not known to or handled by the RR/RIA. Investment advisers receive a part of the asset management fee only and **receive no part of any transaction fee**. The adviser is registered with the SEC and any states as necessary. This activity would be subject to Section 43 rather than Section 40 of the Rules of Fair Practice".
[27] Janssen Letter.

Simply stated, Janssen clarified and emphasized that the RR/IAR simply needed to inform his/her employer broker-dealer of their intention to run an advisory practice, and that those activities were not subject to Rule 3040,[28] and therefore did not require member broker-dealer supervision. The facts and circumstances in Ms. Revell's analysis are an exact match for the issue at-hand.

Janssen, of course, simply recognized the fact that any RIA trades placed (by an IAR/RR) at another broker-dealer[29] (not the employer) did not require supervision by the employing broker-dealer.

Any suggestion that Janssen isn't applicable because the accounts at-issue are not "wrap accounts" is without merit. In the Janssen Letter, Ms. Revell herself defines the term "wrap accounts," as the term has no official definition.[30] For purposes of her analysis, she defines "wrap accounts" as those where "the RR/IA receives a portion of the 'wrap fee' for asset management, accounting, and reporting, ***but does not receive any transaction fee*** **(emphasis added).** Under the program, the RR/IA is not involved with the execution, which are handled by another broker-dealer firm."[31] The Janssen Letter directly contradicts Scenarios 5 and 6 within Attachment C to the Regulatory Notice 25-05.

Additionally, any suggestion that anything beyond providing a mere recommendation will constitute participating in the execution of a securities transaction conflicts with FINRA's own interpretation of the Series 55 registration category.[32]

In NTM 00-46 the NASDR Staff indicated that persons that merely make trading decisions (i.e., decide what securities to buy or sell, when to buy or sell such securities, and how much to buy or sell ((and limits, if applicable))) and communicates this information to a trader at the broker-dealer would not be subject to the Series 55 registration[33] requirements because "**such persons are not involved in the execution or processing of securities transactions"[34] (emphasis added).**

"Participating in the execution of securities transactions requires one to, at a minimum, locate the counterparty to a securities transaction and/or negotiate the terms of that transaction."[35]

Providing investment advisory services-such as what securities to buy and sell and when to buy or sell them-generally is not considered to be "executing a securities transaction"-where the advisor places the client's trades through broker-dealer firms. "Many investment advisers have

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[28] It is reasonable to assume that Janssen intended to not reference PSTs as it is silent on PSTs in its "no-Action."
[29] That broker-dealer being "subject to the notification requirements of NASD Rule 3050," per Rule 3040/3280.
[30] That we can find.
[31] Janssen Letter.
[32] White Paper written by Arnold Porter Law. See
https://www.arnoldportor.com/en/perspectives/publication/2001/09/obligations-of-a-broker-dealer-to-supervise-the-

[33] Currently designated as Series 57.
[34] See NTM 00-46.
[35] Arnold Porter White Paper.

trading desks to place orders for client accounts with broker-dealers, and yet these advisory firms have never been considered to be-engaged in the business of effecting transactions in securities."[36]

If indeed it was true that these advisors were effecting transactions in securities, then over 25,000 Registered Investment Advisory firms[37] **would currently be acting in a capacity as unregistered broker-dealers.**[38] [39] [40] Based on the foregoing, and under the 1990s guidance, [41] merely placing an order on behalf of an advisory client, whether by calling the order in to the executing Broker-dealer or by electronically placing the same order for the advisory client through an electronic portal provided by the Custodial Broker-dealer (essentially the same thing), is not participating in the execution of a securities transaction. Therefore, Regulatory Notice 25-05 is inconsistent in this regard with the 1990s guidance it incorporates and relies upon.

III. Regulatory Notice 25-05 requiring supervision of advisory activities is improper, because IAs, in their capacity as such, do not receive selling compensation.

The receipt of "selling compensation" triggers the oversight supervisory requirements of the proposed Rule 3290. Selling compensation is defined as follows:

> Selling compensation' is defined as any compensation paid directly or indirectly from whatever source in connection with or as a result of the purchase or sale of a security, including, though not limited to, commissions; finder's fees; securities or rights to acquire securities; rights of participation in profits, tax benefits, or dissolution proceeds, as a general partner or otherwise; or expense reimbursements.[42]

The proposed Rule 3290 incorporates the identical definition of "selling compensation" as its predecessor rules, FINRA Rules 3280, 3040 and Article III, Section 40 of the Rules of Fair Practice. [43] The expansive definition of selling compensation set forth in the respective rules does not mention advisory fees.

Notwithstanding that numerous recodifications of Article III Section 40 have presented the opportunity to harmonize the Rule with the 1990s Notices, it is noteworthy that the newly

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[36] Arnold Porter White Paper.
[37] By our conservative estimate. Includes both SEC and States-registered firms.
[38] See Phillip A. Loomis, Jr. The Securities and Exchange Act of 1934 and The Investment Advisers Act of 1940, 28 Geo. Wash. L. Rev. 214, 246 (1959).
[39] Section 15(a)(1) of the 1934 Act requires registration of all persons effecting securities transactions unless exempt.
[40] See U.S.C.A.$ 78(a)(1)(1994): "It shall be unlawful for any broker or dealer which is either a person other than a natural person or a natural person not associated with a broker or dealer which is a person (other than a natural person..) to make use of the mails or any means of instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security...unless such broker or dealer is registered..[with the SEC}."
[41] Notices to Members 94-44 and 96.33.
[42] Rule 3280. The definition remained unchanged through all subsequent revisions of the Rule to the present.
[43] See Section 40 of the Rules of Fair Practice for original Private Securities Transaction rule. https://www.finra.org/rules-guidance/notices/85-84.

proposed Rule 3290 still does not include advisory fees in its definition of selling compensation. We submit that advisory fees are not listed within the proposed Rule's definition because such inclusion is inconsistent with established rules and law.

"Notice to Members 85-84, which announced the approval of Article III, Section 40, grouped the transactions sought to be captured by the new rule into two general areas:

1. Transactions in which an associated person sells securities to public investors on behalf of another party (e.g., as part of a private offering of limited partnership interests, without the participation of the individual's employer firm); or

2. Transactions in securities owned by the associated person.

There was no indication, at the time of the issuance of the notice, that advisory activities were intended to fall within the scope of the proposed rule.

"Selling Compensation was addressed in NTM 85-84, which stated that the term was intended to be broad in scope, and to capture "any compensation paid directly or indirectly in connection with or as the result of the purchase or sale of a security." In other words, transaction-based compensation.

Transaction-based or selling compensation has always been understood to mean commissions or other fees that are based on the execution of securities transactions. Transaction-based compensation generally is not understood to include advisory fees based on a percentage of assets under management.[44] "This distinction in fee structure has historically differentiated broker-dealers from investment advisors."[45] Any interpretation of selling compensation that would include advisory fees departs from the generally accepted principle that a fee, which is paid by the client directly to the advisor for investment advice pursuant to an advisory contract, is not based on the execution of a securities transaction (e.g., an asset-based fee), is not transaction-based compensation."[46]

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[44] See generally Letter In Re: Portico funds, Inc. (April 11, 1996). See also Securities Exchange Act Release No. 42099, "Certain Broker-Dealer deemed Not to Be Investment Advisers" (Nov. 4, 1999) and "Definition of Terms in and Specific Exemptions for Banks, Savings Associations, and Savings Banks under Section 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934," Exchange Act Release No. 44291 (May 11, 2001). Indeed, the "fiduciary" exemption for banks from broker-dealer regulation incorporates the concept that asset-based advisory fees are not transaction-related compensation. See § 3(a)(4)(B)(ii) of the Exchange Act.

[45] Speech by SEC Staff: "Remarks before the ABA Trust, Asset Management, and Marketing Conference" by Robert L.D. Colby Deputy Director, Division of Market Regulation US Securities & Exchange Commission January 31, 2001. Available on the SEC's Web site at www.sec.gov/news/speech/spch461.htm.

[46] Arnold Porter White Paper. This is evident from the fact that the advisory fees are fixed and do not vary based upon the number of recommended transactions, if any. Fees that are in any way dependent or related to the execution of securities require broker-dealer registration. See SEC No-Action Letter to BD Advantage, October 11, 2000.

"Indeed, the 'fiduciary exemption' for banks from broker-dealer regulation incorporates the concept that asset-based advisory fees are not transaction-related compensation. See § 3(a)(4)(B)(ii) of the Exchange Act."[47]

That "selling compensation" cannot be interpreted to include investment advisory fees is further supported by the SEC No-Action Letter of May 7, 2001 [1st Global]. In that letter, the SEC stated:

> ...the Division "has taken the position that the receipt of securities commissions or other transaction related compensation is a key factor in determining whether a person or an entity is acting as a broker-dealer. Absent an exemption, an entity that receives commissions or other transaction-related compensation in connection with securities-based activities that fall within the definition of `broker' or `dealer' ... generally is required to register as a broker-dealer" *[footnotes omitted]*. Persons who receive transaction-based compensation generally have to register as broker-dealers under the Exchange Act because, among other reasons, registration helps to ensure that persons with a "salesman's stake"[48] in a securities transaction operate in a manner consistent with customer protection standards governing broker-dealers and their associated persons, such as sales practice rules. That not only mandates registration of the individual who directly takes a customer's order for a securities transaction, but also requires registration of any other person who acts as a broker with respect to that order, such as the employer of the registered representative or any other person in a position to direct or influence the registered representative's securities activities. *[Footnotes omitted]*

It is clear that "transaction related compensation" under 1st Global is the equivalent of "selling compensation under Rule 3280 and its predecessors, defined as "any compensation paid...as the result of the purchase or sale of a security." Given that it is well known to the SEC that investment advisors receive asset based advisory fees and are exempt from broker-dealer registration, it is clear that the SEC does not consider advisory fees as transaction related compensation. It is submitted that 1st Global is in direct contravention of any interpretation of selling compensation under FINRA Rule 3280 that would include investment advisory fees. [49]

IV. The revocation of NASD Rule 3050 removes the authority of a broker-dealer to demand transactional data from an executing broker-dealer.

As originally promulgated, Rule 3040/3280 provided a specific exclusion for any transactions, "subject to the notification requirements of NASD Rule 3050."[50] Simply stated, any transaction

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[47] Arnold Porter White Paper.

[48] Meaning a monetary incentive to make the trade, i.e., earn a commission for making the recommendation and trade.

[49] The SEC has reiterated in numerous other No-Action letters that receipt of transaction-based compensation is a primary hallmark of broker-dealer activity that requires registration. See SEC No-Action Letter to Birchtree Financial Services, August 19, 1998; SEC No-Action Letter to Robert & Ferguson and Assocs., August 19, 1998; SEC No-Action Letter to John R. Wirthin, January 19, 1999.

[50] Rule 3040 and Rule 3280 until April 2017.

placed at another SEC/FINRA Registered broker-dealer was exempt from the Rule, **as all FINRA member broker-dealers were subject to the notification requirements of NASD Rule 3050.** This Rule was in-place when NTMs 94-44 and 96-33 were issued; it is inconceivable that these NTMs' guidance was intended to deliberately contradict an existing and clearly defined black-letter Rule.[51] The Rule recognized that transactions placed at another broker-dealer clearly indicated that the advisor was not participating in trade execution,[52] and was therefore exempted from the Rule. **Rule 3040, and its interpretive guidance, was intended to place supervisory oversight into transactions that were not otherwise regulated, such as Private Placements, Promissory Notes or Unregistered Limited Partnerships.[53]**

Simply stated, Rule 3040/3280 was intended to mandate supervision of **TRUE** Private Securities Transactions written away from the employing broker-dealer, and the interpretive guidance solely served to highlight the fact that dually licensed advisors could not work through their unaffiliated RIAs to escape PST[54] oversight by their employing broker-dealer. For PSTs, and for PSTs only, FINRA's guidance cited[55] advisory fee-based compensation as "selling compensation."

There can be no doubt as to this, as the guidance in NTMs 94-44 and 96-33 is **specific** to Private Securities Transactions, and not to broader advisory activities.[56] If the guidance was intended to include the provision of advice, including passing orders along for execution by other broker-dealers, certainly the guidance would have addressed those issues.

NTM 25-05 inappropriately expands the guidance offered in NTMs 94-44 and 96-33 to include supervisory responsibilities never intended, nor addressed within the guidance itself and which 25-05 and proposed Rule 3290 purport to rely upon. This position has occasionally been adopted by some broker-dealers as it empowers them to mandate Registered Representatives to write fee-based advisory services through their dually licensed employer broker-dealer, citing an overly broad interpretation of a non-existing regulatory rule.[57]

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[51] It is similarly inconceivable that, in promulgating Rule 3210, it was FINRA's intent to retrospectively subject all orders previously covered by NASD Rule 3050 to supervision under Rule 3280, particularly in view of the views of FINRA's precedent as expressed shortly thereafter in Regulatory Notice 18-08.

[52] As clearly stated in Janssen Letter, NTM 00-46, and Regulatory Notice 18-08.

[53] See Campbell Law Review. Volume 19 Issue 2 Spring 1997. See also NASD Notice to Members 85-84.

[54] Guidance in 94-44 directed at "any person associated with a member who participates in a private securities transaction"

[55] Within NTM 94-44.

[56] Article III, Section 40 provides that any person associated with a member who participates in a private securities transaction must, prior to participating in the transaction, provide written notice to the member with which he or she is associated. The required notice must describe the transaction, the associated person's role, and state whether the associated person has received or may receive selling compensation. The member must respond to the notice in writing indicating whether it approves or disapproves the proposed transaction. Where the registered person has received or may receive selling compensation, the member approving the transaction must record the transaction in its books and records and must supervise the registered person's participation in the transaction as if it was the member's own under Article III, Section 27 of the Rules of Fair Practice.

[57] The DC District Court disallowed "fee-based" brokerage in 2008, the so-called "Merrill Rule." After that time, all fee-based brokerage had to be conducted through an advisory firm. Some broker-dealers are also RIAs. A financial

It is noteworthy that many law firms commented on Regulatory Notice 18-08, universally supporting the need for a broker-dealer to supervise activities at an unaffiliated RIA. These law firms' motives are patently self-serving, and only intended to provide an opportunity for them to arbitrate against parties that are often wholly unconnected with the issue at-hand. Their comments should be viewed in that light. The public is not better protected because a law firm can sue an uninvolved and unaffiliated party.

In 2017 FINRA rescinded NASD Rule 3050 and replaced the verbiage within 3280 that referenced the 3050 exemption with verbiage that " 'Private Securities Transaction' shall mean any securities transaction outside the member's regular scope of business..., provided however that transactions subject to the notification requirements of Rule 3210,...shall be excluded."[58]

The replacement of 3050 with 3210 temporarily injected some additional and likely-unintended ambiguity into the Rule, specifically with the elimination of discretionary accounts while maintaining a specific exclusion for accounts "in which the associated person has a beneficial interest."

When reviewing this change, we considered if there were any possibility that FINRA would remove the requirement (under NASD Rule 3050) for an executing member firm[59] to supply transactional data to a requesting employer member firm, such data being needed to fulfill a supervisory obligation, if there existed a rule in-force that mandated such supervision. There can be no question that the answer is an emphatic "NO."

The removal of the NASD Rule 3050 requirement to supply transactional data for discretionary transactions, when reviewed in the context of the proposed Rule 3290, as described in detail in Regulatory Notice 18-08, obviously supports our position. Further, the removal of NASD Rule 3050 makes it impossible for a broker-dealer to demand-and-receive transactional data from another broker-dealer except to comply with Rule 3210, which does not cover clients at an unaffiliated RIA.

V. The proposed Rule and its guidance conflicts with clearly stated guidance provided in Regulatory Notices 18-08 as well as other guidance and legal opinions.

When first proposed in 2018, Rule 3290's stated purpose was "streamlining the rules into a single combined rule that would benefit both members and registered persons by reducing the likelihood of regulatory confusion."[60] There is no discussion of changing any current[61] rule, but rather eliminating "potential overlap between the two rules[62] in the hopes that "this simplified

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services firm that integrates all of the brokerage and advisory business of their associated persons might be in favor of the Proposal as it is beneficial to its business model.

[58] Rule 3280, as amended in 2017.

[59] NASD Rule 3050 states, in part, "a member who knowingly executes a transaction...for any account over which an associated person <of another broker-dealer> has discretionary authority...upon written request by the employer member, transmit duplicate copies of confirmations <and> statements..."

[60] FINRA Regulatory Notice 18-08.

[61] At that time.

[62] Read: 3270 and 3280.

approach may encourage registered persons who have previously avoided these activities because of the perceived regulatory uncertainty to pursue outside activities."[63]

As originally proposed, the Rule clearly stated that FINRA "would not impose supervisory and recordkeeping obligations for most other outside activities, including IA activities at an unaffiliated third-party IA."[64] [65] FINRA has clearly changed course 180 degrees. This begs the question, "what has occurred to cause Staff to completely contradict its previously, and clearly stated, logic and guidance?"

Regulatory Notice 18-08 states that, in making its assessment of a member's requirement to supervise, "the member would be required to consider whether the person is relying on a member's registration as a broker or dealer to conduct the activity, in which case the activity would be deemed to be that of the member, if approved."[66] Clearly, an IAR and/or RIA do not require broker-dealer licensure to conduct an advisory business. Again, Regulatory Notice 25-05 ignores this consideration.

In Regulatory Notice 18-08, FINRA clearly provides its assessment of the need to supervise OBAs. "For example, after conducting the required risk assessment of an investment-related activity, a member may approve a registered person to act as a registered investment advisor through an unaffiliated third-party IA, however, the member also may condition the approval on the IA's custody of its clients' advisory assets with the member. In this example, the proposed rule would require the member to reasonably supervise the registered person's adherence <to> that condition, but **the member would not be required by the rule to otherwise supervise the IA activity."**[67]

The second example provided states, "if the person can only legally engage in the outside business activity because the person is associated with a member, the member approving that activity must treat it as its own....this provision serves a critical investor protection interest and requires the member's supervision over the types of activities **that the private securities transactions rule was originally adopted to address."**[68] "See, e.g. Notice to Members 85-21 (March 1985) requesting comment on private securities transactions rule, which was aimed at addressing transactions that had long been a regulatory concern, namely "transactions in which an associated person is selling securities **to public investors on behalf of another party, e.g. as part of a private offering of limited partnership interests, without the participation of the person's employer firm."**[69]

Regulatory Notice 25-05 now proposes to expand the rules and related guidance beyond what "the transactions rule was originally adopted to address."

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[63] FINRA Regulatory Notice 18-08.
[64] FINRA Regulatory Notice 18-08.
[65] Absent the employer member's self-imposed policies, as discussed *Infra.*
[66] FINRA NTM 18-08.
[67] FINRA Regulatory Notice 18-08.
[68] FINRA Regulatory Notice 18-08.
[69] FINRA Regulatory Notice 18-08.

In FINRA Regulatory Notice 18-08 Staff notes, on several occasions, the potentially problematic overlap between the existing rules surrounding supervision of outside business activities. Staff recognizes "significant confusion and practical challenges, for example, privacy challenges with a member obtaining account information for customers[70] [71] of an unaffiliated IA through which a member's registered person may be acting in an IA capacity."[72] Regulatory Notice 25-05 cites these concerns also, footnoting my own comments from a previous Request for Comment.

Simply stated, FINRA NTM 18-08, and the then proposed language in Rule 3290, did not attempt to change FINRA's interpretation of supervisory requirements, but rather to streamline and clarify the original intent and to correct inaccuracies that may have existed in the industry subconscious. "The proposed rule would not impose supervisory and recordkeeping obligations for most other outside activities, including IA activities at an unaffiliated third-party IA."[73]

To the extent that any ambiguity could possibly exist, however, FINRA published in plain English and clear terms, its existing stance as they wished it to be codified as a combined rule for

[70] See SEC Regulation S-P.
[71] See Section III, *supra.*
[72] FINRA Regulatory Notice 18-08.
[73] FINRA Regulatory Notice 18-08, Background and Discussion.

the stated purpose of eliminating confusion, as outlined in Regulatory Notice 18-08 *infra*.

The graph above[74] summarizes FINRA's then-current view of the supervisory mandate addressed by Rules 3270 and 3280, and its proposal to combine them into one Rule.[75] This Regulatory Notice was also written with a firm understanding that the contemplated Rule would be subject to Reg BI, itself already in the "Comment" stage at that time, and itself not requiring monitoring of accounts.

Further, it is reasonable to infer from 18-08 that FINRA categorizes, and has always intended to categorize, Private Securities Transactions as those activities that are not themselves subject to

[74] Copied directly from Regulatory Notice 18-08.
[75] Specifically to replace both Rules 3270 and 3280.

direct regulatory oversight.[76] [77] It was never the intention of FINRA at any time to overextend its jurisdiction into companies regulated by the Investment Advisors Act, and not the Exchange Act.

PKS has been a FINRA-Member Broker-dealer for thirty-one years. We are entitled to rely upon FINRA's published material when determining whether the current facts-and-circumstances are applicable. We feel that FINRA itself, and various state regulators, must do the same.

As further evidence that FINRA stood behind this guidance, FINRA has cited at least three times, Regulatory Notice 18-08 as an "Additional Resource" to be consulted when a member firm assesses its responsibilities regarding OBAs and PSTs. Specifically, in both its 2021 Report on FINRA's Examination and Risk Monitoring Program and its 2022 Report on FINRA's Examination and Risk Monitoring Program[78] and most recently its 2023 Report on FINRA's Examination and Risk Monitoring Program, FINRA specifically points to Regulatory Notice 18-08 as a resource "that may be helpful to member firms in reviewing their supervisory procedures and controls and fulfilling their compliance obligations,[79] specifically regarding OBAs and PSTs. FINRA's consistent citation, over the course of at least three years of Regulatory Notice 18-08 as a resource that broker-dealers may rely upon when assessing the difference between Rule 3270 and Rule 3280 (Read: OBAs and PSTs) clearly ratified the content within as applicable to the assessment as to what constitutes an OBA and a PST.

VI. Regulatory Notice 25-05 is in conflict with Regulatory Notice 20-38 and FINRA Rule 3241.

Regulatory Notice 20-38[80] describes the potential conflicts surrounding registered persons holding, among other positions, "positions of trust" for customers. Among the positions of trust cited is to "hold a power of attorney or similar position for or on behalf of their customer."[81] We submit that the Agreements[82] that RIA's sign with their clients confers, at a minimum, a limited power of attorney, which is itself an essential element to discretionary asset management.

Regulatory Notice 20-38 states, "where a registered person…holds a power of attorney or a similar position for or on behalf of a customer account **'at a member firm with which the registered person is associated'[83] (emphasis added)** …the member firm must supervise the account in accordance with Rule 3110."[84] In other words, there is no supervisory oversight requirement under circumstances where the broker-dealer does not hold the account.

Regulatory Notice 20-38 further states, "if a registered person is approved to hold (and receive compensation for) a position of trust for a customer **'away from the member firm' (emphasis**

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[76] The example in Regulatory Notice 18-08 is "Private Placements."
[77] Arnold Porter White Paper.
[78] Published February 9, 2022, pp. 13-15.
[79] 2022 Report on FINRA's Examination and Risk Monitoring Program, p.1.
[80] Regulatory Notice 20-38 summarizes Rule 3241[80] and is titled FINRA Adopts Rule to Limit a Registered Person From Being Named a Customer's Beneficiary or Holding a Position of Trust for or on Behalf of a Customer.
[81] Regulatory Notice 20-38.
[82] Specifically Discretionary Management Agreements.
[83] Regulatory Notice 20-38.
[84] Regulatory Notice 20-38.

added), the requirements of both Rule 3241 and Rule 3270 regarding outside business activities would apply to the activities away from the firm."[85]

Regulatory Notice 20-38, published two years after Regulatory Notice 18-08, is currently in effect and is in direct conflict with Regulatory Notice 25-05, as it clearly supports the position that advisory (read: POA) accounts held-away are subject to Rule 3270 and not subject to supervisory oversight by the member firm.

Further, in its Regulatory Notice titled FINRA Rule 2111 (Suitability) FAQ, FINRA addresses what "constitutes a "customer for purposes of the Suitability Rule."[86] Specifically, FINRA defines "the term customer includes a person who is not a broker or dealer who opens a brokerage account at a broker-dealer or purchases a security **for which the broker-dealer receives or will receive, directly or indirectly, compensation" (emphasis added)** "even though the security is held at an issuer, the issuer's affiliate or a custodial agent (*e.g.*, "direct application" business," "investment program" securities, or private placements), or using another similar arrangement." This clearly states that a broker-dealer has no mandate to determine suitability for any trade for non-clients of the broker-dealer, provided the broker does not receive compensation.[87] The guidance within Regulatory Notice 25-05 ignores Rule 2111. Regulatory Notice 25-05's mandate to supervise an unaffiliated RIA's business would impose the responsibility to assess suitability, which is in direct contradiction to the Rule 2111 requirements. In the same notice, FINRA provides further clarification[88] in the form of a hypothetical situation, "Where, for example, a registered representative makes a recommendation to purchase a security to a *potential investor*, the suitability rule would apply to the recommendation if that individual **executes the transaction through the broker-dealer** with which the registered representative is associated or the broker-dealer receives **or will receive, directly or indirectly, compensation as a result of the recommended transaction. In contrast, the suitability rule would not apply to the recommendation in the example above if the *potential investor* does not act on the recommendation or executes the recommended transaction away from the broker-dealer" (emphasis added)** "with which the registered representative is associated without the broker-dealer receiving compensation for the transaction."

VII. Regulation Best Interest monitoring restrictions are incompatible with broker-dealer supervision of unaffiliated RIA recommendations.

The SEC implicitly recognized the incompatibility of broker-dealer transactions with advisory transactions in its adopting release of Regulation Best Interest, cited (in part) below:

> Although key elements are substantially similar, the Commission notes that the obligations of a broker-dealer under Regulation Best Interest and the obligations of an investment adviser pursuant to its fiduciary duty under the Advisers Act differ in certain respects, taking into account the scope of the services and relationships

[85] Regulatory Notice 20-38.
[86] See Question 2.1, FINRA Rule 2111 (Suitability) FAQ.
[87] There may be some broker-dealers that are compensated for oversight, as defined in their WSPs. Those matters are not addressed within this Comment, other than to say most broker-dealers do not receive that compensation.
[88] See Question and Answer, Q. 2.2 FINRA Rule 2111 (Suitability) FAQ.

> typically offered by broker-dealers and investment advisers. For example, an investment adviser's duty of care encompasses the duty to provide advice and monitoring at a frequency that is in the best interest of the client, taking into account the scope of the agreed relationship. This difference reflects the generally ongoing nature of the advisory relationship, and the Commission's view that, within the scope of the agreed adviser-client relationship, investment advisers' fiduciary duty generally applies to the entire relationship. In contrast, the provision of recommendations in a broker dealer relationship is generally transactional and episodic, and therefore the final rule requires that broker-dealers act in the best interest of their retail customers at the time a recommendation is made and imposes no duty to monitor a customer's account following a recommendation. [89]

FINRA has amended many of its rules to avoid inconsistencies with Reg BI.[90] However, in reviewing Regulatory Notice 25-05, we noticed the citation of a commentator opposed to FINRA's position in Regulatory Notice 18-08.

> Another commenter claimed that "eliminating FINRA firms' responsibilities in this area would place investors at risk by eliminating day-to-day oversight in favor of . . . intermittent state and federal securities regulators oversight to identify or prevent misconduct.

The footnote to this comment was in part: [91]

> See letter from Joseph P. Borg, president of North American Securities Administrators Association (NASAA), dated April 27, 2018. See also letters from Seth Miller, general counsel, senior vice president and chief risk officer, Cambridge Investment Research, dated April 27, 2018 ("Presently, regulatory oversight of investment advisory activity does not appear to be as robust and recurrent as in the broker-dealer space, which could create the potential for investor harm if activities and transactions member firms have been supervising are no longer being **monitored and supervised." (Emphasis added).**

As the SEC clearly states that a broker-dealer **has no duty required to monitor its customer accounts,**[92] the citation of a comment suggesting a duty to monitor accounts at an unaffiliated RIA raises concerns regarding the impact of the proposed new rule and its associated regulatory guidance, both from regulatory and litigation exposure perspectives.

VIII. SEC Regulation S-P makes it illegal for a broker-dealer to access RIA Client Information necessary to supervise recommendations by an unaffiliated RIA.

In continuing to make our assessment of the regulatory issues concerning a broker-dealer's review of unaffiliated RIA's accounts, we further cite findings from the SEC in the Examination

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[89] https://www.sec.gov/files/rules/final/2019/34-86031.pdf, at pages 59-60.
[90] Regulatory Notice 20-18.
[91] Regulatory Notice 2025-05, footnote 23.

of <name redacted>[93] Financial Group LLC (File No. 801-number redacted),[94] specifically regarding Reg S-P.

Within the Letter is Exhibit A(B)(1), Privacy Policy Procedures.[95] The SEC states clearly that sharing RIA clients' information (specifically e-mails) with PKS[96] where those clients did not have an account with PKS was not allowed (under the privacy policy). The SEC defines PKS as an "unaffiliated third party," and implies here that PKS' purview only applies to products and services supplied by PKS.

The SEC elaborates on the above finding by further finding that providing PKS access to RIA clients' PII [97] is not just a violation of the RIA's WSPs but **is an SEC rule violation**. Exhibit A(IV) Regulation S-P [98] states "that Registrant failed to comply with the requirements of Regulation S-P by allowing a third-party broker-dealer to review Registrant's emails and, therefore, allowing it access to client account communications that were not related to any advisory service or product provided by such broker-dealer."[99] In other words, echoing a long-standing argument against having RIA Clients' PI in order to "supervise" unaffiliated advisory business violated Reg BI; in the first paragraph of this section the SEC is specific enough to define PII as basically every item of information needed to assess suitability.[100] This section further states, "Registrant's failure to safeguard NPPI by allowing PKS access to the email correspondence of clients who had not purchased a product from, or had an account with, PKS **is a violation of Regulation S-P."** Footnote 14[101] to this quoted statement further elaborates, "financial products and services offered by PKS are not financial products and services that Registrant provides as part of its investment advisory services but are purchased for clients by registered representatives of PKS. Therefore, a client who has not purchased a product from or maintained an account with PKS **would not** expect their email correspondence **(and any PII contained therein) to be shared with PKS"[102] (emphasis added).**

While the above-stated audit findings against the RIA are limited to the SEC's review of e-mail procedures, the SEC makes it abundantly clear in the above statements that an unaffiliated broker-dealer **is not entitled to any** PII of clients that are not themselves clients of the broker-dealer, and that an RIA is prohibited **by Rule** from providing such information to an unaffiliated

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[93] Name redacted to protect the privacy of the individual and organization that received the exam letter. PKS will provide the complete unredacted letter to FINRA upon request.
[94] "the Letter."
[95] Page five of SEC findings letter.
[96] In this case, the unaffiliated broker-dealer.
[97] Personally Identifiable Information.
[98] Page eight.
[99] "the Letter."
[100] Including but not necessarily limited to: "including any information (1) a consumer provides to an adviser to obtain a financial product or service; (2) about a consumer resulting from any transaction involving a financial product or service between an adviser and a consumer; (3) or an adviser otherwise obtains about a consumer in connection with providing a financial product or service to that consumer."
[101] Page nine.

[102] "the Letter."

broker-dealer (which the SEC states is the case that PKS is unaffiliated). This would make it impossible to provide oversight or assess suitability under any circumstances.

Clearly, given the SEC's stance on what constitutes a broker-dealer's right to possess PII of an unaffiliated firm, a broker-dealer cannot supervise transactions recommended at that unaffiliated firm without violation of a black-letter regulation.

IX. The Rule 3110 definition of mandated oversight of accounts conflicts with Regulatory Notice 25-05 and proposed Rule 3290.

FINRA makes quite clear in Rule 3110 [103] what accounts held-away [104] need to be reviewed and supervised, as cited below:

> **(d) Transaction Review and Investigation**
>
> (1) Each member shall include in its supervisory procedures a process for the review of securities transactions that are reasonably designed to identify trades that may violate the provisions of the Exchange Act, the rules thereunder, or FINRA rules prohibiting insider trading and manipulative and deceptive device that are effected for the:
> (A) accounts of the member;
> (B) accounts introduced or carried by the member in which a person associated with the member has a beneficial interest or the authority to make investment decisions;
> (C) accounts of a person associated with the member that are disclosed to the member pursuant to Rule 3210; and
> (D) covered accounts.

In the same Rule,[105] "covered accounts are defined as:

> For purposes of this Rule:
> (A) The term "covered account" shall include any account introduced or carried by the member that is held by:
> (i) the spouse of a person associated with the member;
> (ii) a child of the person associated with the member or such person's spouse, provided that the child resides in the same household as or is financially dependent upon the person associated with the member;
> (iii) any other related individual over whose account the person associated with the member has control; or
> (iv) any other individual over whose account the associated person of the member has control and to whose financial support such person materially contributes.

In Rule 3110, which is specific to broker-dealer **Supervision,** FINRA painstakingly outlined the held-away accounts that would need to be supervised, as outlined above. It is clear that they took

[103] FINRA Rule 3110(d)
[104] Read: Executed at another broker-dealer.
[105] Rule 3110(d)(4)(a).

great care to outline the accounts that would need to be reviewed by the employing broker-dealer. It is noteworthy that they fail to mention any accounts held or having custody at an unaffiliated broker-dealer unless that account is held by the associated person or related person, presumably by blood or marriage. Further, there can be no interpretation of the nature of these listed accounts that could be construed to apply to accounts advised by unaffiliated RIAs, unless those accounts were owned directly-by the registered person or his/her family members.

As stated *supra*, FINRA Regulatory Notice 18-08 [106] sought to clarify FINRA's position; "the proposed rule [107] would not impose supervisory and recordkeeping obligations for most other outside activities, including IA activities at an unaffiliated third-party RIA."

NASD NTM 94-44 is unclear as to the extent it is applicable to any supervisory mandate of unaffiliated RIAs; it only suggests [108] that "certain activities" may be subject to the Rule. [109] We find it noteworthy that **"ALL"** advisory activities are not subject to the Rule, and our review of contemporaneous and subsequent guidance affirms our stance that supervision is not required absent a participation in the **execution** of trades and receipt of compensation specific to the execution of those trades. Ms. Revell, in drafting the Janssen Letter, was specific in clarifying that absent receiving a "transaction fee" for another broker-dealer's execution, the advisory activities are not subject to Rule 3040. [110] She further clarified that NTM 96-33 did not contradict the analysis. To be clear, the Janssen Letter was drafted three years subsequent to NTM 94-44 and the year after NTM 96-33, for the specific purpose of clarifying any perceived ambiguity surrounding advisory activities. The Janssen Letter is further consistent with the SEC 1st Global No-Action Letter cited above, and is affirmed by FINRA's clearly stated interpretation of the Rule as outlined in Regulatory Notice 18-08.

X. Regulatory Notice 25-05, its guidance and proposed Rule 3290 violates Section 208(d) of the Advisors Act of 1940.

Section 208(d) of the Investment Advisors Act of 1940 provides as follows:

> It shall be unlawful for any person indirectly, or through or by any other person, to do any act or thing which it would be unlawful for such person to do directly under the provisions of this subchapter or any rule or regulation thereunder. [111]

The unfairness of the imposition of additional regulatory burdens on an RIA whose associated persons are FINRA licensed, that does not exist for the vast majority of RIAs, is axiomatic. Such

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[106] FINRA Regulatory Notice 18-08 is a request for comment to formalize FINRA's stance on supervision of OBAs, and not yet a rule. Within the Notice FINRA offered its interpretation of the applicable rules as currently (at the time) in existence.
[107] Drafted for the purpose of combining and clarifying the intent of Rules 3270 and 3280.
[108] By quoting findings from the NBCC meeting in May 1991.
[109] NTM 94-44.
[110] And by extension Rule 3280, but rather the notification requirements of Rule 3270.
[111] 15 USC § 80b-8.

an uneven supervisory structure was not intended by Congress in its enactment of the Investment Advisers Act.[112]

In RIA/financial networking arrangements, the SEC staff has insisted on **RIA sole control over all activities** of its associated persons."[113] Mandating an unaffiliated broker-dealer's oversight would remove the requirement-for and ability-of the RIA's "sole control" over those activities.

The suggestion that any IA activities are subject to broker-dealer supervision subjects the RIA to supervision not contemplated under Investment Advisors Act, and further imposes a fiduciary and control liability upon a broker-dealer with respect to RIA clients having no relationship-with and who are unknown to the broker-dealer.[114]

This argument begs the question: "what if a state regulator overseeing an RIA with dually-licensed IA/RRs mandated that the RIA/IA/RRs supervise the activities at the unaffiliated broker-dealer?" As a securities principal with thirty-seven years as such, I would argue that the state has no such authority, and that position must be applied to the FINRA rules as well, and that FINRA would agree with my position.

It is more than arguable that a broker-dealer not registered under the Advisers Act, who engages in supervision of RIA activities, is engaged in unlicensed advisory activities.[115]

> Any broker-dealer asserting supervision and control over a registered investment adviser or its agents and associated persons:1 7 is inconsistent with the shibboleth of register or be subject to RIA control; arguably, could jeopardize that broker-dealer's exclusion from the definition of investment adviser under the Advisers Act; and, is inconsistent with Advisers Act Section 208(d)'s prohibition against doing indirectly what one cannot do directly; namely, engage in the advisory business without registration. [116]

Further, the broker-dealer would be offering services not related to the products offered by the firm, a violation of the rules.[117]

It is noteworthy that Rule 3280 requires a broker-dealer approving Private Securities Transactions to supervise the business as if it were its own. Pursuant to FINRA rules, broker-dealers perform a point-of-sale suitability analysis, and there are no requirements to perform ongoing services or recommendations on the security. Again, broker-dealers have no requirement to monitor accounts.

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[112] Campbell Law Review, Volume 19, Article 5, Issue 2 Spring 1997, Investment Advisory Regulatory Muddy Waters: Registration and Control Issues are Confused with Issues of Disclosure and Anti-Fraud .
https://scholarship.law.campbell.edu/cgi/viewcontent.cgi?article=1321&context=clr
[113] Campbell Law Review, Id..
[114] Campbell Law Review, Id.
[115] Campbell Law Review, Vol. 19:349 p. 358.
https://scholarship.law.campbell.edu/cgi/viewcontent.cgi?article=1321&context=clr
[116] Campbell Law Review, Id. at page 357.
[117] See P. 22, pp4 and footnote 117, *infra*.

The guidance within Regulatory Notice 25-05, however, has eliminated the verbiage "as if" <the business> were its own; this seemingly places no limit on the responsibilities that would be potentially and arbitrarily assigned to the broker-dealer. As stated *infra and supra,* such a mandate is inconsistent with numerous Rules and longstanding guidance.

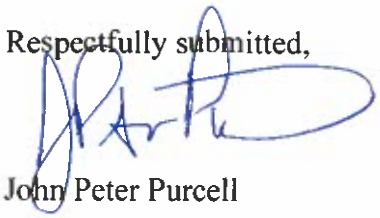
The Investment Advisors Act of 1940 specifically excludes from the definition of investment advisor, and thus from the application of the Advisors Act, a broker or dealer "whose performance of such advisory services is solely incidental to the conduct of its business as a broker or dealer and who receives no special compensation."[118] "Special compensation means compensation received specifically for investment advice in a form other than traditional commissions or analogous transaction-based compensation."[119] Under the Advisors Act, a broker-dealer that offers advice in connection with the purchase or sale of securities for a commission is excluded from the need to register as an advisor.

In 2007 the DC District Court of Appeals essentially "outlawed" fee-based brokerage accounts.[120]

Because a broker-dealer, absent dual-licensure as an RIA, does not have the authority to advise on the suitability of transacting in securities not offered by that broker-dealer, a broker-dealer may not legally opine upon the transactions of an unaffiliated RIA for suitability.

In closing, PKS submits that, by definition, anything that is **not a security** could never fall within the definition of a "Private Securities Transaction," where the operative word is actually "Security." Regulatory Notice 25-05, its guidance and exhibit, as well as proposed Rule 3290 must acknowledge that fact and remove any language and guidance, if indeed Staff proceeds to promulgate the Rule, that suggests a mandated oversight of both non-securities and unaffiliated RIAs.

Respectfully submitted,



John Peter Purcell

[118] Thomas v. Metropolitan Life Insurance Company, 631 F3d 1153, citing 15 USC § 80b-2(A)(11)(c).
[119] Thomas v. Metropolitan Life Insurance Company
[120] Financial Planning v. SEC. 482 F.3d 481