



June 13, 2008

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

Re: FINRA Regulatory Notice 08-23: Proposed Consolidated FINRA
Rules Governing Financial Responsibility

Dear Ms. Asquith:

The Capital Committee of the Securities Industry and Financial Markets Association (“SIFMA”)¹ appreciates the opportunity to comment upon FINRA Regulatory Notice 08-23 (“the Notice”) which is a set of proposed financial responsibility rules based in major part on existing NASD and NYSE Rules. The Notice has been published as part of the process to develop a new consolidated FINRA rule book. Proposed Rules 4110, 4120, 4130, 4140, and 4521 would constitute the applicable financial responsibility rules for member firms, while Rules 9557 and 9559 would govern an expedited appeal process for firms served with a notice under the financial responsibility rules.

Overview: The Committee is pleased to note that FINRA created a number of industry groups to provide feedback on the effort to create a new consolidated rulebook, and that a number of members of the Capital Committee served in an individual capacity on the group supplying feedback on the financial responsibility rules. Generally, the Committee believes that the proposed rules of the Notice represent a successful effort to develop a new consolidated set of financial responsibility rules from the NASD and NYSE predecessor rules, but we believe that a number of clarifications and corrections of these rules is warranted, as we have noted below. In addition, we believe that some clarifications and a reconsideration of the scope of discretion granted in the new proposed expedited appeal rules would likewise be appropriate, as also noted below.

Rule 4110: We believe that the Notice may create confusion with respect to its scope by use of the phrase “carrying or clearing members or a member or members operating

¹ SIFMA brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA’s mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public’s trust and confidence in the markets and the industry. SIFMA works to represent its members’ interests locally and globally. It has offices in New York, Washington D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

pursuant to the exemptive provisions of SEA Rule 15c3-3(k)(2)(i).” As the Committee understands the operation of Rule 15c3-3(k)(2)(i), any firm claiming the exemption but which handles customer securities or cash would fall within the scope of the term “carrying or clearing members.” Thus, for such firms the reference to operating pursuant to Rule 15c3-3(k)(2)(i) is redundant at best, and very possibly confusing. There are also firms that claim the exemption of SEA Rule 15c3-3(k)(2)(i) but which do not hold customer cash or securities, such as private placement firms and floor brokers. The Committee does not believe such firms should be subject to the provisions of Rule 4110. Therefore we recommend the deletion of the reference to Rule 15c3-3(k)(2)(i). We also suggest that Endnote number 5 be revised to clarify that the phrase “carrying or clearing members” includes those 15c3-3(k)(2)(i) firms that hold customer cash or securities.

4110 (c)(1): In order to clarify that the withdrawal of profits from an earlier period is permitted, we propose the addition of a sentence to read: “This provision is deemed to have been met as long as the total of such member’s capital accounts, after any withdrawal by such member, is greater than such member’s total capital contributed during the prior twelve month period.”

4110 (c)(2): The net effect of this proposal would be to impose upon non-NYSE member firms more stringent notification requirements regarding the withdrawal of capital. Additionally, it would set a lower threshold – 10% of a firm’s excess net capital – for application of the provision than the SEC requires of firms. As no explanation is provided concerning why such firms should be subject to these more rigorous standards, we suggest that FINRA consider paralleling the SEC standards for all its member firms. Also, we suggest that FINRA consider providing a reasonable timeframe within which it must decide to accept or reject requests for the withdrawal of capital.

4110 (e)(2): We believe that this paragraph would be improved by some additional clarity. Insofar as a “general partner” is conventionally defined as having unlimited personal liability whereas the point of forming an LLC is to limit liability, the Committee understands that only very rarely will an LLC participant have rights “analogous to those of a general partner in a partnership.”

While the Committee believes that relatively poorly capitalized and financially vulnerable firms are the concern of this paragraph, it is important to point out that a number of very large and well-capitalized institutions have structured an affiliated broker-dealer as a single member LLC. The parents of these LLCs are active in the capital markets through Commercial Paper programs, selling preferreds and/or debt, etc. The Committee suggests that a sentence be added to this paragraph clarifying that general purpose debt or equity issuances by a parent in such circumstances would not be subject to approval by FINRA, only those specifically designed to raise capital for the affiliated broker-dealer.

Rule 4120 (c)(3)(I): The Committee suggests that the clause be revised to read: “effecting liquidating customer transactions, or proprietary transactions in circumstances where the transactions are reasonably expected to increase the member firm’s net capital or reduce its risk.”

Rule 9557: The Committee believes that some provisions of this proposed rule represent significant departures from existing rules, and combined with a substantially shortened timeline, raises concerns about the extent of the discretion that would be granted to FINRA staffers.

9557 (d): The Committee has a number of observations regarding this paragraph. First, it is difficult to reconcile the statement that the requirements and/or restrictions of a 9557 notice “are immediately effective” with the language immediately following. It states that the effective date can be stayed for ten business days if the member firm files a request for a hearing, which it has two business days to do. In our view, it would be better to provide that the requirements and/or restrictions become effective within two business days of the notice being issued and served, subject to the right of a member firm to request a hearing during that period.

Second, the paragraph provides that FINRA’s Chief Executive Officer (or his or her designee) may deny a stay after a member firm files a request for a hearing if the FINRA representative in question “determines that such a stay cannot be permitted with safety to investors, creditors or other members.” In light of the substantial degree of discretionary authority being granted, the Committee suggests that FINRA consider two possible revisions. First, that a “showing of good cause” or factual finding be required to be presented to the firm in writing in connection with any denial of the stay. As an alternative, we suggest that the decision of the FINRA representative be made in consultation with an independent third party, such as the National Adjudicatory Council or an appropriate official of the Securities and Exchange Commission. While we are aware that formalizing such a procedure might require amendment of applicable by-laws or regulations, we believe that the additional due process protections that would be provided to member firms would warrant the effort.

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If there is any question about our letter, the Capital Committee would be happy to discuss the contents with FINRA. You may do so by contacting me at 212-272-0531, or by contacting the Committee staffers, Kyle Brandon (212-313-1289) or Jerry Quinn (212-313-1207).

Sincerely,

/s/Marshall Levinson

Marshall Levinson,
Chairman