BEACON
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June 16, 2008

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

Re: Comments to regulatory Notice 08-24: *Supervision and Supervisory Controls* With Respect to Proposed FINRA Rule 3110(b)(3): *Supervision of Outside Securities Activities*

Dear Ms. Asquith:

On behalf of Beacon Wealth Management, LLC, a Registered Investment Advisor, and its PKS (a FINRA member) registered representatives, we wish to thank you for the opportunity to comment on Regulatory Notice 08-24. We write to comment specifically on the portion of the regulatory Notice that proposes the replacement of NASD Rule 3040 as presently constituted with Proposed FINRA Rule 3110(b)(3): *Supervision of Outside Securities Activities*.

Beacon Wealth Management, LLC respectfully opposes the enactment of Proposal Rule 3110(b)(3) as it specifically relates to the outside activities of a Registered Investment Adviser ("RIA"). The reasons for our opposition with respect to RIAs are twofold, namely: (1) Proposed Rule 3110(b)(3) perpetuates possible unintended violations by FINRA and its Member firms of the provisions of Regulation S-P, which prohibits the disclosure of nonpublic personal information by financial institutions without the express consent of the customer, and (2) Proposed Rule 3110(b)(3) continues a duplicative regulatory environment resulting in unnecessary financial and administrative burdens.

Section 1 below provides contextual background to assist FINRA in understanding our objections to the Proposed Rule. Section 2 details that basis for such objections as summarized above, and Section 3 suggests a modification to the Proposed Rule for your consideration.

1. BACKGROUND INFORMATION

Many securities broker-dealers are not registered with the SEC or any state administrator as a registered investment adviser and conduct no business in such capacity. As is the current trend in the financial services industry, a growing number of registered persons associated with these broker-dealers are permitted to conduct business away from that person's broker-dealer as independent RIA firms. [1]

NASD Rule 30402 [2], as presently constituted, requires FINRA Member firms to "selling compensation" is received. The Rule itself is not written specifically to apply to

[1] Indepentent RIA firms as referenced herein are defined as RIA firms who are not members of FINRA.
[2] Formerly Article III, Section 40 of the NASD Rules of Fair Practice.

supervise the (approved) private security transactions of associated persons for which RIA activities, since the list of activities enumerated in the definition of "private securities transaction" does not contain advisory activities. Likewise, the definition for "selling compensation" does not contain "asset based fees".

It is arguable that "asset based fees" and "selling compensation" are mutually exclusive. It is also arguable, based on the NASD's rationale at the time Rule 3040 was initially enacted, that Rule 3040 was never intended to regulate investment advisers.

Notwithstanding these points, following the enactment of Rule 3040, the NASD issued interpretive materials which brought "asset based fees" within the definition of "selling compensation", [3] and thereafter the interpretive requirement that NASD Member firms supervise the outside advisory activities of their registered persons.

2. BASIS FOR OBJECTION

2. (A). Conflict with Regulation S-P

Proposed Rule 3110(b)(3) requires the outside advisory activities of Member-associated persons to be supervised in accordance with Rule 3110. Client suitability assessments undertaken in the course of 3110(b)(3) supervision require the disclosure of certain nonpublic personal information of clients of RIA firms through which transactions are written away from FINRA Member Firms. Regulation S-P [4] requires financial institutions to provide customers with notice of privacy policies, and prohibits disclosure of nonpublic personal information unless certain notice and opt out procedures are followed. Regulation S-P provides exemption from its notice and opt out procedure under certain circumstances, including disclosure made with the consent of a customer, to the extent specifically permitted by law, to law enforcement agencies, to self-regulatory organizations, to comply with a properly authorized civil, criminal, or regulatory investigation, subpoena or summons by federal, state, or local authorities, and to respond to judicial process or government regulatory authorities having jurisdiction over the record keeping entity for examination, compliance, or other purposes as authorized by law.

Although Regulation S-P permits disclosure to a self-regulatory organization ("SRO"), we submit that any SRO taking the nonpublic personal information must have jurisdiction over the entity from whom the records are obtained. Although many RIA firms are broker-dealers and thus Members of FINRA, it is our understanding that the majority of RIA firms are not Members of FINRA. Nonpublic personal information of customers of RIA firms who are not Members of FINRA is thus not disclosable to FINRA under the SRO exception.

We note that Regulation S-P provides an exception for "...persons that are assessing [the financial institution's] compliance with industry standards" [5] However, this language is inconsistent with supervision in the context of proposed Rule 3110(b)(3) requires

[3] NTM 94-44.
[4] 4 17 CFR & 248.15(a).
[5] 17 CFR & 248.15(a)(3)

supervision of the outside securities business of an associated person. Proposed Rule 3110(b)(3) does not require Member firms to assess the compliance of RIA firms with their own industry standards.

Regulation S-P contains no exception that would permit FINRA to receive nonpublic personal information of non-Member firms. Therefore, FINRA cannot, by its rulemaking power, confer upon its Member the power to receive such nonpublic personal information.

2. (B). Duplicative Regulatory Environment Concerning RIA's Writing Away

Proposed Rule 3110(b)(3) would incorporate the activities of a Member's registered person who also conducts business through an independent RIA firm as if such activity were within the scope of the Member's business. This proposed requirement unnecessarily subjects that RIA firm to the supervisory structure of two separate and distinct regulatory systems, thereby imposing significant additional administrative and financial burdens. Further and owing to such additional burdens, that RIA firm faces a distinct competitive disadvantage in comparison to a RIA firm that does not share registered persons with a Member. RIA firms may be multi-faceted and multi-functional, employing a complex organizational structure to govern their affairs and compensatory arrangements. The requirements of the proposed FINRA rule places a Member in the untenable position of directly or indirectly supervising the activities of RIA personnel who have no Member affiliation.

The requirement to supervise outside RIA business as proposed by FINRA Rule 3110(b)(3) is duplicative, cumbersome and unnecessary because RIAs are already regulated by the Investment Advisers Act. This Federal Law, created specifically to regulate the activities of investment advisers, contains provisions requiring registration of a person who, for compensation, advises people, pension funds and institutions about the advisability of investing in, purchasing, or selling securities, and further, imposes certain anti-fraud provisions upon all persons who meet the statute's definition of investment adviser even if the Advisers Act does not require those persons to register with the SEC.

Beacon Wealth Management, LLC believes that the Advisers Act imposes a stringent regulatory structure in the areas of suitability and supervision, and affords advisory clients greater protection than available to brokerage customers. Rules promulgated under the Advisers Act are enforced by the SEC and/or state securities administrators.

Further, it seems apparent that FINRA considered problems associated with duplicative regulatory structures. Proposed Rule 3110(b)(3)(B) excludes from Rule 3110 supervision with respect to bank-related securities activities of "dual employees when such activities are included within any of the statutory or regulatory exemptions from registration as a broker or dealer". For the purposes of the proposed exclusion, bank is defined as an entity "that is subject to consolidated supervision by the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, or the Director of the Office of Thrift Supervision". Under specific circumstances, RIAs should likewise be afforded the same exemption from the application of the Proposed Rule. It is our contention that the SEC is as capable in their

regulatory oversight of RIAs as are those other regulatory bodies in their respective supervision over securities-related bank activities.

Less compelling than the above arguments, but worth mentioning for the benefit of the financial interest of certain FINRA Members, the Court and the SEC (by acquiescence) invalidated the broker-dealer exemption of asset based fee accounts (the so-called "Merrill Rule") in Financial Planning Association v. Securities and Exchange Commission, 482 F. 3d 481. Broker-dealers who do not register and conduct business as an RIA are accordingly barred from conducting business through this type of customer arrangement, yet will be required to bear the cost of supervising this business if Proposed Rule 3110(b)(3) is enacted.

3. SUMMARY AND PROPOSED MODIFICATION

Most RIA Firms conduct advisory business only and therefore do not share affiliated persons with FINRA Member firms. These firms go about their advisory business without any oversight from any FINRA Member firm. They largely receive asset-based compensation, and thus have no incentive to "execute sales… without adequate attention to suitability of their customers with FINRA or its Member firms. They are subject to regulatory oversight by FINRA Members firms – this creates an arbitrary and uneven regulatory system clearly not contemplated by the Advisers Act and the regulations promulgated there-under.

While understanding the regulatory history of NASD Rule 3040 and its related interpretive materials Beacon Wealth Management, LLC strongly opposes the enactment of Rule 3110(b)(3) in its proposed form. Regulatory Notice 08-24 sets forth proposed rule that "would rewrite certain provisions of the existing supervision and supervisory control rules in a manner that provides firms with greater flexibility to tailor their supervisory and supervisory control procedures to reflect their business, size and organization structure". To that stated objected, Beacon Wealth Management, LLC suggests that Rule 3110(b)(3) be further clarified to incorporate an exemption for the outside activities of RIAs similar in scope to the exemption afforded dual employees of banks.

We respectfully submit these comments with the hope that due consideration be given to the weight of our arguments before submission of the final proposed rule is made to the SEC.

Very truly yours,

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