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July 30, 2010

VIA ELECTRONIC DELIVERY

Ms. Mary E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1509

Re: Regulatory Notice 10-25 – Registration and Qualification Requirement for
Certain Operations Personnel

Dear Ms. Asquith:

TIAA-CREF Individual & Institutional Services, LLC (“T-C Services”)¹ appreciates the opportunity to comment on FINRA Regulatory Notice 10-25 (the “Proposal”), which proposes to establish a registration category, qualification examination and continuing education requirements for certain operations personnel (“Operations Professionals”). The Proposal would expand FINRA’s registration requirements to include individuals engaged in, or supervising, activities relating to sales and trading support and the handling of customer assets in the context of a member firm’s back-office operations.

We understand and appreciate FINRA’s objective of enhancing the regulatory structure surrounding a member firm’s back-office operations through the registration and qualification of certain operations personnel. Our comments which follow are offered in support of this goal. We also are in general agreement with the comments submitted on the Proposal by the Securities Industry and Financial Markets Association (“SIFMA”) and the Committee of Annuity Insurers (“CAI”).²

We believe, however, that the Proposal as presently worded is overly broad in its application – potentially extending to numerous levels of personnel that touch back-office functions, rather than capturing the individuals with substantive decision-making and/or oversight authority over key broker-dealer back-office functions. We do not believe FINRA intends such a broad application. T-C Services, therefore, respectfully requests that FINRA refine the Proposal as we recommend below to avoid confusion and unnecessary registration at

¹ T-C Services is a registered broker-dealer that is wholly owned by Teachers Insurance and Annuity Association of America (“TIAA”). T-C Services and TIAA are members of the TIAA-CREF group of companies which comprise one of the world’s largest retirement plan systems. For over 90 years, TIAA-CREF has helped people in the academic, research, medical and cultural fields plan for and live through retirement.

² July 30, 2010 letter to Mary E. Asquith from SIFMA on the Proposal; July 30, 2010 letter to Mary E. Asquith from CAI on the Proposal.

undue expense and burden to member firms and their personnel. We believe our recommendations strike an appropriate balance between investor protection considerations and providing a practical registration and qualification regime for Operations Professionals.

I. FINRA Should Modify the Proposal to Capture More Effectively the Individuals Responsible for Substantive Decision-Making and/or Oversight of Key Back-Office Functions.

While FINRA states in the Proposal that it “generally is aimed at capturing those persons with decision-making and/or oversight authority in direct furtherance of the covered operations functions,” the plain language of proposed Rule 1230(b)(6) applies a much broader brush.

A. Depth of Personnel; a More Targeted Application is Needed.

As noted above, we believe that the applicable depth of personnel standards should reflect those personnel with *substantive* decision making and/or oversight authority. Our recommended modifications to proposed paragraph (b)(6)(A) of Rule 1230 are set forth in Appendix A to this letter and the concerns that inform these recommended modifications are described directly below.

1. Firm Capital Commitments and Contracting Authority.

The need for a substantive qualifier is best illustrated in the context of proposed paragraph (b)(6)(A)(iii) to Rule 1230. The paragraph would require Operations Professional registration for any person “with the authority or discretion to commit the member’s capital in direct furtherance of the covered functions in paragraph (b)(6)(B) of this Rule or to commit the member to any contract or agreement (written or oral) in direct furtherance of the covered functions in paragraph (b)(6)(B) of this Rule.” This statement is extremely far reaching and could capture individuals that perform routine, daily activities or enter into agreements that are consistent with firm policy and that have no material impact on firm operations. By way of example, taken to the extreme, it could capture individuals who are charged with ordering the paper stock needed for print statements on a periodic basis (or entering into the associated work order under a vendor contract).

The requirement should be limited to instances that exceed established firm spending limits. Moreover, at a minimum, the standard should incorporate a materiality standard based on some percentage of a firm’s capital (subject to a firm defined standard of materiality). To this end, our suggested modifications to the paragraph are set forth in Appendix A. If, on the other hand, FINRA merely intends the paragraph to apply to securities lending activities as SIFMA has surmised in its comment letter, we suggest FINRA narrow the application of the paragraph by adopting SIFMA’s recommended approach (i.e., either deleting the paragraph in its entirety or replacing it with language modeled after NYSE Rule 345.10 governing securities lending personnel).

2. Multiple Approvers.

Additionally, in a large multi-subsidary financial institution such as TIAA-CREF, standardized business approval processes may extend across multiple layers of individuals supporting the broker-dealer business, as well as across the organization to personnel supporting various subsidiaries. This helps ensure a consistent approach across the organization's various subsidiaries.

The approval processes may include, by way of example, approval of business requirements for systems and general business security and information entitlement policies. Additionally, approvers can include the individuals within the business line who commission specific systems functionality and are ultimately responsible for it, as well as individuals in legal, compliance, risk and technology roles and other personnel in various areas (including subsidiaries) who have applicable subject matter expertise that may inform the requirements.

We do not believe FINRA intends to capture such an extensive cast of individuals as Operations Professionals. Nevertheless, the proposal is ambiguous through its reach to "other persons approving or authorizing work in direct furtherance of the covered functions" and in its definition of covered functions, particularly those relating to capturing of business requirements and the definition of business security requirements and information entitlement policies. As such, we urge FINRA to clarify that where a firm has a multi-layered approval process, individuals that provide supplementary approval in the context of their ancillary, supportive or advisory roles will not be deemed Operations Professionals. Rather, the Operations Professional designation should flow through the individual approvers that request the functionality and ultimately retain responsibility for the functionality.

3. Dual Hat Employees.

In some instances a broker-dealer employee may wear dual hats and perform different roles for two areas of a member firm or two distinct affiliated entities. The manager(s) of such Operations Professional should similarly be subject to Operations Professional licensing only insofar as the manager has direct responsibility for the covered functions. To take a contrary position may require firms to register legions of personnel up and down reporting lines as Operations Professionals; or, alternatively, to make changes to their organizational structure that may impair the operation of the firm's business and result in undue cost and time burdens.

4. Supportive Roles.

While FINRA indicates in the Proposal's commentary that ancillary, supportive, advisory, ministerial and clerical positions are excluded from Operations Professional registration and qualification requirements, such language does not appear in the proposed language changes to Rule 1230. FINRA should include such language in the rule itself to avoid confusion. Additionally, FINRA should clarify that individuals performing quality assurance and quality control functions in direct furtherance of a covered function similarly are excluded, provided such activities are supervised by an Operations Professional.

B. Covered Functions Ambiguities.

We appreciate FINRA's challenge in describing the 15 covered functions in a manner that translates across member firms' differing business practices. While the list of covered functions appears comprehensive in scope, in some instances the descriptions are too broad, and in other cases the descriptions are too vague to enable firms to interpret their application with any precision. Our recommended clarifications to paragraph (b)(6)(B) in this regard are set forth in Appendix B to this letter. By way of example, we echo SIFMA's concerns in its comment on the Proposal that enumerated covered function (xv) relating to books and records is so far reaching that member firms will find it extraordinarily difficult to apply.

Additionally, FINRA should clarify that the covered functions apply only to activities performed by or on behalf of a member firm's securities and investment banking business. By way of example, in the retirement plan space, a broker-dealer may facilitate securities transactions but may not custody customer funds or effect disbursements from plan assets – the latter being handled by a bank that may or may not be related to the broker-dealer and is subject to separate and distinct regulatory requirements. Likewise, as described in the CAI comment letter on the Proposal, an insurance company affiliate of the member firm may perform many covered functions in its role as variable annuity issuer, including activities performed in reliance on the issuer exemption of Rule 3a4-1 under the Securities Exchange Act of 1934 (“Exchange Act”).

C. FINRA Should Clarify the Exceptions to Treatment of Vendor Employees as Operations Professionals and Associated Persons.

The Proposal indicates that “those persons subject to the new Operations Professional registration category would be considered associated persons of a firm irrespective of their employing entity and would be subject to all FINRA rules applicable to associated persons and/or registered persons.” This statement creates uncertainty given the potentially broad application of the Proposal as presently worded and described above.

Vendors may have their own supervisory or oversight processes for ensuring that their work product is consistent with agreed upon performance standards. This should be irrelevant, however, where a member firm establishes and maintains a supervisory system for monitoring the vendor's activities.

As noted in Notice to Members 05-48 (“05-48”), “members regularly enter into outsourcing arrangements with entities other than broker-dealers.” As a result of the 05-48 guidance and the burdens associated with treating the employees of an unregistered entity as the member firm's associated persons, member firms have typically structured their outsourcing arrangements to date to specifically exclude activities that require registration and qualification under existing rules. Furthermore, based on the 05-48 guidance, firms must have supervisory systems in place to monitor their vendor relationships.

To avoid confusion and potential disruptive effect to existing member firm operations, FINRA should clarify that the Proposal is not meant to capture vendor employees performing

back-office functions which are subject supervision by an Operations Professional employed by a member firm. Adopting a contrary position raises a myriad of complex and difficult issues for member firms, including those described directly below.

1. State Law Prohibitions on Dual Registration.

As noted in the Instructions to Form U-4, some states have prohibitions on individuals maintaining dual registration with unaffiliated broker-dealers. It is likely that vendors performing back-office functions for one member firm also provide such services to other member firms. Many such vendors will not be licensed as broker-dealers (e.g., a print vendor that assists with statement production and mailing).

To the extent the vendor employees described above will be deemed Operations Professionals, and thus associated persons of the member firm, state law prohibitions on dual registration may effectively prevent vendors from providing services to more than one member firm -- which as a practical matter, may result in the vendor terminating services to all or most of its member firm clients, with extreme disruptive effect to the broker-dealer industry.

2. Impact on Vendor Agreements and Pricing.

The treatment of vendor employees as Operations Professionals also would likely require firms to renegotiate their associated vendor agreements. Moreover, vendors may insist on revising their pricing schedules to reflect the re-categorization of the activities under FINRA rules and their perception of increased risk exposure, thus imposing added cost burdens on member firms in a time of extreme cost sensitivity.

3. Unnecessary Regulatory Burdens and Logistical Challenges.

Finally, the application of the compendium of FINRA's conduct rules to non-client facing personnel (both inside and outside of the member firm) will unnecessarily and substantially increase the supervisory and recordkeeping obligations of member firms with little associated benefit to FINRA or investors. It also is unclear from a logistical perspective how firms could practically treat vendor locations as branch offices subject to associated supervision and inspection requirements under FINRA's conduct rules.

II. **FINRA Should Finalize the Permissive Registration Regime Contemplated in Regulatory Notice 09-70 Prior to Implementing a New Operations Professional Designation.**

Implementing the permissive registration regime contemplated in Regulatory Notice 09-70 ("09-70") may help ease the registration burden associated with the proposed Operations Professional designation. It would provide firms and their personnel with the option to maintain licenses while the registered person occupies a non-registered position. Given the scope of back-office functions, it is likely that personnel could move back and forth over time between activities that require Operations Professional registration and those that do not. It also would

provide firms the ability to manage effectively staffing of their operations in a manner that best reflects their evolving needs.

In moving to finalize 09-70, we urge FINRA to address the comments of several industry groups and participants regarding the need to simplify the proposal to reduce the practical difficulties and administrative burdens of compliance. Additionally, FINRA should clarify how the proposed requirement under 09-70 that firms appoint a distinct Chief Operations Officer (“COO”) and a distinct Chief Financial Officer (“CFO”) intersects with the proposed Operations Professional designation. Would the COO and CFO be required to register as Operations Professionals as well?

III. FINRA Should Accommodate Qualification Exam Waivers for Certain Individuals With Recently Lapsed Registrations (Beyond 2 Years).

While proposal paragraph (b)(6)(D) of Rule 1230 would provide an exception from qualification exam requirements for individuals that have held an eligible registration within the two years immediately prior to registering as an Operations Professional, it does not address those individuals who may have dropped an eligible registration prior to the two year cut off to assume a back-office role. FINRA should consider incorporating standards within its Qualification Examination Waiver Guidelines that will accommodate individuals that possessed an eligible registration within a reasonably recent time period and have been performing an Operations Professional role for a reasonable period of time.

Member firms are sensitive to the current parking prohibitions of Rule 1031 and the enforcement actions that FINRA has brought against other member firms (at least one with a seven figure fine). Additionally, member firms are sensitive to the cost considerations in maintaining registrations that fall into the “permissive” category of NASD Rule 1031. As a result, individuals who have moved from a position requiring registration to a back-office role, where retention of such registrations has been merely permissive, may have withdrawn their registrations.

We believe individuals who have held an eligible registration within the five years immediately prior to registering as an Operations Professional and have been performing the equivalent of an Operations Professional role for at least the last two years should be viewed as having sufficient experience in the securities industry to qualify for Operations Professional registration without sitting for the exam (provided the individual’s prior registration was not revoked or terminated pursuant to FINRA Rule 8310). Furthermore, if FINRA is concerned that such individuals may have forgotten some of the concepts reflected in the qualification exam over the intervening five year period, FINRA could require the individual to complete the Firm Element continuing education requirement contemplated by the Proposal prior to submitting a waiver application.

IV. Timing for Rule Implementation: New Personnel that Assume Operations Professional Roles after the Implementation Date Similarly Should Be Given at least 6 to 9 Months to Comply.

The Notice proposes a six to nine month transition period after the rule becomes effective for existing personnel that satisfy the depth of personnel criteria and are engaged in the covered functions to register as Operations Professionals. Personnel that start performing a qualifying role with respect to a covered function after the effective date would not be given the same transition period. They would be required to satisfy the associated qualification exam (unless they hold another eligible registration) and register as Operations Professionals prior to engaging in an activity which requires such registration.

We believe such personnel, whether they assume the role prior to or after the initial transition period, should be given a similar grace period. The six to nine month transition period would provide such individuals an adequate period of time to study and take the exam and provide firms the flexibility to reallocate personnel as may be needed to meet business needs.

V. The Benefits of the Operations Professional Registration Scheme Should be Weighed against the Burdens, and the Proposal Amended as Recommended, Prior to Seeking a Formal Rule Change.

We appreciate that FINRA has the ability, pursuant to Section 15A(g) of the Exchange Act and Section 2, Article III of FINRA's Bylaws to prescribe standards of training, experience and competence to which member firms' associated persons are subject.

We do not believe, however, that the broad reach of the proposed Operations Professional designation achieves the appropriate balance between protection of the public interest and reducing burdens on competition. Specifically, the reach of the Proposal has the potential to capture individuals up and down reporting lines of an organization, including across affiliates and third party vendors. As currently proposed, member firms may face the need to register legions of individuals as Operations Professionals at substantial cost in a time of acute economic pressure; and such costs may include not only the fees and charges directly incurred in registering such individuals with FINRA, but also time away from work to study for the associated test, interim replacement staffing and staffing dedicated to processing registrations for individuals subject to the new designation. Additionally, as noted above, logistical challenges and state law prohibitions may effectively prevent the treatment of a third party vendor's employees as associated persons of the member firm and could have the disruptive effect of preventing further use of such vendors.

We urge FINRA to take account of the burdens associated with the Proposal and revise the Proposal as we have recommended prior to filing a formal rule change with the Securities and Exchange Commission ("Commission") for approval. Not only does FINRA bear the burden of establishing that its rulemaking initiatives are designed to prevent fraudulent and manipulative acts, but such rulemaking must not impose undue burden upon member firms. By way of example, FINRA rules must "take into account relevant matters, including the nature,

extent and type of business being conducted”³ and must not impose any burden on competition not necessary or appropriate in furtherance of the purposes of Title 15 of the United States Code.⁴ Additionally, FINRA rules must provide for the “equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which the association generates or controls.”⁵

Absent such an effort, FINRA’s rulemaking and associated Commission approval may be subject to challenge based on a failure to take into account associated burdens on competition. Although not identical in application, we note the United States Court of Appeals (D.C. Circuit) opinion which remanded Rule 151A of the Securities Act of 1933, as amended (“Securities Act”) to the Commission for further consideration on the basis that the Commission failed to fulfill its statutory obligation under the Securities Act to consider the effects of the new rule on efficiency, competition and capital formation (and the same Court’s subsequent decision to reissue its opinion and vacate Rule 151A).⁶ Given FINRA rulemaking could be subject to review by the same court, a comparable analysis under applicable laws, as discussed above, is warranted.

* * *

We would welcome the opportunity to meet with FINRA staff in person or via telephone to discuss our concerns and recommended changes to the Proposal. If you have any questions, please do not hesitate to contact me at 212.916.4344 or Pamela Lewis Marlborough, Associate General Counsel, at 303.626.4535.

Very truly yours,



Jon Feigelson

cc: Robert Cook, Director, Division of Trading and Markets
Katherine England, Assistant Director, Division of Trading and Markets
James McHale, Securities Industry and Financial Markets Association
Clifford Kirsch, Committee of Annuity Insurers
Eric Arnold, Committee of Annuity Insurers

Appendices: Appendix A – Revised paragraph (b)(6)(A), Requirements
Appendix B – Revised paragraph (b)(6)(B), Covered Functions

³ FINRA Bylaws, Article III, Section 2.

⁴ Section 15A(b)(9) of the Exchange Act.

⁵ Section 15A(b)(5) of the Exchange Act; See also Section 15(b)(7) of the Exchange Act.

⁶ *American Equity Investment Life Insurance Company v. Securities and Exchange Commission*, 572 F.3d 923 (D.C. Cir., July 21, 2009), reissued at 2010 U.S. App. LEXIS 14249 (D.C. Cir., July 12, 2010).

Appendix A – Recommended Modifications to Proposed Paragraph (b)(6)(A) of Rule 1230 (underlining denotes additions, strikethrough denotes deletions).

(A) Requirement. Persons in the following categories shall be required to register with FINRA as an Operations Professional:

(i) Senior management with direct responsibility over the covered functions in paragraph (b)(6)(B) of this Rule;

(ii) Supervisors, managers or other persons responsible for ~~approving or authorizing work in direct furtherance of~~ primary oversight of the covered functions in paragraph (b)(6)(B) of this Rule, ~~including work of other persons in the covered functions in paragraph (b)(6)(B) of this Rule;~~ and

(iii) Persons with the authority or discretion to commit the member's capital, including entering into any contract or agreement (written or oral) which commits the member's capital, beyond the established spending limits set forth in the member's written policies in direct furtherance of the covered functions in paragraph (b)(6)(B) of this Rule ~~or to commit the member to any contract or agreement (written or oral) in direct furtherance of the covered functions in paragraph (b)(6)(B) of this Rule.~~

[New Paragraph (B)] The requirements of paragraph (b)(6)(A) of this Rule shall not apply to:

- (i) Persons who perform covered functions, provided, however, that such performance does not otherwise involve direct responsibility over the covered function, primary oversight of the covered function or authority to commit the member's capital beyond the established limits set forth in the member's written policies;
- (ii) Persons who perform a function ancillary to a covered function or whose function is to serve a role that can be viewed as supportive of, or advisory to, the performance of a covered function;
- (iii) Persons who are engaged in quality control or quality assurance work in direct furtherance of a covered function and such work is supervised by a Operations Professional; and
- (iv) Persons who are engaged solely in clerical or ministerial activities in any of the covered functions.

Appendix B -- Recommended Modifications to Proposed Paragraph (b)(6)(B) of Rule 1230
(underlining denotes additions, strikethrough denotes deletions)

~~(B)~~ (C) Covered Functions. The following activities performed by or on behalf of a member firm's securities and investment banking business constitute "covered functions":

- i. Development and approval of pricing models used for valuations of securities;
- ii. Generation of customer trade confirmations and account statements, and settlement of transactions in customer brokerage accounts and margining of customer securities in customer brokerage accounts;
- iii. Customer stock loan/securities lending;
- iv. Prime brokerage (services to other broker-dealers and financial institutions);
- v. ~~Client on boarding (customer account data and document maintenance)~~ Customer account acceptance and associated account record maintenance;
- vi. ~~Capturing Approval~~ of business requirements for sales and trading systems and ~~any other systems related to the~~ used for other covered functions, and validation that these systems meet such business requirements;
- vii. ~~With respect to the covered functions, defining and approving~~ Acceptance and approval of business security requirements and policies for information technology (including, but not limited to, systems and data) used for sales and trading systems or systems used for other covered functions ;
- viii. ~~Defining~~ Acceptance and approval of the information entitlement policy used in connection with sales and trading systems or systems used for other covered functions;
- ix. Acting as Financial Controller (including control over general ledger entries);
- x. Collection, maintenance, re-investment (i.e., sweeps) and disbursement of customer funds;
- xi. ~~Bank, custody, depository and firm account management and reconciliation~~ Management and reconciliation of the member firm's accounts (including bank, custody, depository);
- xii. Segregation, possession and control, fail control, buy-ins;
- xiii. Receipt and delivery of securities and funds, account transfers;
- xiv. Financial regulatory reporting; and
- xv. ~~Posting entries to the books and records of a firm in connection with the~~ cover functions.