WMBA
AMERICAS
WHOLESALE MARKETS BROKERS' ASSOCIATION

May 14, 2015

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

Re: Membership Application Rules [Regulatory Notice 15-10]

Dear Ms. Asquith:

The Wholesale Markets Brokers' Association, Americas ("WMBAA" or "Association")[1] appreciates the opportunity to provide specific comments to the Financial Industry Regulatory Authority ("FINRA") regarding the effectiveness and efficiency of the Membership Application Rules ("MAP Rules").[2]

The WMBAA is an independent industry body representing the largest inter-dealer brokers operating in the North American wholesale markets across a broad range of financial products. The five founding members of the group are: BGC Partners; GFI Group; ICAP; Tradition; and Tullett Prebon. The WMBAA member firms collectively operate multiple FINRA member broker-dealers. Based on our experience to date with the MAP Rules, we respectfully submit the following comments related to NASD Rule 1017 on the Application for Approval of Change in Ownership, Control, or Business Operations.

In brief, the WMBAA recommends that FINRA: (1) amend the imposition of interim restrictions to provide for a review of material changes in business operations after a member effectuates a change; (2) alter its approach to the Rule 1017 process by construing the definition of "material change in business operations" strictly according to the defined types of business expansions; (3) amend the definition of "disciplinary history" to permit more reasonable access to the safe harbor provision; (4) provide increased flexibility within membership agreement restrictions; and (5) streamline information requests within the context of the Rule 1017 process to reduce unnecessary costs and burdens for members.

[1] The WMBAA membership collectively employs approximately 4,000 people in the United States; not only in New York City, but in Stamford, Connecticut; Chicago, Illinois; Louisville, Kentucky; Jersey City, New Jersey; Raleigh, North Carolina; and Houston and Sugar Land, Texas. For more information, please see www.wmbaa.org.

[2] FINRA Regulatory Notice 15-10, *available at* http://www.finra.org/sites/default/files/notice_doc_file_ref/Notice_Regulatory_15-10_0.pdf.

Imposition of Interim Restrictions

Rule 1017(c) sets forth the timing and conditions for effecting various changes, including changes related to ownership or control. For a member filing an application for approval of a change in ownership or control, Rule 1017(c)(1) requires the application to be filed "at least 30 days prior to such change." An NASD notice to members regarding the MAP Rules ("NASD Notice") also stated that "[a] member may effect a change prior to the conclusion of NASD Regulation's review of the application or issuance of the Department's decision on the application."[3] In addition, Rule 1017(c)(3) permits a member to file an application for approval of a material change in business operations at any time, but the member may not effect such change until the conclusion of the proceeding.

The WMBAA respectfully submits that the 30-day advance notice requirement and the interim restriction for material changes in business operations under provisions (c)(1) and (c)(3), respectively, are impracticable when a member is launching a new business or when a firm considers hiring an established team with fully qualified supervisors and representatives. As a practical matter, a member should not be required to obtain a preapproval on a Rule 1017 filing for a business that it has not yet acquired. The WMBAA submits that there should be an amended process that permits a member to expeditiously hire an established and licensed team, expand the number of its branch offices, and increase the number of securities for market making.

In instances where a firm seeks approval before acquiring an established team, a member is unlikely to be able to provide productive answers to information requests before a change has taken effect. For example, a supervisor who is hired with the team would likely be able to respond to an inquiry regarding who would be responsible for supervising the business. As a result of these interim restrictions, members are hampered in their ability to make real-time business decisions, as prospective employees are unlikely to engage the member if the member is not permitted to effectuate a necessary business change.

Rather than impose such interim restrictions, the WMBAA recommends that FINRA amend the requirements under Rule 1017(c) such that FINRA's review of a change occurs upon notification by a member that it has effected such change in its business operations.

Material Change in Business Operations

Under Rule 1011(k), the term "material change in business operations" "includes, but is not limited to: (1) removing or modifying a membership agreement restriction; (2) market making, underwriting, or acting as a dealer for the first time; and (3) adding business activities that require a higher minimum net capital under SEC Rule 15c3-1."

The NASD Notice explained that it is not "possible to develop an exhaustive definition of the term "material change in business operations," but stated that, "[i]f a change in a member's business falls outside of the definition or the safe harbor provisions . . . then the member must determine

[3] *See* NASD Notice to Members 00-73, *available at* http://www.finra.org/sites/default/files/NoticeDocument/p003977.pdf.

whether, based upon all facts and circumstances, the change is material."[4] Further, the NASD Notice provided that a member *may*, but is not required to, engage in a materiality consultation with the NASD Regulation District Office to obtain guidance on the issue.[5]

Instead of a comprehensive definition of the term, two measures were "designed to add greater clarity to the [Rule 1017] process and still preserve flexibility in applying the rule to individual situations: the adoption of [Interpretive Material] 1011-1 ["IM-1011-1"] to create a safe harbor for certain changes that are presumed not to be material and therefore do not require a member to submit an application; and the adoption of a non-exhaustive definition of 'material change in business operations' that would alert members to some of the types of business expansions that can be expected to trigger the need to file an application."[6]

In developing an appropriate definition of the term "material change in business operations," the WMBAA appreciates the need to balance certainty for members regarding when a Rule 1017 application would be required with flexibility for applying the rule to individual situations. Despite the general contours of the definition, however, members have observed that FINRA staff has repeatedly applied an overly expansive view of the term in its oversight of members by encouraging materiality consultations and requiring members to submit Rule 1017 applications for activities and business operations that do not constitute material changes in business operations and that are far different in nature from the type of activities outlined in the definition. The WMBAA is concerned that the definition of material change in business operations is being applied unevenly among members and, consequently, the Rule 1017 process is being applied in an arbitrary manner.

The WMBAA believes that, in applying the definition of "material change in business operations" to particular situations, members and FINRA should first examine the situation for the three prongs in the definition. To the extent that a particular situation falls outside the scope of such prongs, consistent with the guidance in the NASD Notice, the three prongs should be referenced as guideposts that delineate the types of business expansions that could be expected to trigger the need for a Rule 1017 application.

Safe Harbor for Material Change in Business Operations

As noted above, IM-1011-1 was adopted to create a safe harbor for certain changes that are presumed not to be material and therefore do not require a member to submit an application. "The safe harbor was created out of the recognition that firms need to be able to grow while essential investor protections are maintained."[7] However, firms with a defined "disciplinary history" are not able to use the safe harbor.[8]

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[4] *Id.* at 568.

[5] *Id.*

[6] *Id.* at 574.

[7] *Id.* at 569.

[8] *Id.* at 570. As noted in the NASD Notice, the term "disciplinary history" means "a finding of a violation by the member or a principal of the member in the past five years by the SEC, a self-regulatory organization, or a foreign financial regulatory authority of one or more" of certain enumerated provisions or regulations promulgated thereunder. *Id.* at 574.

The WMBAA is concerned that the safe harbor is no longer accessible for many members, given the prevalence of members with disciplinary histories. Further, the nature of the violations among members with disciplinary history can vary greatly, *e.g.,* the impact of a sales practice violation differs from that of a trade reporting violation or Order Audit Trail System ("OATS") violations. The WMBAA believes that certain types of violations, such as a trade reporting violation, should not prevent members from accessing the safe harbor presumption in order to effectuate changes in business operations.

In order to provide meaningful access to the safe harbor presumption, the WMBAA believes that FINRA should revise the definition of the term "disciplinary history" by: (1) adopting a tailored approach to the violations included within the definition; and (2) specifying that the five-year timeframe begins from the time of the violation, rather than from a "finding" or adjudication of a violation.

Membership Restriction Agreements

Under Rule 1017(c)(2), a member may file an application to remove or modify a membership agreement restriction, though an existing restriction remains in effect throughout the proceeding.

The WMBAA submits that membership restriction agreements should not impose any unnecessary constraints through prescriptive provisions on a firm's ability to expand. Rather, FINRA should permit flexible provisions within membership agreement restrictions that permit members to expand their operations within reasonable bounds without being required to submit a Rule 1017 application in every instance.

Cost-Benefit Considerations

While members will inevitably incur certain costs as a result of the Rule 1017 application process, the WMBAA believes that FINRA can minimize these attendant costs by streamlining its requests for information in the context of application reviews. Currently, members receive information requests that frequently exceed the scope necessary to determine whether a business should be permitted to expand its operations. Instead, the WMBAA submits that FINRA requests in the application process should be simplified and focused solely on information relevant to determining whether a circumstance constitutes a material change in business operations. This approach would, in turn, reduce regulatory compliance costs for members and reduce FINRA's membership fees, as FINRA would avoid reviewing extraneous information.

Conclusion

The WMBAA thanks FINRA for the opportunity to comment on NASD Rule 1017. Please feel free to contact the undersigned with any questions you may have on our comments.

Sincerely,

William Shields
Chairman, WMBAA