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## FINRA Re-Clarifies Investment Banker Qualifications

The Financial Industry Regulatory Authority (FINRA) recently issued a Frequently Asked Questions (FAQ) release on the qualifications necessary to engage in investment banking activities, and it is apparent that membership clearly failed to ask the right questions when FINRA proposed Rule 1032 (i) (Limited Representative – Investment Banking) (the “Rule”) and the Series 79 exam qualifications for investment banking in 2009. In the current FAQ release, FINRA “clarified” the required qualifications necessary to engage in investment banking activities for membership. That clarification essentially re-defines the meaning of “marketing”, which results in most full service investment bankers now being required to obtain both the Series 79, for their investment banking activities, and the Series 7, Series 62 or Series 82 for “marketing” the respective offerings and interacting with investors.

In the FAQ, FINRA specifically stated that “The Investment Banking Representative registration category is meant to include investment bankers advising on a marketing plan prepared by a sales team or developing and/or contributing information for marketing materials. However, it would **not** include persons who actively market the offering and interact with investors or potential investors, such as a person who is engaging in road show activities. Such a person would **also** need to be registered as a General Securities Representative (Series 7), Corporate Securities Representative (Series 62) or Private Securities Offerings Representative (Series 82) depending on the type of offering being made.” FINRA also stated “If you are only engaged in selling the offering or actively marketing the offering to investors or potential investors, the Series 7 registration is sufficient. However, if you want to engage in activities such as preparing a marketing plan or advising on a marketing plan prepared by a sales team or developing and/or contributing information for marketing materials, you would **also** need to be registered as an Investment Banking Representative (Series 79).”

Based upon FINRA’s response, it appears that it is now necessary to qualify as a Series 79 to engage in investment banking activities that have historically been viewed as non-securities and advisory in nature (to wit, advising on capital formation alternatives, structure, advising on a marketing plan or developing and/or contributing information for marketing materials), in addition to having to qualify with a Series 7, 62 or 82 in the event the banker actually communicated to potential investors regarding a banking opportunity (i.e., participating on road shows and soliciting indications of interest from potential investors).

## Background

Notwithstanding the current regulatory position on the required qualifications necessary to engage in investment banking, FINRA's position appears to have evolved from the issuance of Notice to Members 09-41 ("NTM") in 2009. That NTM represented that the Rule required "an associated person to register with FINRA as a Limited Representative – Investment Banking (Investment Banking Representative) and pass a corresponding qualification examination if such person's activities involve: (1) advising on or **facilitating debt or equity securities offerings through a private placement or a public offering, including but not limited to origination, underwriting, marketing, structuring, syndication, and pricing of such securities and managing the allocation and stabilization activities of such offerings, or (2) advising on or facilitating mergers and acquisitions, tender offers, financial restructurings, asset sales, divestitures or other corporate reorganizations or business combination transactions, including but not limited to rendering a fairness, solvency or similar opinion.**" As the majority of banking opportunities are placed privately to sophisticated and or institutional investors, it appeared clear in the NTM that the Series 79 was in fact replacing the need for an investment banker to qualify for Series 7, 62 or 82.

To that end and in further support of the initial interpretation, the NTM went on to state that "Individuals whose activities require registration as an Investment Banking Representative will be required to pass the Investment Banking Representative Qualification Examination (Series 79) or obtain a waiver. FINRA has developed this exam to provide a more targeted assessment of the job functions performed by the individuals that fall within the registration category. *The exam will be required in lieu of the current General Securities Representative (Series 7) exam or equivalent exams by the individuals who perform the job functions described in the new registration category.*" (Italics added for emphasis) As stated above, the job functions cited in the NTM included facilitating the debt or equity securities offerings through a private placement or a public offering, including but not limited to origination, underwriting, marketing.

To further exacerbate the situation, the FAQ's issued in the NTM specifically stated that "The Series 79 Exam will qualify an Investment Banking Representative for only those activities covered under the Rule. If the representative engages in activities not covered by the Investment Banking Representative registration, such as retail or institutional sales, the representative will need to take the appropriate qualification exam, such as the Series 7 or Series 7 equivalent exam." That seemed to make it clear that retail or institutional sales were considered different than "marketing" investment banking transactions. However, it now appears that is not the case today.

Finally, it should be noted that FINRA membership was not the only group that was not provided with a clear vision of FINRA's intent to complicate, rather than simplify the regulatory framework for investment banking professionals. Numerous states had to amend their state statutes to allow for the Series 79 qualification in 2009 and 2010. In the proposed amendment to the securities statutes in the state of Texas, which was subsequently adopted, the State Securities Board of Texas stated in their legislative release that the proposed amendment to Article 115.1 would create a restricted

registration category to correspond to the new Series 79 examination for investment banking registration. A person seeking this type of restricted registration could pass the Series 79 registration in lieu of the examination on general securities principles. Prior to the creation of the Series 79, agents who worked as investment bankers took the Series 7 exam--the General Securities Principles Exam--which is more comprehensive and is focused toward retail sales. The content of the Series 79 is exclusively on investment banking activities.” The states obtained their direction from FINRA, and as with the NTM, there was no indication from the states that that the Series 79 was anything less than a standalone qualification.

Ultimately, due to FINRA’s recent interpretation, state regulators may need to go back and review their statutory framework to assure it is in synch with FINRA with respect to the Series 79. Ironically, FINRA’s action gives further support for those groups attempting to obtain a “lite” registration status for investment banking activities as it further evidences FINRA’s apparent lack of understanding of the investment banking business model.

## **Summary**

FINRA has redefined the definition of “marketing” to obtain its desired results, and that redefinition now exposes investment banking personnel to the potential requirement to qualify and obtain both the Series 79 for their non-securities investment banking activities, and the Series 7, Series 62 or Series 82 for actually “marketing” their respective offerings. To the extent this was always the intent of FINRA, it appears that FINRA should take note of the obligations imposed on membership with respect to dealing with the public and take this opportunity to address the failure to originally make a full and fair disclosure to FINRA membership as to what they believed to be the real qualifications necessary to engage in investment banking.

## **Action Items**

To the extent investment banking personnel have been hired since the opt-in period ended for the Rule on May 3, 2010, and they are engaged in banking activities and “marketing”, they need not only the Series 79, but also either the Series 7, 62 or 82. As a result, investment banking firms need to take the following action:

- Take immediate steps to review the current registration qualifications for their investment banking professionals.
- Review the job description and functions for all for their investment banking staff to determine whether such personnel are engaged in “marketing” activities or just investment banking activities.
- Review client offerings to determine which qualifying exam is appropriate (i.e., the General Securities Representative, Series 7; Corporate Securities Representative, Series 62; or the Private Securities Offerings Representative, Series 82).

- To the extent there is a gap with respect to the qualifications of any of its investment banking professionals, exams should be scheduled so as to assure any such persons pass the required qualifying exam.
- The written supervisory procedures for the firm need to be reviewed and revised to reflect the impact of the Rule on the registration and qualification process followed by a firm related to the hiring of new employees.

We hope that this information has been helpful to you. Should you have any additional questions or concerns, please feel free to contact Daniel E. LeGaye or Michael Schaps by e-mail or phone, at 281-367-2454, or consult with your legal counsel or compliance consultant.

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