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BANKS AND BROKERS AND BRICKS AND CLICKS: AN
EVALUATION OF FINRA'S PROPOSAL TO MODIFY THE "BANK
BROKER-DEALER RULE"

*Jill I. Gross**
*Edward Pekarek***

I. INTRODUCTION

Paula P., a risk-averse individual with no investment experience and no significant assets,¹ walks into her local bank branch recently, intending to renew her one year Certificate of Deposit ("CD") and seeking interest on her \$20,000 in savings accumulated over a lifetime of modest employment. Pat, the bank teller, recommends that she talk to Joe D. who works in the office and who may be able to help her obtain a higher rate of return on her money. Paula agrees, and Joe takes her over to his cubicle, eagerly explaining that he has "something better" for her than the CD she sought to renew. Paula, pleased to learn she could earn a higher interest rate on her savings, agrees to work with Joe. After signing a few papers that Joe says are merely "red tape," they complete the transaction, and Paula leaves the bank a satisfied customer. Paula does not realize, however, that she just purchased shares of a speculative "junk bond" mutual fund—an investment product

* Professor of Law, Pace Law School, and Director, Pace Investor Rights Clinic ("PIRC"). This article is based, in part, on a Comment Letter the authors filed with the Securities and Exchange Commission ("SEC") in response to the proposed rule change of the Financial Industry Regulatory Authority ("FINRA") to adopt FINRA Conduct Rule 3160 in its Consolidated Rulebook. See SEC Comment Letter from Jill I. Gross & Edward Pekarek, Director and Clinical Law Fellow, Pace Law School Investor Rights Clinic, to Elizabeth M. Murphy, Secretary, U.S. Sec. & Exch. Comm'n (Sept. 8, 2009), available at <http://www.sec.gov/comments/sr-finra-2009-047/finra2009047-4.pdf>.

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¹ While Paula is a fictional character, her story is based on a typical fact pattern that the authors have heard repeatedly from clients of PIRC. Opened in 1997, PIRC is the nation's first law school clinic in which Juris Doctor students, for academic credit and under close faculty supervision, provide pro bono representation to individual investors of modest means in arbitrable securities disputes against broker-dealers and their associated persons. See Barbara Black, *Establishing A Securities Arbitration Clinic: The Experience at Pace*, 50 J. LEGAL EDUC. 35 (2000).

wholly different in risk than a CD.

This is the story of countless unsuspecting and unsophisticated banking customers who enter the seemingly “safe and sound” confines of their trusted financial institution² seeking low-risk, insured, depository *savings* products, but are lured into purchasing volatile, uninsured non-depository *investment* products they often do not understand, only to later suffer substantial losses and learn that FDIC (or FSLIC) insurance is unavailable to make them whole.³ Customers like Paula have been victimized by a regulatory scheme that permits broker-dealers to operate on the premises of financial institutions without fully disclosing to customers the fundamental differences between a depository institution and a broker-dealer and the products and services each respectively markets.⁴ Financial regulators repeatedly have failed to proscribe this manipulative behavior, to the detriment of countless retail investors.

This article evaluates the Financial Industry Regulatory Authority’s (“FINRA”)⁵ proposal to adopt a modified version of National Association of Securities Dealers (“NASD”) Rule 2350, known as the “bank broker-dealer rule,”⁶ which, if approved by the

² Of course, the hallmark of the depository financial institution is “the presence of full faith and credit [of the United States] behind deposit insurance,” unlike the uninsured non-deposit Wall Street products often pushed by affiliated brokers. CARL FELSENFELD, *BANKING REGULATION IN THE UNITED STATES* 136 (2d ed. 2006).

³ See, e.g., SEC Comment Letter from Richard E. Horn, Vice President, BankBoston Investor Servs., Inc., to Jonathan G. Katz, Secretary, U.S. Sec. & Exch. Comm’n (June 6, 1997) (citing Gordon J. Alexander et al., *Mutual Fund Shareholders: Characteristics, Investor Knowledge, and Sources of Information* 10–11, 15–16 (June 24, 1996) (unpublished working paper, on file with the Office of the Comptroller of the Currency), available at <http://comptrollerofthecurrency.gov/ftp/workpaper/wp97-13.pdf>), available at <http://www.sec.gov/rules/proposed/s71097/horn1.txt>; see also Frederick T. Furlong & Simon H. Kwan, *SAFE & SOUND BANKING, 20 YEARS LATER: WHAT WAS PROPOSED AND WHAT HAS BEEN ADOPTED* (Aug. 17, 2006) (unpublished manuscript, on file with the Federal Reserve Bank of San Francisco), available at http://www.frbsf.org/economics/conferences/0608/kwan_furlong.pdf.

⁴ A financial institution must determine if undertaking various securities activities may cause it to meet the definition of “broker” in the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(4) (2006), or whether it falls within one of the exceptions from the broker-dealer definition offered by the Gramm-Leach-Bliley Financial Modernization Act of 1999, Pub. L. No. 106-102, §§ 201–202, 113 Stat. 1338, 1385–91 (codified as amended in scattered sections of 12 and 15 U.S.C.). If it does not fit within an exception, the securities activity is typically “pushed-out” to a broker-dealer that is a FINRA member and registered with the SEC.

⁵ FINRA was created in 2007 following the consolidation of the NASD with the enforcement, member regulation and arbitration functions of the New York Stock Exchange (NYSE). See FINRA, *About the Financial Industry Regulatory Authority*, <http://www.finra.org/AboutFINRA/index.htm> (last visited Feb. 23, 2010).

⁶ See Notice of Filing of Proposed Rule Change to Adopt FINRA Rule 3160 (Networking Arrangements Between Members and Financial Institutions) in the Consolidated FINRA

SEC, would be designated as FINRA Rule 3160 within FINRA's Consolidated Rulebook ("proposed rule change").⁷ The proposed rule change ostensibly seeks to prevent FINRA member firms that offer broker-dealer products and services through contractual "networking arrangements" with financial institutions—both on and off the premises of those institutions—from undertaking certain business practices that might tend to confuse or harm customers of financial institutions.⁸ The proposed rule change also aims to prevent customer confusion by, *inter alia*, ensuring that certain disclosures are made to customers so they can understand and appreciate the distinction(s) between the products and services sold by a financial institution and those sold by its broker-dealer affiliate.⁹

As discussed in this article, the proposed rule change protects bank customers who may be solicited for the purchase of investment products and services, but only to a limited extent. It does not rectify sales practices of broker-dealers—affiliated with financial institutions—which tend to confuse, and even mislead, financially unsophisticated investors of modest means who can least afford to be exposed to excessive risk. Additionally, the proposed rule change adds no meaningful surveillance, inspection, enforcement, or punitive mechanisms to prevent and/or redress insidious practices that are akin to "bait and switch" tactics and are particularly effective against financially unsophisticated investors. In fact, the proposed rule change even rolls back some key regulatory provisions, an especially unsettling retreat when one considers the lack of oversight during the recent market malaise and the contribution that such abridgement may have made to the present economic contraction as a reverse "wealth effect" impinges upon consumer behavior. In short, as demonstrated below, the proposed rule change is inadequate to sufficiently protect investors and promote genuine market integrity.

II. THE HISTORY OF REGULATING NETWORKING ARRANGEMENTS

Prior to implementation of the "bank broker-dealer rule," the SEC governed networking arrangements between financial institutions and broker-dealers through the issuance of interpretive "no-action"

Rulebook, 74 Fed. Reg. 41,774, 41,774–75 (Aug. 18, 2009).

⁷ *Id.*

⁸ *Id.* at 41,775.

⁹ *Id.*

letters.¹⁰ On November 24, 1993, SEC staff issued what became known as the “Chubb Letter,” which detailed SEC policy relating to certain broker-dealer operational activities that occurred on the premises of financial institutions.¹¹ After the release of the Chubb Letter, the four main federal bank regulators issued an “Interagency Statement on Retail Sales of Nondeposit Investment Products” (“Interagency Statement”) on February 15, 1994.¹² The Interagency Statement adopted many of the Chubb Letter provisions and directed banks and savings institutions to adhere to those principles when either: (1) effecting direct sales of securities to customers; or (2) overseeing NASD members in connection with the purchase or sales of securities on their premises.¹³

In 1995, NASD proposed new Conduct Rule 2350 (“Broker-Dealer Conduct on the Premises of Financial Institutions”), based largely on the Chubb Letter and the Interagency Statement, in order to establish uniform and consistent standards to govern “the activities of NASD members that are conducting broker-dealer services on the premises of a financial institution where retail deposits are taken.”¹⁴ Three years later, on November 4, 1997, the SEC approved Rule 2350, also known as the “bank broker-dealer rule.”¹⁵

¹⁰ See Chubb Securities Corp., SEC No-Action Letter, 1993 WL 565540 (Nov. 24, 1993) [hereinafter Chubb No-Action Letter]. Networking arrangements typically fall into two main categories: (1) referral arrangements; and (2) standard arrangements. OFFICE OF THRIFT SUPERVISION, EXAMINATION HANDBOOK § 710.3 (2004), available at <http://files.ots.treas.gov/422201.pdf> [hereinafter OTS HANDBOOK]. A referral arrangement is a written agreement by which financial institution employees refer customers to an affiliated broker-dealer, and the related sales activities of non-depository investment products and services occur outside of the confines of the financial institution. Examples of permissible referral activities include, “provid[ing] customers with the broker-dealer’s promotional materials, direct[ing] them to telephones for placing orders, or provid[ing] a toll free telephone number.” *Id.* Standard networking arrangements are generally used for on-site sales of investment products and services, pursuant to a customer access agreement between a financial institution and a registered broker-dealer that is typically situated within the financial institution, and is often either: (i) an unaffiliated third-party; (ii) a service corporation; or (iii) an affiliate. *Id.* § 710.3 to .4.

¹¹ See Chubb No-Action Letter, *supra* note 10, at *1–*4.

¹² Interagency Statement from Office of the Comptroller of the Currency, et al., to American Bankers Association (Sept. 12, 1995), available at <http://www.occ.treas.gov/ftp/release/95-94.txt> (“Joint Interpretations of the Interagency Statement on Retail Sales of Nondeposit Investment Products”) [hereinafter Interagency Statement].

¹³ *Id.* at 1.

¹⁴ 94-94 NASD Requests Comment on Proposed Rule Governing Members Operating on Bank Premises, http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=1439 (last visited Feb. 23 2010).

¹⁵ See Order Approving Proposed Rule Change by the National Association of Securities Dealers, Inc. and Notice of Filing and Order Granting Accelerated Approval of Amendment No. 5 to Proposed Rule Change Governing Broker-Dealers Operating on the Premises of

On November 12, 1999, through “the culmination of a \$300 million lobbying effort by the banking and financial-services industries,”¹⁶ Congress passed the Gramm-Leach-Bliley Act (“GLB”), repealing key provisions of the Glass-Steagall Act of 1933¹⁷ and eliminating the long-standing separation of insurance, banking, and securities businesses.¹⁸ GLB did nothing to enhance investor knowledge or awareness, yet it permitted—and even fostered—the blending of seemingly secure depository savings institutions with the high-flying speculative culture of investment banking.¹⁹

Following the passage of GLB, unsophisticated depository customers were exposed to a slew of new offerings from giant hybrid financial services entities which, according to at least one observer, “were given the right to merge into behemoths, but regulators remained scattered and focused on a world that had ceased to

Financial Institutions, Release No. 34-39294, 65 SEC Docket 1779 (Nov. 4, 1997), *available at* 1997 WL 685310.

¹⁶ Joseph E. Stiglitz, *Capitalist Fools*, VANITY FAIR, Jan. 2009, at 48.

¹⁷ Banking (Glass-Steagall) Act of 1933, ch. 89, 48 Stat. 162–195 (1933) (codified as amended in scattered sections of 12 U.S.C.).

¹⁸ *See, e.g.*, *Inv. Co. Inst. v. Camp*, 401 U.S. 617, 623 (1971) (citing 12 U.S.C. §§ 24, 378(a) (2006), as the statutory authority for this division); *see also* *Sec. Indus. Ass’n v. Bd. of Governors of the Fed. Reserve Sys.*, 839 F.2d 47, 57 (2d Cir. 1988); *Effects of Consolidation on the State of Competition in the Financial Services Industry: Hearing Before the H. Comm. on the Judiciary*, 105th Cong. 20 (1998) (statement of Hon. John M. Nannes, Deputy Assistant Att’y Gen., Antitrust Division, United States Department of Justice), *available at* <http://www.usdoj.gov/atr/public/testimony/1787.pdf>; Daniel Gross, *Shattering Glass-Steagall: Lehman’s Failure Marks the End of an Era*, NEWSWEEK, Sept. 15, 2008, <http://www.newsweek.com/id/159092>.

¹⁹ Joseph E. Stiglitz, Columbia University Economics Professor and 2001 recipient of the Nobel Memorial Prize in Economic Sciences, attributes the 2008 economic collapse largely to the repeal of the Glass-Steagall Act:

The most important consequence of the repeal of Glass-Steagall was indirect—it lay in the way repeal changed an entire culture. Commercial banks are not supposed to be high-risk ventures; they are supposed to manage other people’s money very conservatively. It is with this understanding that the government agrees to pick up the tab should they fail. Investment banks, on the other hand, have traditionally managed rich people’s money—people who can take bigger risks in order to get bigger returns. When repeal of Glass-Steagall brought investment and commercial banks together, the investment-bank culture came out on top. There was a demand for the kind of high returns that could be obtained only through high leverage and big risk taking.

Stiglitz, *supra* note 16, at 48. *But see* Clyde Mitchell, *Ten Years After Gramm-Leach-Bliley: A Defense*, N.Y. L.J., Dec. 16, 2009, at 3 (quoting Lawrence H. White, *How Did We Get into This Financial Mess?* 2 (Cato Inst. Briefing Papers No. 110, 2008), *available at* <http://www.cato.org/pubs/bp/bp110.pdf>.) According to Lawrence White, repeal of the key provisions of Glass-Steagall

opened the door for financial firms to diversify: a holding company that owns a commercial bank subsidiary may now also own insurance, mutual fund, and investment bank subsidiaries. Far from contributing to the recent [economic] turmoil, the greater freedom allowed by [GLB] has clearly been a blessing in containing it.

White, *supra*, at 2.

exist.”²⁰ Just months before the recent economic decline accelerated, John Reed, the “architect” of the merger of Travelers (insurance), Citibank, N.A. (commercial banking), and Salomon Smith Barney (securities brokerage and investment banking)—which was then the world’s largest financial services firm, Citigroup—reflected on that transaction and admitted it was a “mistake.”²¹

Years after GLB’s passage, Congress promulgated the Financial Services Regulatory Relief Act of 2006, which, *inter alia*, required the SEC and the Federal Reserve Board to adopt final rules addressing the matter and to implement the exceptions to the definition of “broker” under GLB section 201 to govern the joint activity of banks and broker-dealers.²² Commentators may differ about the root causes of the 2008–09 market collapse and the “Great Recession” that followed, but even some of the staunchest GLB proponents point to insufficient regulatory oversight as one main cause for recent market and economic turmoil.²³

III. PROPOSED FINRA CONDUCT RULE 3160

The proposed rule change aims to harmonize FINRA rules²⁴ with

²⁰ Chris Suellentrop, *Sandy Weill: How Citigroup’s CEO Rewrote the Rules so He Could Live Richly*, SLATE, Nov. 20, 2002, <http://www.slate.com/id/2074372/>.

²¹ Francesco Guerrera, *Citi Merger Architect Calls Deal ‘Mistake,’* FIN. TIMES, Apr. 4, 2008, <http://www.ft.com/cms/s/0/adb7e4a6-019d-11dd-a323-000077b07658.html>; see generally, Edward Pekarek & Michela Huth, *Bank Merger Reform Takes an Extended Philadelphia National Bank Holiday*, 13 FORDHAM J. CORP. & FIN. L. 595, 679–81 (2008).

²² See Financial Services Regulatory Relief Act of 2006, Pub. L. No. 109-351, 120 Stat. 1966 (codified as amended in scattered sections of 12, 15 U.S.C.); see also 15 U.S.C. §§ 6801–09 (2006); SEC Regulation R, 17 C.F.R. §§ 247.100 to .781 (2010).

²³ Mitchell, *supra* note 19, at 10 (“[T]he [SEC] never really was given (or exercised) sufficient regulatory authority over investment banks and their capital positions, which, based upon their deterioration (Bear Stearns, Morgan Stanley and Merrill) and failure (Lehman Brothers), proved to be inadequate.”).

²⁴ The FINRA rulebook, presently known as the “Transitional Rulebook,” is comprised of: (1) NASD Rules; and (2) the rules incorporated from the NYSE. FINRA, INFORMATION NOTICE: RULEBOOK CONSOLIDATION PROCESS 2–3 (2008) <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p038121.pdf>. In connection with its ongoing process to consolidate the Rulebook, FINRA staff is reviewing existing NASD and NYSE Rules for: (1) obsolescence; (2) differences between them; (3) ways to synthesize them; and (4) rules that can be transferred into the Consolidated Rulebook without substantive modification. *Id.*

[A]s the SEC approves new rules for inclusion in the Consolidated FINRA Rulebook and they become effective, FINRA members will become subject to those rules. . . . [T]he Transitional Rulebook will be reduced by the elimination of those rules that address the same subject matter of regulation. When the Consolidated FINRA Rulebook is completed, the Transitional Rulebook will have been eliminated in its entirety.

Id.

relevant provisions of GLB and Regulation R.²⁵ The proposed rule change calls for FINRA members to: (1) establish written networking agreements with banks identifying responsibilities and compensation; (2) segregate the retail deposit-taking area from all securities activities occurring on bank premises; (3) permit some inspection and examination access by the SEC and FINRA; (4) require customer communications to “clearly” identify that all brokerage services are provided by the broker-dealer, not by the bank; (5) disclose that securities products offered are not insured like savings products; and (6) make reasonable efforts while opening an account to obtain a customer’s written acknowledgement of the receipt of the required disclosures.²⁶

While the proposed rule change contemplates broker-dealer internet activities generally, adoption of the setting regulations of the proposed rule change would address—by implication through the FINRA by-laws—only “on premises” activities in the “retail deposit-taking area.”²⁷ Unfortunately, this provision ignores the fact that there are an ever-increasing number of bank deposits. These include “substitute drafts,” as defined and permitted by the “Check 21 Act,” and electronic payroll deposits,²⁸ both of which are facilitated online, and which should logically result in expansion of the covered “area” to include cyberspace—at least for the purposes of appropriate setting regulation.²⁹ In our view, the proposed rule

²⁵ See Notice of Filing of Proposed Rule Change to Adopt FINRA Rule 3160 (Networking Arrangements Between Members and Financial Institutions) in the Consolidated FINRA Rulebook, 74 Fed. Reg. 41,774, 41,774–75 (Aug. 18, 2009); 15 U.S.C. §§ 6801–09; SEC Regulation R, 17 C.F.R. § 247.700 to .781; see also Definitions of Terms and Exemptions Relating to the “Broker” Exceptions for Banks, 72 Fed. Reg. 56,514, 56,514 (Oct. 3, 2007) (codified at 12 C.F.R. pt. 218, 17 C.F.R. pts. 240, 247); Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(4)(B); Press Release, U.S. Sec. & Exch. Comm’n & Bd. of Governors of the Fed. Reserve Sys., Agencies Adopt Final Rules to Implement the Bank “Broker” Provisions of the Gramm-Leach-Bliley Act (Sept. 24, 2007), available at <http://www.federalreserve.gov/newsevents/press/bcreg/20070924a.htm>.

²⁶ See Notice of Filing of Proposed Rule Change to Adopt FINRA Rule 3160 (Networking Arrangements Between Members and Financial Institutions) in the Consolidated FINRA Rulebook, 74 Fed. Reg. 41,774, 41,774–75 (Aug. 18, 2009).

²⁷ NASD RULE 2350(c)(1) (2009), available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=3650.

²⁸ See Check Clearing for the 21st Century (Check 21) Act, 12 U.S.C. §§ 5001–18 (2006).

²⁹ Investors would benefit from the use of a broadly defined concept of the banking space, much like a “facility” is defined with regard to the activities of an exchange. See Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(2) (“The term facility when used with respect to an exchange includes its premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or

change, in its present form, is a regulatory setback that substantially undermines the maxims of market integrity and investor protection, particularly in light of the increasing information asymmetry that exists between broker-dealers and their customers.

IV. INVESTMENT ILLITERACY AND CUSTOMER CONFUSION: THE NEED FOR REGULATION

Over the past twelve years, individual investors have been confused regarding the role of the financial institution—as defined within the proposed rule change—with respect to the securities activities of affiliated broker-dealers through network arrangements.³⁰ Investment illiteracy research conducted by the SEC in conjunction with the Office of the Comptroller of the Currency revealed pervasive customer confusion that extended across financial product “distribution channels.”³¹ For example, more than one of every eight (13.3%) mutual fund investors who participated in that study, and who invested through the so-called “bank broker-dealer” distribution channel, incorrectly believed they could not suffer a loss of principal in a bond fund investment; around one of every five (20.1%) such investors inaccurately concluded they could not lose principal in a money market fund; and more than one-third (36.4%) of those surveyed had invested with the misapprehension that money market funds are federally insured.³² Another investment illiteracy study from the same era made the startling determination that “fewer than one-fifth of all individual investors (in stocks, bonds, funds, or other securities) could be considered to be ‘financially literate.’”³³ According to the most recent FINRA Investor Education Foundation study, financial

service.”) (emphasis added).

³⁰ See OTS HANDBOOK, *supra* note 10, § 710.3.

³¹ See Alexander et al., *supra* note 3, at i. The mutual fund shareholder study consisted of a “nationwide telephone survey of 2,000 randomly selected mutual fund investors who purchased shares using the services of six different intermediaries, referred to as distribution channels—brokers, banks, mutual fund companies, insurance companies, employer-sponsored pension plans, and ‘other’ (e.g., financial planners).” *Id.*

³² *Id.* at 22 n.3, 34 tbl.4.

³³ *Id.* at 4 (citing Albert B. Crenshaw, *Before Risking the Money, Invest in Financial Literacy*, WASH. POST, May 19, 1996, at H1, H4). The NASD subsequently defined “investor literacy” in 2003 as being “the understanding ordinary investors have of market principles, instruments, organizations and regulations.” APPLIED RESEARCH & CONSULTING LLC, NASD INVESTOR LITERACY RESEARCH (2003) [hereinafter NASD RESEARCH], available at <http://www.finra.org/web/groups/Investors/@inv/@protect/documents/Investors/P011459.pdf>.

illiteracy is not limited to any one cohort of investors. Worse still, this troubling trend has actually accelerated among young adults, who are notably less financially literate than previous generations.³⁴

NASD's 2003 study of "a wide range of investors across income, gender, size of investment portfolio and types of investments" produced similarly dismal findings of investment illiteracy, despite the fact that almost seventy percent of responding investors "described themselves as being 'somewhat knowledgeable' about investing."³⁵ For example, just slightly more than one-third (35%) of the NASD study's respondents were able to "answer[] . . . seven out of the ten of NASD's Basic Market Knowledge questions correctly."³⁶ Meanwhile, almost two-thirds (62%) of surveyed investors either did not know or erroneously believed that they were insured against stock market losses, and one-fifth of all respondents believed that such insurance was provided either by the SEC (16%) or the NASD (4%).³⁷

TD Ameritrade, a FINRA member, funded investment illiteracy research in 2006 which revealed that more than half of all investors surveyed incorrectly believed that a stockbroker owes a fiduciary responsibility "to act in [a customer's] best interest in all aspects of the financial relationship."³⁸ A FINRA Investor Education Foundation study from the same year measured the level of senior investor illiteracy, and found that "55% of respondents lost money on an investment." Of those who lost investment principal, almost one in five "attribute[d] the loss to being misled or defrauded[,] and 78% of those misled or defrauded did not report it."³⁹ These

³⁴ See FINRA INVESTOR EDUCATION FOUNDATION, FINANCIAL CAPABILITY IN THE UNITED STATES (2009), available at <http://www.finrafoundation.org/web/groups/foundation/@foundation/documents/foundation/p120536.pdf>. Financial illiteracy has become so significant that the U.S. Social Security Administration is providing millions in funding for a Financial Literacy Center founded by the RAND Corp., Dartmouth College, and the Univ. of Pennsylvania's Wharton Business School to develop educational materials and programs to improve the presently dismal financial literacy of Americans of all ages. See Press Release, RAND, RAND Launches New Financial Literacy Center with Dartmouth College and the Wharton School (Oct. 7, 2009), available at http://www.rand.org/news/press/2009/10/07/financial_literacy.html. The U.S. Treasury and Education Departments recently announced an initiative to increase the financial literacy of high school students. See David Lawder, *Obama Administration Aims for High School Financial Literacy*, REUTERS, Dec. 15, 2009, <http://www.reuters.com/article/idUSTRE5BE3GG20091215>.

³⁵ NASD RESEARCH, *supra* note 33, at 3–4.

³⁶ *Id.* at 6.

³⁷ *Id.* at 9.

³⁸ See TD Ameritrade Institutional, Investor Perception Study, <http://www.tdainstitutional.com/pdf/InvestorPerceptionStudy.pdf> (last visited Feb. 23, 2010).

³⁹ NASD, SENIOR INVESTOR LITERACY AND FRAUD SUSCEPTIBILITY SURVEY EXECUTIVE

troubling findings translate into approximately 10% of all senior citizen investors being defrauded at some point—with the majority of defrauded seniors not reporting the fraud.⁴⁰ The study also concluded that many “victims of fraud are relatively knowledgeable and active investors.”⁴¹

The SEC maintained in 2007 that the prevention of fraud targeting senior investors was a top priority, but conceded that this laudable goal has remained elusive, due in large part to substantially insufficient regulatory oversight, including erosion at the edges of the governing rules.⁴² A 2007 FINRA Investor Education Foundation study determined, not surprisingly, that “[p]ersonal relationships factor into senior investor decision making.”⁴³ According to the Electronic Financial Services Council, “[i]nvestors are most vulnerable to high pressure sales tactics when they are interacting personally with a salesperson in whom they have placed their trust and confidence.”⁴⁴ Two of every five senior investors who participated in the 2007 FINRA study “hired a broker recommended by a friend, relative, co-worker or neighbor.”⁴⁵ Nearly three of every five (58%) senior investors who were defrauded previously entrusted their investing activity to a broker based on a personal recommendation.⁴⁶

At least one observer recently concluded that the presence of “a ‘truth bias’ caus[es senior citizens] to believe what they’re told by someone who appears to be authoritative.”⁴⁷ When customers are

SUMMARY (2006), http://www.finrafoundation.org/web/groups/sai/@sai/documents/sai_original_content/p036699.pdf.

⁴⁰ FINRA, Senior Investor Literacy and Fraud Susceptibility Survey Key Findings, <http://www.finra.org/web/groups/investors/@inv/@smart/documents/investors/p036810.pdf> (last visited Feb. 23, 2010).

⁴¹ *Id.*

⁴² See, e.g., Christopher Cox, Former Chairman, U.S. Sec. & Exch. Comm’n, Address to the Senior Investor Protection Symposium (May 18, 2007), available at <http://www.sec.gov/news/speech/2007/spch051807cc.htm>; see also U.S. Sec. & Exch. Comm’n, For Seniors, <http://www.sec.gov/investor/seniors.shtml> (last visited Feb. 23, 2010).

⁴³ FINRA, Senior Fraud Risk Survey <http://www.finra.org/web/groups/investors/@inv/@smart/documents/investors/p036813.pdf> (last visited Feb. 23, 2010)

⁴⁴ INTUIT INC. & ELEC. FIN. SERV. COUNCIL, PROMOTING EFFICIENT ARRANGEMENTS BETWEEN PORTALS AND ONLINE BROKERS 2 (2000), available at <http://www.sec.gov/pdf/intuitefscpaper.pdf>.

⁴⁵ FINRA, Senior Fraud Risk Survey, *supra* note 43.

⁴⁶ *Id.*

⁴⁷ *Id.* Additional decision-making biases are examined in detail by at least one scholar who has concluded that investor and consumer education programs are of questionable value. See Lauren E. Willis, *Against Financial-Literacy Education*, 94 IOWA L. REV. 197, 226 (2008).

⁴⁷ See Jayne W. Barnard, *Deception, Decision, and Investor Education*, 7 ELDER L.J. (forthcoming 2010) (manuscript at 3), available at

told by a professional, surrounded by all the trappings of the bank setting, that a product is “just like a CD, but even better,” they might be prone to accept the veracity of such puffery, due to the phenomenon of “truth bias,” particularly when the customer is a financially unsophisticated senior citizen.⁴⁸ The studies cited above demonstrate that the traditional financial institution setting has the potential to create false impressions of safety and security for customers who are ill-equipped to sense that they are being solicited for their savings by professionals who typically enjoy an information asymmetry and a position of trust.

V. VAGUE REGULATORY LANGUAGE AND SANCTIONS, LAX INSPECTION AND ENFORCEMENT

Bank customers commonly describe themselves as confused in financial institution settings where there are no signs distinguishing divisions within the bank, customer communications are vague, disclosure is inadequate, and securities activities transpire in close proximity to retail deposit-taking areas without appropriate segregation.⁴⁹ Anecdotal evidence further suggests that bank employees use customer account data in order to apply relationship-based sales tactics when potentially investable funds become available, such as on or near the maturity date of a certificate of deposit. These customers likely do not know that the bank employee who recommends an affiliated broker-dealer is motivated by the compensation he or she receives for steering customers toward non-depository products such as securities—compensation which is limited only by bank-friendly Regulation R.⁵⁰

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1291843.

⁴⁸ *Id.* (manuscript at 3, 26).

⁴⁹ We urge the SEC to altogether eliminate disclosure loopholes provided by the Interagency Statement, a scheme crafted in response to banking industry lobbyist efforts, which allow exempted non-disclosure in

[(i)] radio broadcasts of 30 seconds or less; [(ii)] electronic signs [which] may include billboard-type signs that are electronic, time and temperature signs, and ticker tape signs. Electronic signs would not include such media as television, on line services, or ATM's; and [(iii)] signs, such as banners and posters, when used only as location indicators.

Interagency Statement, *supra* note 12.

⁵⁰ See 12 CFR § 218.701 (2009) (entitled “Exemption from the definition of broker for certain institutional referrals”); 17 CFR § 247.701 (2009) (same). According to former SEC Commissioner Laura S. Unger, “[t]he Commission [r]eceived [s]ubstantial [i]nput from the [b]anking [c]ommunity and the Rules [r]eflect [t]his [i]nput . . . [and] [p]rovide [f]lexibility to [b]anks to [c]ompensate [e]mployees.” *Pushing Back the Pushouts: The SEC’s Broker Dealer Rules: Hearing Before the H. Comm. On Financial Services*, 107th Cong. 63–65, 69–71 (2001) (statement of Laura S. Unger, Former Acting Chairperson, U.S. Sec. & Exch. Comm’n),

That these and other misleading activities continue to take place, despite the regime established by NASD Rule 2350, strongly suggests that the current rule does not adequately prevent unsophisticated investor confusion. At least one market observer has acknowledged that “regulatory bodies have struggled with implementation of the bank ‘broker’ provisions.”⁵¹ Because it appears designed to dilute the already inadequate status quo, the SEC should not approve the proposed rule change.

Ambiguity within the proposed rule change, as it is currently constructed, leaves ample room for sharp parsing and actually invites misconduct. For example, the provision that intends to adopt NASD Rule 2350(c)(4)(B) would require disclosures within all of the member’s “[a]dvertisements and sales literature that announce the location of a financial institution.”⁵² If, however, a broker-dealer subsidiary employs an identical logo and a confusingly similar trade name to that of the affiliated financial institution, has that advertising content announced the name or services of the financial institution within the meaning of the rule?⁵³ The proposed rule change does not appear to prohibit such conduct.

The proposed rule change also substantially diminishes certain compliance and disclosure mechanisms as compared to NASD Rule 2350. For example, by eliminating the requirement of NASD Rule 2350(c)(3)(B)—which compels broker-dealers to make objectively reasonable efforts to obtain written customer acknowledgement of the receipt of mandated disclosures—FINRA provides its members far less incentive to ensure that associated persons are in fact disclosing the required information. Instead, an associated person can routinely state that he or she made the requisite disclosures because the proposed rule would not affirmatively require an investor acknowledgement to verify this contention. This aspect of the proposed rule change, coupled with the absence of meaningful

available at <http://www.sec.gov/news/testimony/080201tslu.htm>; see also Securities Exchange Act of 1934, 15 U.S.C. § 77c(a)(4)(B)(i) (2006).

⁵¹ Edwards, Angell, Palmer & Dodge, LLP, Implications of Regulation R on Bank Distribution Channels Used for Insurance Sales, <http://www.eapdlaw.com/newsstand/detail.aspx?news=1125> (last visited Feb. 23, 2010) (quoted material appears at n.3); see also The Hole on Brian Moynihan’s Resume, <http://blogs.wsj.com/deals/2009/12/21/the-hole-on-brian-moynihans-resume/> (Dec. 21, 2009, 8:30 EST); Brian Moynihan: From Edwards & Angell to the Top of BofA, <http://blogs.wsj.com/law/2009/12/17/brian-moynihan-from-edwards-angell-to-the-top-of-bofa/> (Dec. 17, 2009, 11:51 EST).

⁵² NASD RULE 2350(c)(4)(B) (2009), available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=3650.

⁵³ *Id.*

record-keeping requirements, surveillance, and/or inspection provisions regarding the efforts undertaken to obtain the customer acknowledgement, is part of a pronounced retreat from the interests of investor protection and market integrity.

Likewise, the proposed rule change dilutes the setting requirements of the bank broker-dealer rule. Currently, NASD Rule 2350(c)(1) unambiguously requires the setting of the financial institution to be “clearly distinguished” from the broker-dealer.⁵⁴ In contrast, subsection 3160(a)(1)(c) of the proposed rule change requires a member firm to physically separate its broker-dealer products and services from the “routine retail deposit-taking activities of the financial institution,” but only “to the extent practicable.”⁵⁵

This language is particularly problematic because it invites subjective self-serving interpretation by the broker-dealer. The use of substantially similar aesthetic elements (which are known as “trade dress” and include identical interior décor, signage style, logos, etc.) within retail bank branches that feature brokerage products and services, as well as confusingly similar business names and identical website addresses, can create the illusion in a naïve investor’s mind—perhaps deliberately—that the broker and the banker are actually one and the same.

Under the proposed regime, a broker-dealer could combine that tactic with a dubious semantic determination that segregating the banking area from the brokerage area is “impracticable,” setting a potential trap for the trusting customer. Anecdotal evidence indicates that, even under the current regime, the physical separation of space between some bank tellers and brokers is negligible, and the interior banking areas either lack required disclosure signage, are indistinguishable from each other, or both. Rather than strengthening the setting requirements, the proposed rule change weakens them without explanation.

Similarly, despite the fact that the radio industry changed its

⁵⁴ NASD RULE 2350(c)(1) (“Wherever practical, the member’s broker/dealer services shall be conducted in a physical location distinct from the area in which the financial institution’s retail deposits are taken. In all situations, members shall identify the member’s broker/dealer services in a manner that is clearly distinguished from the financial institution’s retail deposit-taking activities. The member’s name shall be clearly displayed in the area in which the member conducts its broker/dealer services.”).

⁵⁵ Notice of Filing of Proposed Rule Change To Adopt FINRA Rule 3160 (Networking Arrangements Between Members and Financial Institutions) in the Consolidated FINRA Rulebook, 74 Fed. Reg. 41,774, 41,774–75 (Aug. 18, 2009).

pricing model five years ago⁵⁶ to one where the “30-second ad[vertisement became] the standard unit of measure for network radio sales,”⁵⁷ the relevant portion of the current rule, NASD Rule 2350(c)(4)(D), for some reason specifically excludes “radio broadcasts of 30 seconds or less” from the disclosure requirements of NASD Rule 2350(c)(4)(C).⁵⁸ The proposed rule change ignores this important shift in broadcast media advertising and, despite its claim “to give consideration to the rapidly evolving nature of the securities business,”⁵⁹ FINRA has continued to adhere to the 1995 Interagency Statement—an outdated proviso developed as the internet entered its commercial infancy.⁶⁰ The proposed rule change will almost invariably increase confusion for customers of all ages.

VI. FAILURE TO CLEARLY REGULATE INTERNET ACTIVITIES OF BROKER-DEALERS

The proposed rule change fails to clearly regulate the confusingly commingled internet presence of financial institutions and affiliated broker-dealers, despite the fact that online banking now surpasses visits to “brick and mortar” branches within key demographic

⁵⁶ See Roy H. Williams, *Radio Ads: How Long Should They Be? Everything You Need to Consider When Choosing Between 15-, 30- and 60-Second Spots*, ENTREPRENEUR, Sept. 13, 2004, <http://www.entrepreneur.com/advertising/adcolumnistroyhwilliams/article72584.html>. Clear Channel Communications, one of the nation's largest radio station operators, forever changed the radio industry pricing model in early 2005 to favor 30 second advertising spots. “For the first time ever, 30- and 15-second ads will be priced worth the money. Up until now, all radio ads were priced essentially the same, regardless of length, so everyone ran 60s . . .” *Id.*

⁵⁷ Google Radio Misses Success by 30 Seconds, <http://www.radiodirect.com/blog/?p=173> (May 29, 2009, 10:03 EST).

⁵⁸ Incidentally, “NASD Regulation staff has [also] extended this [non-disclosure] exception to letterhead, envelopes, and business cards that do not reference investments or securities products” directly, thereby relieving broker-dealer affiliates of the onerous burden of a nine-word disclosure. See FINRA, *Ask The Analyst: Advertising Regulation*, http://finra.complinet.com/en/display/viewall_display.html?rbid=1189&element_id=11590049 84 (last visited Feb. 23, 2010). NASD Rule 2350 (c)(4)(C) calls for the following cautionary language: “Not FDIC Insured, No Bank Guarantee, May Lose Value.” NASD RULE 2350(c)(4)(C). It should be noted that FINRA’s guidance was provided before the passage of GLB.

⁵⁹ FINRA, *Information Notice: Rulebook Consolidation Process*, <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p117155.pdf> (last visited Feb. 23, 2010).

⁶⁰ See Interagency Statement, *supra* note 12; see also Robert H. Zakon, *Hobbes’ Internet Timeline 10*, <http://www.zakon.org/robert/internet/timeline/> (last visited Feb. 23, 2010) (“1995 . . . dial-up systems (CompuServe, America Online, Prodigy) begin to provide Internet access.”).

groups.⁶¹ According to a 2007 FINRA study, “a majority of older investors (55 and older) are interested in a variety of online resources, [although] they are less interested than younger investors. . . . [On the other hand, o]lder investors are more likely to visit brokerage firm Web sites to research investment[s] than other Web sites, such as Yahoo and Morningstar.”⁶²

As mentioned above, younger Americans are more comfortable with online and mobile banking technology, but they are also more financially illiterate than any other cohort—two interrelated trends which have serious implications given the lack of regulation of securities activities on bank Web sites.⁶³

Presently, domestic retail banking Web sites do not separate information regarding banks and brokers, and these sites appear not to be adequately inspected or prevented due to the lack of appropriate surveillance, inspection, and enforcement mechanisms. This contradicts federal regulatory guidance provided to the banking industry which directs national banks to “make certain that their disclosures on Internet banking channels, including Web sites, remain synchronized with other delivery channels to ensure

⁶¹ More Consumers Prefer to Bank Online, Says American Bankers Assn. http://latimesblogs.latimes.com/money_co/2009/09/more-consumers-prefer-to-bank-online-says-american-bankers-assn.html (Sept. 21, 2009, 13:26 PST) [hereinafter More Consumers Prefer]. An August 2009 survey of 1,000 consumers conducted on behalf of the American Bankers Association by market research firm Ipsos-Reid, revealed findings the bank lobbyist called a “watershed change.” *Id.* The study revealed that:

[Twenty-five percent] of all bank customers under age 55 now prefer the speed and convenience of Internet banking to phone and mail options. For customers ages 18 to 34, a whopping 38% preferred banking online. Among older customers, 26% still prefer visiting their local branch. But just 21% of the overall group would rather bank at physical locations, and only 17% prefer ATMs. Just 1%, mostly 18- to 34-year-olds, are most likely to enjoy mobile banking on cellphones or personal digital assistants.

Id.

⁶² FINRA, INSIGHTS ON INVESTMENT ATTITUDES AND BEHAVIORS COMPARING OLDER AND YOUNGER INVESTORS (2007), available at <http://www.finra.org/web/groups/investors/@inv/@smart/documents/investors/p036812.pdf>.

⁶³ See Check 21 Act, 12 U.S.C. §§ 5001–5018 (2006); Scanning Your Money to the Bank, N.Y. Times Blog, <http://bits.blogs.nytimes.com/2008/02/07/scanning-your-money-to-the-bank/> (Feb. 7, 2008, 17:29 EST) (“To use the service, consumers would sign onto their bank’s Web site, activate a piece of software, type in the amount, and then scan the front and back side of each check they want to deposit. The bank has the option of immediately sending the check image to be cleared or to have a human review it first.”); Wanna Deposit Checks from Home?, MainStreet Blog, <http://www.mainstreet.com/article/moneyinvesting/savings/remote-check-deposit-slow-coming-consumers> (July 13, 2009) (“Right now, the 150 largest banks offer this service, which allows you to fax or email checks to your bank for deposit. Among those who do are Key Bank [], Wells Fargo [], Chase [], Citi [] and Bank of America []. Many regional banks provide remote deposit services as well. According to the Community Bankers of America, 50% of banks offer remote deposit, and 70% plan to have it by next year.”).

the delivery of a consistent and accurate message to customers.”⁶⁴

A sampling of commercial banking Web sites reveals a pattern of blending securities activities with traditional banking functions on the same Web site, located at the same URL address, apparently hosted on the same network server, and frequently used the same widely-recognized bank logo(s), trade name(s), and trade dress.⁶⁵ Often, the only “segregation” between bank and non-bank offerings marketed online is an html-coded tab, button or hyperlink at or near the top of a Web site. The Web site setup is designed to enable customers to navigate information regarding checking and savings accounts, credit cards, mortgages, home equity lines of credit (“HELOCs”), and student loans, along with a host of brokerage activities involving non-depository investment products such as common equities, mutual funds, options, commodities, forex products, and futures. On most of the banking and brokerage Web sites we sampled, the “trading” tab was featured prominently, often adjacent to the “banking” tab. Almost without exception, required disclosures were buried at the bottom of the respective Web pages.⁶⁶ This is especially alarming in light of the fact that roughly 42% of all internet users presently bank online.⁶⁷

The absence of any meaningful regulatory oversight of this fast-growing distribution sub-channel undermines the investor

⁶⁴ COMPTROLLER OF THE CURRENCY, *THE INTERNET AND THE NATIONAL BANK CHARTER* 89 (2001), <http://www.fdic.gov/regulations/information/ebanking/Internet&NationalBankChrt.pdf>.

⁶⁵ See Banc of America Online Investing, <https://www.baisidirect.com/live/login.jspv> (last visited Feb. 23, 2010); BB&T Investments, <http://www.bbt.com/personal/products/investments/default.html> (last visited Sept. 8, 2009); Citi Investing, <https://online.citibank.com/US/JRS/pands/detail.do?ID=InvestingOverview> (last visited Feb. 23, 2010); Chase Investments, https://www.chase.com/ccp/index.jsp?pg_name=ccpmapp/individuals/investments/page/plan_b_rkg (last visited Feb. 23, 2010); Key Investment Services, <https://www.key.com/html/ira-investments-retirement.html> (last visited Feb. 23, 2010); PNC Investments, <https://www.pnc.com/webapp/unsec/ProductsAndService.do?siteArea=/pncorp/PNC/Home/Personal/Investments+and+Wealth+Management/Investments> (last visited Feb. 23, 2010); Morgan Keegan & Co., http://www.regions.com/personal_banking/morgan_keegan.rtf (last visited Feb. 23, 2010); Wells Fargo, <https://www.wellsfargo.com/investing/styles/comparison> (last visited Feb. 23, 2010).

⁶⁶ Notably, courts have been reluctant to deem Web site disclosures legally effective if the user has to scroll to the bottom of the webpage to read them. See, e.g., *Specht v. Netscape Comm'ns Corp.*, 306 F.3d 17, 20 (2d Cir. 2002) (“[P]laintiffs could not have learned of the existence of those terms unless, prior to executing the download, they had scrolled down the webpage to a screen located below the download button. . . . [A] reasonably prudent Internet user in circumstances such as these would not have known or learned of the existence of the license terms before responding to defendants’ invitation to download the free software, and that defendants therefore did not provide reasonable notice of the license terms.”).

⁶⁷ Kevin Borders et al., *Analyzing Websites for User-Visible Security Design Flaws*, SYMPOSIUM ON USABLE PRIVACY AND SEC. July 2008, at 1, 1 <http://cups.cs.cmu.edu/soups/2008/proceedings/p117Falk.pdf>.

protection potential of the proposed rule change.⁶⁸ All too often a broker-dealer affiliated by network arrangement with a financial institution uses a confusingly similar trade name to that of the contracting financial institution, with only a perfunctory appendage such as “Investment Services, LLC.”⁶⁹ This trend exposes customers to greater risk online *and* in the physical bank setting, because the use of confusingly similar trademarks and names may lead to the inference that the banker and the broker are the same, further blurring the line between insured savings products and risky investment products. Unfortunately, the proposed rule change does nothing to prevent what appears to have become a

⁶⁸ See, e.g., John Adams, *Small Banks Seen Flocking to Online Account Products*, AM. BANKER, May 29, 2009, at 7 (“Online account-opening applications offer a low-cost way to increase deposits, according to community and regional bankers.”); see also Press Release, Bank of America Corporation—1st Quarter Results (Apr. 20, 2009) (on file with author) (providing that Bank of America maintains a total of “approximately 55 million consumer and small business relationships . . . [and] online banking with nearly 30 million active users”). Online banking has been a boon for financial services marketing:

But just as with the ATM and automated phone systems of a generation earlier, Internet banking didn’t cause a mass migration of transactions from high- to low-cost channels. Instead, bankers say, *it has spurred more transactions than ever.*

... Wendy Grover, a spokeswoman for Wells Fargo & Co.’s Internet services group, said the San Francisco banking company has seen the same benefits that Mr. Andrews described and more. The company is no longer worrying about the kind of benefits it initially expected from online banking, she said, and instead enjoys customer retention, *cross-selling*, and balance growth rewards.

Bill Stoneman, *Rationale for Online Banking Starts to Shift*, AM. BANKER, Mar. 12, 2001, at 6A (emphasis added); see also More Consumers Prefer, *supra* note 61; Check 21 Act, 12 U.S.C. §§ 5001–5018 (2006).

⁶⁹ See *Rescuecom Corp. v. Google Inc.*, 562 F.3d 123, 130 (2d Cir. 2009) (citing Lanham Act, 15 U.S.C. § 1125(a) (2006)); *Estee Lauder Inc. v. The Gap, Inc.*, 108 F.3d 1503, 1508–09 (2d Cir. 1997) (discussing the likelihood of consumer confusion standard within the Lanham Act context); see also Letter from Brewster M. Ellis, Co-Chair, Sec. Indus. Ass’n, to Denise V. Crawford, Tx. State Sec. Bd. (Apr. 16, 1997), available at http://www.sifma.org/regulatory/comment_letters/comment_letter_archives/31224607.pdf (entitled “Proposed Rules for Sales of Securities at Financial Institutions”) (“A non-deposit investment product must not have a name that is identical to the name of the financial institution.”). For example, all divisions of Citi, including its financial instruments division and its affiliated broker, use identical marks. Notably, the disclaimer located on Citi’s Online Investing Overview Web site reveals that:

Citi Personal Wealth Management is a business of Citigroup Inc., which offers securities through Citigroup Global Markets Inc. (“CGMI”), member SIPC. Insurance is offered through Citigroup Life Agency LLC (“CLA”). In California, CLA does business as Citigroup Life Insurance Agency, LLC (license number OG56746). CGMI, CLA and Citibank, N.A. are affiliated companies under the common control of Citigroup Inc. *Citi and Citi with Arc Design are registered service marks of Citigroup Inc. and its affiliates and are used and registered throughout the world.*

Citibank Online Investing Overview,
<https://online.citibank.com/US/JRS/pands/detail.do?ID=InvestingOverview> (last visited Feb. 23, 2010) (emphasis added).

standard stratagem employed by bankers and brokers to make one business indistinguishable from the other.

VII. CONCLUSION

The language of the proposed rule change is wholly insufficient to prevent fraudulent and manipulative acts and practices, and, in general, to protect investors and the public interest. It also lacks adequate surveillance, inspection and enforcement measures, as well as appropriate sanctions for non-compliance. The statutory purpose of “ensur[ing] that communications with customers clearly identify that the broker-dealer services are provided by the member”⁷⁰ is offended by the false sense of security created within the confines of the financial institution setting. This is true whether one considers the on-premises “bricks,” or the off-premises “clicks,” particularly when coupled with relationship sales tactics employed by compensated bank employees whose mission it is to steer customers to affiliated broker-dealers who utilize confusingly similar trade names and feature the same, or confusingly similar, logos and trade dress, inadequate signage and vague or non-existent disclosure.

While the level of documented investment illiteracy demonstrates a pressing need for thorough investor protection, profound regulatory gaps continue to exist with regard to, inter alia, the industry’s present use of networking agreements between financial institutions and affiliated broker-dealers. The SEC should press FINRA to substantially enhance the provisions of the proposed rule change so as to protect individual investors and bolster genuine market integrity.

⁷⁰ See Notice of Filing of Proposed Rule Change to Adopt FINRA Rule 3160 (Networking Arrangements Between Members and Financial Institutions) in the Consolidated FINRA Rulebook, 74 Fed. Reg. 41,774, 41,774–75 (Aug. 18, 2009).