

FINRA Requires Order Taker Registration

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In late 2017, FINRA pronounced in Regulatory Notice 17-30 that, "Beginning on October 1, 2018, unregistered persons cannot accept an order from a customer under any circumstances. Only appropriately registered persons can accept an order from a customer." At the same time, FINRA decided to eliminate the Series 11 registration category for order processing assistant representatives. FINRA is of the view that accepting unsolicited customer orders for the purchase or sale of securities is not considered a clerical or ministerial function. Supplementary Material to new FINRA Rule 1230 proclaims that "associated persons who accept customer orders under any circumstances shall be registered in an appropriate registration category pursuant to Rule 1220." But does order taking always involve broker activity? FINRA's position may raise a number of issues for variable insurance product operations. For example, when a contract owner places a subaccount transfer order or partial surrender order, what is the "security" – the variable contract itself or the units of interest in the separate account? The answer to this question may turn in part on the title of securities being registered on the facing sheet of an insurer's variable annuity or variable life insurance policy registration statement. Some may argue that, to the extent the security is the variable contract itself, and not the units of interest in the separate account, the security has already been sold and any subsequent order to transfer or surrender accumulation units is a contract administrative activity that does not involve a securities order. By way of further example, what order taking activities may variable product call center and branch office personnel perform without a Series 6 (investment company and variable contracts products representative) registration? Some clerical and ministerial order taking activities – address changes, beneficiary changes, and requests for performance – clearly do not involve securities transactions. But some branch office order taking activities may be unclear: 1) Could an unregistered branch office employee forward orders to the insurer/distributor on behalf of customers without being deemed to "accept" the order? 2) Does "accepting an order" mean accepted by or on behalf of the broker-dealer? 3) Might such acceptance occur only after the broker-dealer receives the order at the home office/central processing center? FINRA's position on order taker registration also raises a potential regulatory anomaly. For example, in the *Universal Pensions, Inc.* (UPI) SEC Staff No-Action Letter (Jan. 30, 1998), the SEC staff took the position that a third party administrator to pension plans could, through automated telephone voice response and internet systems, accept participant orders without registering as a broker-dealer. The

staff was of the view that this type of order taking was clerical and ministerial activity that did not require registration. The SEC's 2015 Transfer Agent Concept Release cites UPI for this point and notes, "depending on the type of securities being administered and the scope of administration services being performed, an entity may or may not be required to register with the Commission in the capacity of a transfer agent and/or a broker-dealer." Query whether FINRA's position would apply, for example, to a broker-dealer's associated person who also is an employee of a transfer agent, if that employee's acceptance of an order is clearly in a transfer agency capacity. Supplementary Material to Rule 1230 states that an unregistered person is not accepting an order "when an appropriately registered person is unavailable, [and] the associated person transcribes order details submitted by a customer and the registered person contacts the customer to confirm the order details before entering the order." Whether this so-called exception to the rule will prove helpful in practice remains to be seen. For some insurers and their principal underwriters, requiring registration of call center and branch office personnel may impact variable product operations. As a result, insurers and principal underwriters are evaluating what changes, if any, may need to be made to their variable product operations and personnel registrations before October 1.

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