Financial Industry Regulatory Authority

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Mr. Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: File No. SR-FINRA-2015-057 (Proposed Rule Change to Adopt FINRA Rule 2273 (Educational Communication Related to Recruitment Practices and Account Transfers))

Dear Mr. Fields:

This letter responds to comments received by the Securities and Exchange Commission ("SEC" or "Commission") to the above-referenced rule filing related to adopting FINRA Rule 2273, which would establish an obligation to deliver an educational communication in connection with member recruitment practices and account transfers.

The Commission published the proposed rule change for public comment in the Federal Register on December 30, 2015.[1] The Commission received 12 comment letters directed to the rule filing.[2] The following are FINRA's responses, by topic, to the commenters' material concerns.

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1 See Securities Exchange Act Release No. 76757 (December 23, 2015), 80 FR 81590 (December 30, 2015) (Notice of Filing of File No. SR-FINRA-2015-057).

2 See Letter from Alexandra Hughes, Student Intern, and Nicole Iannarone, Assistant Clinical Professor, Georgia State University College of Law's Investor Advocacy Clinic, to Robert W. Errett, Deputy Secretary, SEC, dated January 14, 2016 ("GSU"); letter from Paul J. Tolley, Senior Vice President, Chief Compliance Officer, Commonwealth Financial Network, to Robert W. Errett, Deputy Secretary, SEC, dated January 15, 2016 ("Commonwealth"); letter from Carrie L. Chelko, Chief Counsel, Lincoln Financial Network, to Robert W. Errett, Deputy Secretary, SEC, dated January 20, 2016 ("Lincoln"); letter from Robert J. McCarthy, Director of Regulatory Policy, Wells Fargo Advisors, LLC, to Robert W. Errett, Deputy Secretary, SEC, dated January 20,

Overall Proposal

Two commenters stated that the current proposal is an improvement from the previous version of the proposal.[3] FSI stated that the "approach of providing guidance that enables clients to ask the appropriate questions to their advisors when determining whether to transfer their assets strikes an effective balance between investor protection and operational feasibility."

Eight additional commenters expressed support for a regulatory effort to provide investors with meaningful information upon which to base a decision to transfer assets but did not support all aspects of the current proposal.[4] Two commenters opposed the current proposal and instead supported a return to the requirement in a previous version of the proposal to provide specific information about any financial incentives received by the representative and costs associated with the former customer transferring assets.[5] Alternatively, GSU suggested requiring the member to provide written answers to the questions included in the educational

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2016 ("Wells Fargo"); letter from Hugh D. Berkson, President, Public Investors Arbitration Bar Association, to Robert W. Errett, Deputy Secretary, SEC, dated January 20, 2016 ("PIABA"); letter from Tash Elwyn, President, Private Client Group, Raymond James & Associates, Inc., to Robert W. Errett, Deputy Secretary, SEC, dated January 20, 2016 ("RJA"); letter from Scott A. Curtis, President, Raymond James Financial Services, to Robert W. Errett, Deputy Secretary, SEC, dated January 20, 2016 ("RJFS"); letter from David T. Bellaire, Esq., Executive Vice President and General Counsel, Financial Services Institute, to Robert W. Errett, Deputy Secretary, SEC, dated January 20, 2016 ("FSI"); letter from Sutherland, Asbill & Brennan LLP on behalf of the Committee of Annuity Insurers, to Robert W. Errett, Deputy Secretary, SEC, dated January 20, 2016 ("Committee of Annuity Insurers"); letter from Kevin Zambrowicz, Managing Director and Associate General Counsel, and Stephen Vogt, Assistant Vice President and Assistant General Counsel, Securities Industry and Financial Markets Association, to Robert W. Errett, Deputy Secretary, SEC, dated January 20, 2016 ("SIFMA"); letter from David P. Bergers, General Counsel, LPL Financial LLC, to Robert W. Errett, Deputy Secretary, SEC, dated January 20, 2016 ("LPL"); and letter from Eric Chartan, Associate General Counsel, HD Vest Investment Services, to Robert W. Errett, Deputy Secretary, SEC, dated January 20, 2016 ("HD Vest").

3 See Lincoln and FSI.

4 See SIFMA, LPL, Wells Fargo, PIABA, RJA, RJFS, Commonwealth and HD Vest.

5 See PIABA and GSU.

communication if the customer so requests. HD Vest further commented that the proposal is not justified by its costs because there are no systemic issues with the current account transfer process, which also includes some disclosure.

FINRA believes that the proposal will promote investor protection by highlighting important conflict and cost considerations of transferring assets and encouraging customers to make further inquiries to reach an informed decision about whether to transfer assets to the recruiting firm. As explained in more detail in the rule filing, FINRA considered several alternatives to the proposal to ensure that it is narrowly tailored to achieve its purposes without imposing unnecessary costs and burdens on members. FINRA believes that the proposed rule is an effective and efficient alternative to the previous proposal. While educating former customers about important considerations to make an informed decision whether to transfer assets to the recruiting firm, the proposed rule eliminates or reduces the privacy and operational concerns raised to the previous proposal (*e.g.*, by removing the requirement to disclose to former customers the magnitude of recruitment compensation paid to a transferring representative). FINRA notes that the dialogue prompted by the educational communication could include a discussion with the transferring representative about more specifics related to the incentives and costs associated with the transfer.

FINRA further believes that former customers would benefit from receiving a concise, plain-English document that highlights the potential implications of transferring assets, such as conflict and cost considerations of transferring assets, several of which are not disclosed or otherwise brought to the attention of a customer as part of the account transfer approval documentation.

Requirement to Deliver the Educational Communication

Under the proposal, delivery of the educational communication would be triggered when: (1) the member, directly or through a representative, individually contacts a former customer of that representative to transfer assets; or (2) a former customer of the representative, absent individual contact, transfers assets to an account assigned, or to be assigned, to the representative at the member.[6] If such contact is in writing, the proposed rule would require the educational communication to accompany the written communication.[7] If the contact is oral, the proposed rule would require the educational communication be sent within three business days from

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6 See proposed FINRA Rule 2273(a).

7 See proposed FINRA Rule 2273(b)(1)(A).

such oral contact or with any other documentation sent to the former customer related to transferring assets to the member, whichever is earlier.[8]

FSI supported the proposal's delivery requirements as providing a "clear and straightforward standard." FSI further commented that with the "straightforward standard, firms will be able to easily create and implement policies, procedures and systems to comply with the rule."

Yet, some commenters stated that the triggers for delivering the educational communication would be complex and difficult for members to implement as members would be dependent on reporting by representatives to members with respect to each individualized contact with a former customer.[9] Some commenters commented that compliance with the proposed rule would require significant time and effort on the part of members and would result in significant costs.[10] FINRA does not believe that the burdens associated with tracking whether there has been individualized contact with a former customer are unreasonable relative to the value in providing the educational communication to such customers. As noted in the rule filing, members already are obligated to supervise representatives' communications with existing or prospective customers and have flexibility to design their supervisory systems to track communications soliciting new business from former customers of representatives. As such, FINRA does not believe the proposed rule change imposes substantially new or burdensome obligations by requiring firms to establish policies and procedures reasonably designed to ensure that the educational communication is timely delivered to former customers.

HD Vest commented that a member cannot supervise communications between representatives and former customers before such customers establish accounts at the member. FINRA does not understand the commenter's assertion. If a representative is associated with or employed by a member, the member is required to supervise the representative's conduct consistent with FINRA rules, including FINRA Rule 2210 (Communications with the Public). The standards applicable to retail communications and correspondence under Rule 2210, as well as the requirements to supervise correspondence pursuant to FINRA Rule 3110 (Supervision), are not limited to communications with current customers. Therefore, the fact that a former customer or any other individual has not yet established an account at the member does not obviate those supervision requirements.

Individualized Contact

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8 See proposed FINRA Rule 2273(b)(1)(B).

9 See Commonwealth and HD Vest.

10 See Commonwealth and HD Vest.

Some commenters requested additional guidance as to what individualized contact with a former customer would trigger the requirement to deliver the educational communication.[11] As stated in the proposed rule change, FINRA intends for a broad range of oral or written communications by a recruiting firm, directly or through a representative, to constitute individualized contact with a former customer to transfer assets and therefore trigger the delivery of the educational communication under the proposed rule. The proposed rule change gave several examples of such individualized contacts, including a written or oral communication informing the customer that the representative is now associated with the recruiting firm. FINRA will consider giving additional guidance, as appropriate, where questions about specific types of individualized contact arise.

The proposed rule change would require delivery of the educational communication, absent individualized contact, with account transfer approval documentation. GSU supported requiring delivery of the educational communication to a former customer, where there is not individualized contact, before the transmittal of the account transfer approval documentation. To lessen any associated operational and supervisory burdens of implementing the proposed rule, FINRA has not proposed requiring that the educational communication be provided to former customers before the account transfer approval documentation where there is not individualized contact.

Commonwealth commented that the different delivery requirements based on whether there was individualized contact would be unworkable as members could not reasonably determine that the receipt of account paperwork was the result of no contact between the registered person and the former customer. As set forth in the rule filing, FINRA believes that a representative reasonably should know whether an individual had an account assigned to him or her at the representative's prior firm and whether the representative has individually contacted the former customer regarding transferring assets to the recruiting firm. FINRA also believes that a reasonably designed supervisory system would require the representative to communicate with a member whether he or she had individualized contact with a former customer. As such, FINRA does not believe it is unworkable to distinguish account transfers that resulted absent individualized contact.

Some commenters requested clarification regarding whether the requirements of the proposed rule would be triggered by "unanticipated communications" between a representative and a former customer.[12] The proposed rule would apply where a member, directly or through a representative, individually contacts a former customer of that representative to transfer assets or where a former customer transfers assets to an account assigned to the representative at the member absent individualized contact.

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11 See SIFMA, HD Vest, RJA and RJFS.

12 See Lincoln, RJA and RJFS.

As such, whether contact that occurs with a former customer is planned or serendipitous is not dispositive; rather, it is the substance of the communication that determines if the delivery requirement is triggered. Thus, unanticipated contact with a former customer (*e.g.*, at a sporting or social event) without a communication from the representative to the former customer that would constitute individualized contact, as described above, about transferring assets would not trigger the requirements of the proposed rule. However, if, for example, the representative took the opportunity of the situation to inform the former customer of his or her move to a new firm and the merits of transferring assets to that new firm, then the delivery requirement would be triggered.

Timing and Delivery of Educational Communication

Several commenters expressed concern with the means and timing of the delivery requirement. Some commenters contended that the requirement to deliver the educational communication within three business days after oral contact by a representative with a former customer would present operational and supervisory challenges, such as training representatives on the scope and practical implications of the requirement, relying on representatives to timely report contacts to the member, and preparing the mailing to former customers within the required period of time.[13] Wells Fargo suggested eliminating the requirement to deliver the educational communication within three business days after oral contact and instead require written delivery in all circumstances. Along with Wells Fargo, some commenters suggested that the requirement to deliver the educational communication be integrated into an existing process, such as including the communication with the account transfer approval documentation, so as to make implementation of the requirement more cost effective and efficient for members.[14] Alternatively, HD Vest suggested lengthening the period to deliver the educational communication to 10 business days.

SIFMA requested additional analysis and justification for FINRA's belief that delivering the communication at or prior to account opening would be too late because customers typically have already made the decision to transfer assets by that point in the process. Commonwealth commented that requiring the educational communication to accompany the first written communication would mean that any efforts taken by a member to review written communications that have already occurred between a representative and a former customer would be too late to prevent a rule violation.

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13 See SIFMA, Committee of Annuity Insurers, Lincoln, RJA, RJFS, Commonwealth and HD Vest.

14 See SIFMA, Lincoln, Committee of Annuity Insurers, Wells Fargo, RJA, RJFS, Commonwealth and HD Vest.

With respect to delivery after oral contact, as stated in the rule filing, FINRA believes that the three-business-day period gives a representative sufficient time to inform the recruiting firm of the former customers who have been contacted and, in turn, for the recruiting firm to send the educational communication to those former customers. Furthermore, FINRA understands that members frequently send account opening documentation within that time frame to customers that have indicated an interest in opening an account. FINRA also notes that it sought data and evidence around the associated costs of the proposed rule and that commenters did not provide specific data or analysis to support their contention that the delivery requirements as proposed would present considerable additional costs for recruiting firms. Accordingly, FINRA does not propose to change the requirement in the proposed rule.

As explained in more detail in the rule filing, FINRA believes that to be effective, the proposed educational communication must be accessible to the former customer at or shortly after the time the first individualized contact is made by the recruiting firm or the representative. The delivery requirement will allow the customer the time needed to have discussions with the registered representative and the customer's current firm about the implications of transferring assets in close proximity to receipt of any information the representative may have provided to encourage a transfer and will facilitate an informed and reasoned decision. Some commenters to Regulatory Notice 15-19,[15] where FINRA first proposed the delivery requirements, noted the benefits of timely delivery. Two commenters supported requiring delivery of the educational communication prior to the time that a former customer decides to transfer assets to the recruiting firm to ensure that the former customer has sufficient time to consider and respond to the information in the communication.[16] Another broker-dealer commenter that favored contemporaneous delivery of the educational communication at the time of first individualized contact stated that permitting three business days following an oral communication was too late as many customers will make a determination to transfer assets prior to receiving the communication.[17]

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15 See Regulatory Notice 15-19 (May 2015) ("Notice 15-19").

16 See Letter from Jeffrey T. Brown, Senior Vice President and Head of Legislative and Regulatory Affairs, Charles Schwab & Co., Inc., to Marcia E. Asquith, Senior Vice President and Corporate Secretary of FINRA, dated July 13, 2015; and letter from Joseph C. Peiffer, President, Public Investors Arbitration Bar Association, to Marcia E. Asquith, Senior Vice President and Corporate Secretary of FINRA, dated July 13, 2015.

17 See Letter from Jesse Hill, Principal – Government and Regulatory Relations, Edward Jones, to Marcia E. Asquith, Senior Vice President and Corporate Secretary of FINRA, dated July 14, 2015.

FINRA agrees with the commenters that providing the communication at the time of account opening would be less effective than the proposed approach as customers have already made the decision to transfer assets at the time the customer has initiated the account opening process. Similarly, a requirement to permit delivery of the educational communication at any time prior to account opening would allow members to wait until the customer agrees to transfer assets to the member or until shortly before the account is opened before delivering the educational communication.

Finally, with respect to Commonwealth's comment that post-use review of communications cannot prevent a violation of the requirement that the educational communication accompany written first individualized contact, FINRA rules provide members' some flexibility with respect to review of representatives' communications with customers and require review of only some communications prior to first use or distribution.[18] Consistent with those rules, a member would not necessarily need to implement prior use approval of every written communication to a former customer to have policies and procedures reasonably designed to achieve compliance with the proposed rule change.

Duration of Delivery Requirement

Under the proposal, the delivery of the educational communication would apply for three months following the date the representative begins employment or associates with the member. SIFMA supported shortening the applicable time period from six months as proposed in Notice 15-19 to three months as proposed in the rule filing. On the other hand, two commenters supported extending the period to one year.[19]

FINRA believes the three-month period strikes an appropriate balance between achieving the regulatory objective of an informed decision by former customers most likely to consider transferring assets as the result of their representative's move to a new firm, while lessening the economic impacts on members.

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18 Correspondence with customers is subject to the supervision and review requirements of FINRA Rules 3110(b) and 3110.06 through .09. While review of all institutional communications is not required prior to first use or distribution, FINRA Rule 2210(b)(1)(A) requires that an appropriately qualified registered principal of the member must approve each retail communication before the earlier of its use or filing with FINRA's Advertising Regulation Department.

19 See PIABA and GSU.

Efforts by Current Firm to Retain Customers

Lincoln favored requiring a customer's current firm to deliver the educational communication to the customer and including questions in the communication that a customer may wish to consider if the current firm is soliciting a customer to keep his or her account with the firm. PIABA also supported including specific disclosure about the incentives that employees of the current firm may receive for retaining the customer.

As noted in the rule filing, FINRA is focused on providing customers impactful information to consider when deciding whether to transfer assets to a representative's new firm, where cost and portability issues are most likely to arise and where some potential conflicts (*e.g.*, financial incentives to attract new assets) are more pronounced. While the proposed rule change would not require the current firm to provide the educational communication to a customer, the proposed educational communication does note that "some firms pay financial incentives to retain brokers or customers." FINRA believes that the communication will prompt customers to consider the implications of both staying and moving when urged to do so by representatives of either firm. Furthermore, FINRA notes that requiring the current firm to also provide the educational communication to a customer whose representative has transferred to a new firm would result in the customer receiving multiple copies of the same communication.

Contractual and Legal Considerations

Some commenters suggested including a statement in the educational communication that the communication is not intended as a solicitation or to encourage or discourage the transfer of customer assets.[20] Some commenters asked FINRA to amend the proposed rule to include a provision stating that compliance with the rule is not intended to interfere with members' obligations under Regulation S-P, the Protocol for Broker Recruiting ("Protocol") or other contractual non-solicitation obligations.[21]

As noted in the rule filing in response to earlier comments of the same nature, FINRA does not intend the proposed rule to impact any contractual agreement between a representative and his or her former firm or new firm and does not require members to disclose information in a manner inconsistent with Regulation S-P. The proposed rule change assumes that recruiting firms and representatives will act in accordance with the contractual obligations established in employment contracts, state law, and, if applicable, the Protocol. Furthermore, FINRA does not intend for the provision of the educational communication to have any relevance to a determination

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20 See SIFMA, HD Vest and LPL.

21 See RJA and RJFS.

of whether a representative impermissibly solicited a former customer in breach of a contractual obligation. FINRA does not believe it necessary or appropriate to include any statement regarding solicitation in the educational communication, which by itself and its own terms cannot reasonably be considered to encourage or discourage the transfer of assets.

HD Vest stated that an exception from Regulation S-P was needed to permit transferring representatives to take limited customer information with them to their new firms in order to comply with the requirements of the proposed rule. FINRA disagrees. The proposed rule does not require contact with any former customers. It only requires delivering the educational communication once a transferring representative or the recruiting firm makes individualized contact with a former customer about transferring assets to an account assigned to the representative at the member. In most instances, a former customer will not be contacted in the first instance unless the representative or recruiting firm already has the customer's contact information. In those rare circumstances where individualized contact that triggers the requirements of the rule happens by chance or without contact information, FINRA believes the representative or recruiting firm can ask the customer for the contact information needed to deliver the educational communication.

Scope of Proposal

Customers

Some commenters supported expanding the requirement to apply to all customers of a representative, not just former customers.[22] SIFMA recommended that the proposed rule incorporate the definition of institutional account in FINRA Rule 4512(c) (Customer Account Information) without excluding accounts held by any natural person. FINRA declines to revise the definition of "former customer" or to extend the requirement to apply to other customers of a representative. As stated in the rule filing, FINRA believes that former customers that a member or representative individually contacts to transfer assets to a new firm are most impacted in recruitment situations because they have already developed a relationship with the representative and because their assets may be both the basis for the representative's recruitment compensation and subject to potential costs and changes if the customer decides to move those assets to the recruiting firm. FINRA believes that it is appropriate to include natural persons who would be considered institutional accounts under Rule 4512(c), as these individuals may not be aware of the implications of transferring assets.

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22 See PIABA and GSU.

Some commenters supported requiring customer affirmation of the receipt of the educational communication.[23] As noted in more detail in the rule filing, while some firms may elect to include a customer affirmation requirement as part of their supervisory controls in implementing the proposed rule change, FINRA believes the requirements of the rule will ensure that former customers receive and have an opportunity to review the information in the proposed educational communication before they decide to transfer assets to a recruiting firm. In addition, FINRA does not want to impose any additional obligations that may impede the timely transfer of customer assets between members.

Members and Registered Representatives

SIFMA requested clarification regarding whether the proposed rule would apply to representatives who are employed by or associated with a member in a non-financial advisor role (*e.g.*, operations or non-producing branch/complex managers), but who may have customer accounts assigned to them that are incidental to their primary job function. To the extent a representative has accounts assigned to him or her at the new firm, FINRA sees no reason to distinguish those accounts based on the representative's primary function, as the implications for the former customers are the same. Accordingly, FINRA believes that because an account assigned to a representative may be incidental to a representative's primary job function should not obviate the requirements of the proposed rule.

Two commenters requested clarification on whether the proposed rule would apply when a representative transfers between broker-dealer subsidiaries of the same holding company.[24] FINRA believes that the facts and circumstances of such representative transfers may vary. FINRA will consider giving additional guidance, as appropriate, where specific questions arise regarding representative transfers between broker-dealer subsidiaries of the same holding company.

In the rule filing, FINRA interpreted the proposed rule change as not applying to circumstances where a customer's account is proposed to be transferred to a new member via bulk transfer or due to a change of broker-dealer of record. Commenters supported the clarification provided in the rule filing in these contexts.[25] LPL requested that the interpretation that the proposed rule not apply be extended to include all changes in networking arrangements between a financial institution and a broker-dealer, not just those for which bulk transfers are used.

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23 See PIABA and GSU.

24 See RJA and RJFS.

25 See SIFMA, FSI, Committee of Annuity Insurers and LPL.

FINRA believes that the considerations set forth in the educational communication do not have the same application in the context of a bulk transfer as they do when a customer has a viable choice between staying at his or her current firm with the same level of products and services or transferring assets to the recruiting firm, with the attendant impacts. Because the facts and circumstances of changes in networking arrangements between a financial institution and a broker-dealer outside the bulk transfer context may vary, FINRA will consider giving additional guidance, as appropriate, where specific questions arise for changes in networking arrangements outside the bulk transfer context.

In the rule filing, FINRA stated that the proposed rule change would apply to a registered person dually registered as an investment adviser and broker-dealer at the former firm who associates with a member firm in both an investment advisory and broker-dealer capacity. SIFMA supported the clarification provided in the rule filing regarding the treatment of dual-hatted persons. LPL noted that there may be instances where dually registered representatives have former clients with only investment advisory accounts at the former firm and requested clarification on whether the proposed rule would apply to such former customers.

FINRA has proposed to define "former customer" to include any customer that had a securities account assigned to a representative at the representative's previous firm, excluding a customer account that meets the definition of an institutional account pursuant to Rule 4512(c) other than accounts held by any natural person. FINRA would interpret this definition to include an individual who had only an investment advisory account at the representative's old firm. FINRA notes that the proposed rule would not apply if the registered person transferred to a non-member firm or associated with a member firm only as an investment adviser representative.

Terminology

Some commenters supported replacing the term "broker" in the educational communication with the term "registered representative." FINRA declines to make the requested change as it believes "broker" is a commonly understood generic term for a registered representative. It is used in the proposed educational communication for readability and brevity purposes, which FINRA believes is important to encourage customers to read the document.

Implementation Date

SIFMA requested that the implementation date of the proposed rule be at least 180 days from the date that the proposed rule is finalized so as to provide members with sufficient time to design, adopt, and implement appropriate policies and procedures to achieve compliance with the rule. FINRA will consider the need to develop compliance systems and make operational changes in establishing an effective date for the proposed rule.

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FINRA believes that the foregoing responds to the material issues raised by the commenters to the rule filing. If you have any questions, please contact me at (202) 728-8013, email: jeanette.wingler@finra.org. The fax number of the Office of General Counsel is (202) 728-8264.

Best regards,

/s/ Jeanette Wingler

Jeanette Wingler
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