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VIA ELECTRONIC MAIL to pubcom@finra.org

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

Re: Regulatory Notice 15-22: FINRA Requests Comment on a Revised Proposal to Adopt a Consolidated FINRA Rule Regarding Discretionary Accounts and Transactions

Dear Ms. Asquith:

This letter is submitted on behalf of our client, the Committee of Annuity Insurers (the "Committee"),[1] in response to FINRA Regulatory Notice 15-22: *FINRA Requests Comment on a Revised Proposal to Adopt a Consolidated FINRA Rule Regarding Discretionary Accounts and Transactions* (the "Notice"). The Notice requests comment on proposed new FINRA Rule 3260, which would, among other things, govern a member firm's responsibility with respect to its exercise of discretion over a customer account. The Committee appreciates the opportunity to comment on Proposed Rule 3260.

As explained in the Notice, Proposed Rule 3260 would consolidate NASD Rule 2510 (Discretionary Accounts), Incorporated NYSE Rule 408 (Discretionary Power in Customers' Accounts) and NYSE Rule Interpretation 408 (Discretionary Power in Customers' Accounts) into the consolidated FINRA Rulebook. The proposed rule would also address recent amendments to SEC Rule 15c3-3 that codify SEC rules governing broker-dealer sweep accounts under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), and the use of "negative response letters" in certain contexts.

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[1] The Committee is a coalition of 29 of the largest and most prominent issuers of annuity contracts; its member companies represent more than 80% of the annuity business in the United States. The Committee was formed in 1982 to address legislative and regulatory issues relevant to the annuity industry and to participate in the development of securities, banking, and tax policies regarding annuities. For more than three decades, the Committee has played a prominent role in shaping government and regulatory policies with respect to annuities, working with and advocating before the SEC, CFTC, FINRA, IRS, Treasury, and Department of Labor, as well as the National Association of Insurance Commissioners and relevant Congressional committees. A list of the Committee's member companies is attached as Appendix A.

The Committee supports FINRA's efforts to adopt a new rule that would govern discretionary accounts and transactions. The Committee has some questions and requests, however, as noted below, with respect to certain terms and conditions of Proposed Rule 3260 and the Supplementary Material accompanying Proposed Rule 3260.

A. Proposed Rule 3260(a) – Discretionary Accounts and Transactions by Persons Other Than the Customer

Proposed Rule 3260(a) would prohibit a member from effecting for a discretionary account any transactions that are excessive in size or frequency in view of the financial resources and character of the account. Proposed Rule 3260(a) would not apply to accounts that are solely fee-based. The Committee supports the exclusion of fee-based accounts from Proposed Rule 3260(a) because, among other reasons, such accounts are typically advised by an investment adviser, who is responsible for trading in the account, and the adviser itself is subject to the Investment Advisers Act of 1940. We also note that from an operational standpoint, if a broker-dealer uses automated systems to surveil for instances of excessive trading or patterns of excessive trading, there may be a significant number of "false positives" if fee-based accounts are included within the scope of Rule 3260(a). Devoting compliance resources to distinguishing false positives from items of real concern would likely not be the best allocation of compliance department resources.

B. Proposed Rule 3260(b) – Transactions by Agents of Customers

Proposed Rule 3260(b) would prohibit an associated person of the member from accepting an order for a customer's account from a person other than the customer unless the customer has given a signed, dated, prior written authorization to such person and the order is consistent with such person's authority as specified in the customer's prior written authorization. If a customer provides written authorization to a natural person, a member or associated person must obtain the prior manual, dated signature of the named natural person. If a customer provides written authorization to an entity, a member or associated person must obtain the prior manual, dated signature of a natural person authorized to act on behalf of the entity. FINRA states in the Notice that for purposes of compliance with either of these signature requirements, firms must obtain a wet signature or a copy of a wet signature, such as a scanned or faxed copy of a wet signature. Furthermore, pursuant to Proposed Supplementary Material .06 to Proposed Rule 3260, members would be required to preserve customers' prior written authorizations, signature records, records denoting acceptance of accounts and written agreements between members and customers that subsequently are updated, for at least six years after the date they are updated. Proposed Rule 3260(b) would apply to orders for fee-based accounts; accounts managed by an investment adviser; and orders placed by persons other than the customer, such as a family member.

As an initial matter, the Committee believes that the requirement under the proposed rule that members verify whether an order is consistent with an agent's written authorization is overly burdensome and imposes undue risk upon member firms. Member firms typically task operations personnel with responsibility for processing such authorizations. These individuals

typically are not lawyers and are not steeped in the nuances of trust and estate law or the laws and regulations governing powers of attorney or other types of legal documents used by principals to authorize agents to carry out various tasks on their behalf. The Committee is concerned that member firm operations personnel are not in the best position to determine whether agents are acting within the scope of authority granted by legal documents that are often complex or unclear. In addition, the proper interpretation of a given provision may very well vary from state to state, depending on the presence or absence of default provisions established under state law as well as the development of relevant case law. The proposed provision therefore imposes an unfair and unrealistic obligation on member firms to interpret the legal contours of an agent's authority.

At the very least, an inquiry to determine whether an order for a customer's account from a person other than a customer is consistent with such person's authorization would require legal counsel to review the governing documents (which may be lengthy, complex, poorly drafted, internally inconsistent, vague, inconsistent with other documents or fail to satisfy applicable requirements established under state laws or regulations) and analyze them under applicable statutes, regulations and case law. While various documents, such as short-form powers of attorney, should be relatively quick to review, the Committee expects that in some cases it would take several days to adequately review, interpret and vet the scope of authority and reach a determination regarding whether a given trade is within the scope of authority. This will be particularly true where a document is poorly written, complex or where the governing law is in an unfamiliar jurisdiction. Given the volume of orders that various Committee members receive from agents, the Committee believes it is unrealistic for such reviews to be done on a same-day basis.

Since a delay in trade execution would result in many orders not being executed within the timeframe customers expect, the Committee is concerned that member firms would be required to make an unenviable decision: 1) take the time necessary to properly interpret the scope of authority in a given case (and review, if necessary, the relevant statutes, regulations and case law) and thereby risk complaints or lawsuits by dissatisfied customers if the market moves against the customer between the time of order entry and the time the order can be executed following a review of the scope of the agent's authority, or 2) execute the order without fully complying with the provisions in the proposed rule. The Committee submits that member firms should not be placed in this situation.

Accordingly, the Committee requests that Proposed Rule 3260(b) be revised to delete the phase "and the order is consistent with such person's authority as specified in the customer's prior written authorization." In addition, the rule or Supplementary Material should make clear that member firms are not obligated to verify that the agent has not exceeded the scope of the agent's authority and that any agent for the customer is solely responsible for any damages arising out of the agent exceeding such authority.

The Committee also believes that FINRA should eliminate the requirement that firms obtain the prior manual, dated signature of an authorized agent prior to accepting an order placed by the agent on behalf of a customer. The Committee does not fully understand the need or

justification for such a requirement, as Proposed Rule 3260(b) would already require member firms to confirm that the authorized agent has received a signed and dated authorization from the customer.

Alternatively, if FINRA does adopt a requirement that member firms obtain the prior, manual signature of an authorized agent, the Committee believes that FINRA should eliminate the requirement that the signature must be a wet signature or a copy of a wet signature, and permit firms to accept an electronic signature. No such requirement for a wet signature currently exists in NYSE Rule 408(a), which is the rule on which the authorized agent signature requirement is based. Furthermore, FINRA has proposed to permit the use of an electronic signature for purposes of satisfying the customer authorization requirements in Proposed Rules 3260(a) and 3260(b). Accordingly, the Committee believes that if FINRA adopts the authorized agent signature requirement, it should align such requirement with other signature requirements in the proposed rule by eliminating the wet signature requirement and permitting the acceptance of an electronic signature.

Finally, in the Notice FINRA asks member firms for input on how centrally managed accounts would be impacted by Proposed Rule 3260(b)'s requirement to obtain an authorized agent's signature. For purposes of this request, the Committee needs clarification regarding how FINRA defines the term "centrally managed account." If FINRA is referring to accounts managed by a customer's agent (*e.g.*, a third party investment adviser) at a central (*i.e.*, single) location that is not local to where the customer lives, the Committee submits that obtaining a wet signature from such an authorized agent would impose an especially substantial burden on member firms, as such agents would not be local to either the customer or the member firm.

C. Proposed Rule 3260(c) – Specific Discretionary Activities; Extent Permissible

The Committee strongly supports FINRA's proposal to aggregate in one rule the permissible uses of negative response letters and the terms and conditions applicable to the various uses of such letters. First, we believe broker-dealers will benefit from being able to look to two primary sources – SEC Rule 15c3-3(j) and FINRA Rule 3260 – for compliance requirements applicable to the use of negative consent. Second, the Committee believes that customers benefit from the operational efficiencies created by the use of negative consent. FINRA previously recognized these operational efficiencies in NASD Notice to Members 02-57 (Bulk Transfer of Customer Accounts) ("NTM 02-57").

The Committee also supports FINRA's efforts to refer in the proposed rule, where appropriate, to SEC Rule 15c3-3(j) – Treatment of Free Credit Balances. References to 15c3-3(j) should alleviate what has been, up to now, some member firm confusion and uncertainty regarding FINRA rules applicable to sweep accounts.[2]

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[2] SEC Rule 15c3-3(j) provides that for any account maintained by a broker or dealer, the broker or dealer provide the customer with the disclosures and notices regarding the broker or dealer's sweep program required by each self-regulatory organization of which the broker or dealer is a member. To address certain issues related to the interplay between FINRA rules and Rule 15c3-3(j), SEC staff in 2014 responded to certain legal questions regarding bulk transfers in "Frequently Asked Questions Concerning the Amendments to Certain Broker-Dealer Financial Responsibility Rules," *available at*

1. Proposed Rule 3260(c)(1)(C)(i)

(i) Where a Registered Representative Servicing an Account Leaves the Firm

The Committee notes that sub-paragraph "b" of Proposed Rule 3260(c)(1)(C)(ii) would permit a member firm to use a negative response letter to change the broker-dealer of record when a registered representative of the member who is servicing directly held accounts is leaving the firm; the firm will not be providing the services the registered representative was performing for the accounts; and the firm is seeking to change the broker-dealer of record on the directly held accounts to another member willing to service the accounts. When the NASD first granted relief permitting member firms to use a negative response letter in this circumstance, it noted its concern regarding interruptions in customer service and customer accounts becoming "abandoned."[3] Because these same concerns also arise in connection with accounts held at broker-dealers, the Committee believes that Proposed Rule 3260(c)(1)(C)(i) should be expanded to also permit bulk transfers of customer accounts using negative response letters when a registered representative of the member who is servicing the brokerage account is leaving the firm; the firm will not be providing the services the registered representative was performing for the accounts; and the firm is seeking to change the broker-dealer of record on the accounts to another member willing to service the accounts.

Accordingly, the Committee requests that FINRA add a new sub-paragraph to Proposed Rule 3260(c)(1)(C)(i) that reads as follows:

> an introducing firm has one or more registered representative(s) leaving the firm and is seeking to transfer the customer accounts serviced by such departing registered representative(s) to another introducing firm. (requested new text is underlined)

(ii) Bulk Transfer of Customer Accounts and Change of Broker-Dealer of Record – Sub-paragraphs a, f and g

As proposed, sub-paragraph "a" would permit a member firm to use a negative response letter to effect a bulk transfer of customer accounts, if the firm is an introducing firm, has entered into a clearing arrangement with a different clearing firm, and "is seeking to transfer its customer accounts to the new clearing firm."

The Committee supports the inclusion of this provision in the new rule but requests that FINRA amend proposed sub-paragraph "a" to permit a member firm to rely on sub-paragraph "a" in circumstances where the introducing firm wants to transfer *some but not all* of its customer accounts to a new clearing firm. The Committee requests that sub-paragraph "a" be amended to read:

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http://www.sec.gov/divisions/marketreg/amendments-to-broker-dealer-financial-responsibility-rule-faq.htm (hereafter "the SEC FAQs").

[3] *See* NASD Office of General Counsel, Regulatory Policy and Oversight Interpretive Letter dated November 8, 2004, *available at* https://www.finra.org/industry/interpretive-letters/november-8-2004-1200am.

a. an introducing firm that has entered into a clearing arrangement with a different clearing firm is seeking to transfer some or all of its customer accounts to the new clearing firm; (requested new text is underlined)

In this regard, the Committee envisions situations where an introducing firm wants to enter into a new clearing relationship while still maintaining its current clearing relationship, and wants to transfer some but not all of its customer accounts to the new clearing firm.

For similar reasons, the Committee requests that FINRA amend sub-paragraph "f" to read:

f. a member that is acquired by or merged with one or more other members is seeking to transfer all of its customer accounts to the new firm(s); (requested new text is underlined)

The Committee is making this request with respect to sub-paragraph "f" because there are circumstances where different parts or different divisions of a member firm's business may be acquired by different FINRA member firms; in such cases, not "all" of the divesting member firm's customer accounts will transfer to a single new firm. Since sub-paragraph "f" seems intended to apply to member firm mergers and acquisitions, we want to make clear that "f" can be relied upon as the basis for the use of negative consent in circumstances where the merger or acquisition involves more than two FINRA members. (In this regard, we also note that sub-paragraph "c" could apply to the same factual situation, but "c" requires that "all" customer accounts transfer to a new firm, and also does not seem intended to apply to mergers or acquisitions.)

The Committee also requests that sub-paragraph "g" of the proposed rule be revised to refer to the transfer of accounts to more than one member firm. As proposed by the Committee, sub-paragraph "g" would read:

g. upon the conclusion or termination of a networking arrangement between a member and a financial institution pursuant to FINRA Rule 3160, the member is seeking to transfer all customer accounts established under the arrangement to a new firm or firms with which the financial institution has formed a networking arrangement pursuant to FINRA Rule 3160. (requested new text is underlined)

The Committee is making this request because in some circumstances, a financial institution may terminate a networking arrangement with a single FINRA member firm and request that firm to transfer certain customer accounts to one (other) member firm, and transfer other customer accounts to another member firm. The Committee would like to confirm that it would be permissible under Proposed Rule 3260 for a member to comply with such a request from a financial institution in reliance on sub-paragraph "g" of the rule.

2. Proposed Rule 3260(c)(1)(C)(ii) – Bulk Transfer of Customer Accounts and Change of Broker-Dealer of Record – Sub-paragraphs a, c and d

Proposed Rule 3260(c)(1)(C)(ii) would permit a member named as broker-dealer of record on directly held mutual fund and variable insurance product accounts to use negative response letters to change the broker-dealer of record on the accounts to another member in certain circumstances. While the Committee generally agrees with this aspect of the proposed rule (subject to the comments below), the Committee believes that it should be expanded so that in any of the enumerated circumstances a member can employ a negative response letter to change the broker-dealer of record on *any* directly held product, and not just directly held mutual fund and variable insurance products. For example, as proposed, this aspect of the proposed rule would not permit a member to use a negative response letter to change the broker-dealer of record on a 529 college savings plan that is directly held. The Committee sees no reason to apply 3260(c)(1)(C)(ii) to certain types of securities that are directly held and not others. In this respect, the rationale underlying the exceptions in the proposed rule is not security specific or limited to mutual funds and variable products.

As noted above, this aspect of the proposed rule would only permit the use of negative response letters in certain circumstances. One of these circumstances, in sub-paragraph "a" of Proposed Rule 3260(c)(1)(C)(ii), would permit a member firm to use a negative response letter to change the broker-dealer of record if a member is going out of business and seeks to change the broker-dealer of record to another member willing to service the accounts.

The Committee supports the inclusion of this provision in the new rule but requests that FINRA permit a member firm to also rely on sub-paragraph "a" in circumstances where the broker-dealer of record for a directly held product is not going out of business, but is no longer servicing the type of product or account that is being directly held, and another member firm is prepared to service the accounts. This proposed change contemplates situations where a member firm is not in distress, but for operational or other reasons would like to change the broker-dealer of record to another member willing to service the accounts. The Committee believes that such situations will not always be covered by proposed sub-paragraph "d" of the proposed rule.[4]

Accordingly, the Committee requests that FINRA amend sub-paragraph "a" to read:

> a. a member that is going out of business <u>or is no longer servicing a directly held product or account for which it is the broker-dealer of record,</u> is seeking to change the broker-dealer of record on the directly held accounts to another member willing to service the accounts; (requested new text is underlined)

Finally, for the reason noted above in connection with Proposed Rule 3260(c)(1)(C)(i), the Committee requests that FINRA amend sub-paragraph "c" to read:

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[4] Proposed sub-paragraph "d" applies when: "a member that is acquired by or merged with another member is seeking to change the broker-dealer of record on the directly held accounts to the member that will become the successor-in-interest."

c. upon the conclusion or termination of a networking arrangement between a member and a financial institution pursuant to FINRA Rule 3160, the member is seeking to change the broker-dealer of record on directly held customer accounts established under the arrangement to a new firm or firms with which the financial institution has formed a networking arrangement pursuant to FINRA Rule 3160; (requested new text is underlined)

and amend sub-paragraph "d" to read:

d. a member that is acquired by or merged with one or more other members is seeking to change the broker-dealer of record on the directly held accounts to the members that will become the successor(s)-in-interest. (requested new text is underlined)

3. Proposed Rule 3260(c)(1)(D) – Treatment of Free Credit Balances Outside of a Sweep Program

SEC Rule 15c3-3(j)(2)(i) permits a broker or dealer to invest or transfer to another account or institution, free credit balances only upon a specific order, authorization, or draft from the customer and only in the manner and under the terms and conditions specified in the order, authorization or draft. Proposed Rule 3260(c)(1)(D), however, would address *bulk* exchange and *bulk* transfer situations, by permitting broker-dealers to use negative response letters to effect a transfer or exchange where multiple customers' free credit balances are held outside of a sweep program. SEC staff previously has stated that the use of negative response letters with respect to bulk transfers of customer assets held outside of a sweep program, if effected in accordance with the guidance provided in NTM 02-57, would comply with SEC Rule 15c3-3(j)(2)(i).[5] Accordingly, the Committee supports the codification of the SEC staff position and the guidance provided in NTM 02-57, within Proposed Rule 3260.

4. Proposed Rule 3260(c)(1)(E) – Treatment of Free Credit Balances in a Sweep Program

As proposed, member firms would be able to use negative response letters to transfer a customer's free credit balances to a product in the member's sweep program or to transfer a customer's interest in one product in a member's sweep program to another product in the sweep program, as long as certain conditions are met, including:

- A requirement that the member send the customer a negative response letter consistent with the requirements of SEC Rule 15c3-3(j)(2)(ii)(B)(3)(i) at least thirty (30) calendar days prior to changing certain aspects of the sweep program, products offered through the sweep program or the customer's investment through the sweep program;

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[5] *See* SEC FAQs at Question 14.

- A requirement that the member include additional disclosures in an attachment to the negative response letter addressing: (1) any conflicts of interest relating to the sweep program, including whether the member receives compensation or other benefits for customer balances maintained at a money market mutual fund or bank, (2) current interest rates applicable to the sweep program, (3) the manner by which future interest rates will be determined, (4) the nature and extent of SIPC or FDIC insurance available and (5) the entity that the customer should contact should the customer wish to gain access to his or her funds[6];

- A requirement that the member post on its website applicable bank and money market mutual fund interest rates, and regularly update such applicable interest rates;

- A requirement that the member provide notice to the customer, as part of the customer's quarterly account statement, that the balance in the bank deposit account or shares of the money market mutual fund in which the customer has a beneficial interest can be liquidated on the customer's order and the proceeds returned to the securities account or remitted to the customer consistent with SEC Rule 15c3-3(j)(2)(ii)(B)(2); and

- Certain additional requirements if (1) the member is transferring a customer's interest in one money market mutual fund in the member's sweep program to another money market mutual fund in the sweep program,[7] (2) the member maintains customer bank sweep balances on an omnibus basis with an affiliated bank, or (3) a customer's free credit balances are swept to a bank not under the control of the member.

The Committee has certain questions with regard to the proposed requirement that the negative response letter include an attachment. Some of the information that would be included in the attachment seems to be duplicative of information required by SEC Rule 15c3-3(j)(2)(ii)(B)(3)(ii), which requires the broker-dealer, in a notice to the customer, to describe the new terms and conditions of the Sweep Program or product or the new product. Assuming the broker-dealer includes these disclosures in the negative response letter, the Committee does not see the need for the broker-dealer to attach another form of notice to the negative response letter, and include in that other form of notice, current interest rates applicable to the sweep program, and the manner by which future rates will be determined. Current rates applicable to the sweep program would, we believe, be addressed as part of the broker-dealer's compliance with SEC Rule 15c3-3(j)(2)(ii)(B)(3)(ii). The manner in which future rates will be determined could become stale and dated after the negative response letter is sent to the customer, and information on current interest rates will be available on the firm's website pursuant to Proposed Rule 3260(c)(1)(E)(v). For these reasons, the Committee believes that the proposed rule should *not* include requirements for: (i) a separate attachment to the negative response letter, if the negative response letter itself provides the required disclosures; (ii) a separate attachment that includes

[6] Proposed Supplementary Material .03 would require these disclosures to be summarized in a one or two page document written in plain English and refer customers to places where additional and more detailed disclosure is available.
[7] In this circumstance, Proposed Rule 3260 would require the negative response letter to include a tabular comparison of the nature and amount of the fees charged by each money market mutual fund, a comparative description of the investment objectives of each money market mutual fund and a prospectus of the money market fund to be purchased.

information regarding current interest rates applicable to the sweep program; and (iii) a separate attachment that describes the manner by which future interest rates will be determined.

If FINRA believes that the manner by which future interest rates will be determined should be included in sweep account notices, the Committee requests that FINRA clarify whether it will it be sufficient for purposes of compliance with the rule for members to state that interest rates are determined by the product offeror? Or would the rule require the member to periodically request information from the product offeror regarding factors the offeror uses to establish interest rates?

In connection with the proposed conflict of interest disclosure requirement (which the Committee also believes could be included in the negative response letter rather than in a separate attachment to the negative response letter), the Committee requests FINRA's guidance as to whether proprietary sweep account products, or sweep account products offered by an affiliate of the member firm, should presumptively be treated as creating a conflict of interest for purposes of the required disclosure. For example, would FINRA expect to see a statement regarding a conflict of interest in every case where the member's sweep program includes proprietary or member-affiliate products? In a case where the product offeror is not an affiliate of the member, what type of conflict of interest disclosure does the rule require?

The Committee also requests clarification from FINRA regarding the requirement that the member post on its website applicable bank and money market mutual fund interest rates, and regularly update such interest rates. The Committee believes it would be helpful from an operational standpoint if FINRA, instead of requiring a member to "regularly" update interest rate information, instead requires a review of the posted information within a specified period of time, *e.g.,* quarterly, along with updating the web site disclosure if necessary based on such review.

With regard to proposed Rule 3260(c)(1)(E)(vi) (requiring a member firm that maintains customer bank sweep balances with an affiliated bank on an omnibus basis to make certain books and records), the Committee requests deletion of the phrase "on behalf of the bank" from the proposed rule. The Committee does not understand the phrase in the context of a broker-dealer's required books and records. If a bank or another third party holds assets on an omnibus basis, knowledge of the identity of individual customers should not be imputed to the bank, through use of the phrase "on behalf of the bank," or otherwise.

In addition, with respect to Proposed Rule 3260(c)(1)(E), the Committee requests more discussion from FINRA regarding the requirements set forth in sub-paragraph (vii). When are free credit balances deemed not to be "under the control of the member" for purposes of Proposed Rule 3260(c)(1)(E)(vii)? Is "not under the control of the member" a synonym for free credit balances not held with an affiliated bank of the member?

Lastly, the Committee seeks clarification regarding FINRA's intent with respect to the requirement that a separate attachment to the negative response letter identify the entity that the customer should contact if the customer wishes to gain access to his or her funds. Would it be permissible for the contact to be the customer's registered representative? Or is it the intent of

the rule for the contact to be the legal entity (which may or not be the FINRA member firm) that has possession of the customer's free credit balances, *e.g.*, either the FDIC-protected bank or the legal entity offering the money market mutual fund?

D. Supplementary Material .02 – Additional Conditions for Bulk Transfers under Rule 3260(c)(1)(C) – Sub-paragraph a

Under Proposed Supplementary Material 3260.02(a), bulk transfers that are made pursuant to Proposed Rules 3260(c)(1)(C)(i)a. through g. are subject to the following additional conditions: (1) the firms involved in the transfer, if required to do so, must file an application under NASD Rule 1017 with FINRA with respect to the proposed transfer, and such application must be approved prior to sending negative response letters to the customers; and (2) no personal confidential information (*e.g.*, social security numbers) may be provided to the receiving introducing or clearing firm, as applicable, unless the sharing of such information is in compliance with SEC Regulation S-P (Privacy of Consumer Financial Information).

In connection with these additional conditions, the Committee requests confirmation from FINRA that member firms can share customer information with firms receiving bulk transfers prior to the approval of any required application under NASD Rule 1017 or the sending of a negative response letter, provided that the firms conduct such information sharing in compliance with SEC Regulation S-P and any applicable state laws regarding the sharing of customer information. In addition, the Committee requests confirmation that member firms may, if necessary, send "opt-out" notices pursuant to SEC Regulation S-P and any other notices that may be required by state laws *prior to* the approval of any required application under NASD Rule 1017 or the sending of a negative response letter. The Committee requests these confirmations from FINRA because from an operational standpoint, the process of effecting a bulk transfer can require a substantial amount of time. If firms are prohibited from developing operational solutions to bulk transfers until after the approval of any required application under NASD Rule 1017 (which generally requires six months) and the sending of a negative response letter (which, pursuant to Proposed Rule 3260(c)(1)(C)(iii), must be done 30 days prior to the date of the transfer), the timeline for a bulk transfer pursuant to Proposed Rules 3260(c)(1)(C)(i)a. through g. could be over a year.

Given the potential for customer harm, the Committee believes that the timeline set forth in Proposed Supplementary Material 3260.02(a) should not be interpreted in such a way as to create an unreasonable delay in the bulk transfer process. Customers would be harmed and service to their accounts could be disrupted if customer information could not be shared between member firms prior to FINRA approval of a Rule 1017 application.

Finally, with respect to Proposed Supplementary Material 3260.02(a)'s application to Proposed Rule 3260(c)(1)(C)(i)(f) concerning acquisitions of member firms, the Committee believes the proposed timeline may be inconsistent with existing NASD Rule 1017(c)(1), which provides as follows:

> (1) A member shall file an application for approval of a change in ownership or control at least 30 days prior to such change. A member may effect a change in

> ownership or control prior to the conclusion of the proceeding, but the Department may place new interim restrictions on the member based on the standards in Rule 1014, pending final Department action.

This provision allows members to file a Rule 1017 application for a change in ownership or control 30 days prior to such change taking place. The provision also permits member firms to effect a change in ownership or control prior to the conclusion of the proceeding. Thus, if a member firm acquires another member firm within the meaning of NASD Rule 1017(a)(2), the acquisition can be consummated within 31 days after filing the Rule 1017 application. The Committee would like to understand FINRA's expectations in the situation where an acquisition is consummated on the 31st day. In this situation, if the Rule 1017 application is not approved for several more months, would the acquired firm be required to wait until the Rule 1017 application is approved prior to sending negative response letters to its customers?

E. Supplementary Material .04 – Members Receiving Free Credit Balances From Negative Response Letters

Under Proposed Supplementary Material 3260.04, a member receiving a bulk transfer of customers' accounts may, in certain circumstances, invest such customers' free credit balances in products available in the receiving member's sweep program, provided:

> (1) the customers' free credit balances were invested in a "substantially similar product" in the sweep program of the member delivering the accounts;
>
> (2) the negative response letter contained, in an attachment to the letter, the disclosures required by Proposed Rule 3260(c)(1)(E)(iv), and
>
> (3) if the customers' free credit balances were previously invested in a money market mutual fund in the delivering member's sweep program that is different than the money market fund available through the receiving member's sweep program, the negative response letter contained a tabular comparison of the nature and amount of the fees charged by each money market mutual fund, a comparative description of the investment objectives of each money market mutual fund and a prospectus of the money market mutual fund to be purchased.

The Committee is concerned that Proposed Supplementary Material 3260.04 unnecessarily limits the utility of a negative response letter in situations where the customer's free credit balances were not previously invested in a "substantially similar product" in the sweep program of the member firm delivering the accounts. SEC staff previously stated, in the SEC FAQs, that:

> [I]f the customers' free credit balances were previously invested in a product (either a money market mutual fund or an FDIC-insured bank account) in the Sweep Program of the delivering firm, the receiving firm must reinvest

> customers' free credit balances in a substantially similar product in its Sweep Program to the extent possible.[8]

SEC staff seems to have considered the fact that the receiving firm's sweep program products may not be "substantially similar" to those of the delivering firm – but it would still be possible for the receiving firm to invest free credit balances in a product offered by the receiving firm, in reliance on the negative response letter used to effect the transfer of accounts. Assuming this to be case, the Committee seeks clarification regarding the meaning of "substantially similar product," within the context of Proposed Rule 3260. Under the proposed rule, what factors should a member receiving free credit balances take into consideration in determining whether its product is substantially similar to the product in the delivering member's sweep program? In the case of investments in bank products, would a receiving member's product be considered substantially similar to the delivering member's product if the receiving firm's product interest rate is within a certain number of basis points of the interest rate offered by the delivering member's product?

Finally, the Committee also requests confirmation from FINRA that, if a tabular presentation of the nature and amount of the fees charged by the money market fund used by the delivering firm, compared to the money market fund used by the receiving firm, is provided to the customer, the receiving member is not required to invest free credit balances in a "substantially similar product" pursuant to Proposed Supplementary Material 3260.04(a).

E. General Comments

The Committee applauds FINRA's efforts to adopt a new rule that would govern discretionary accounts and transactions. Given the complexity of Proposed Rule 3260 and the possibility that the new rule may not contemplate all of the fact patterns that may arise in the future as business models evolve, the Committee recommends that FINRA amend Proposed Rule 3260 to allow FINRA staff to grant exemptions to the proposed rule. FINRA previously recognized, in NTM 02-57, that "circumstances may exist outside of the scenarios [described in NTM 02-57] where the use of negative response letters may be appropriate."[9] By giving the staff a general power of exemption, FINRA may be able to address circumstances that, while not squarely addressed by the express provisions of Proposed Rule 3260, comply with the spirit of the proposed rule and certain appropriate safeguards.[10]

The Committee also recommends that FINRA revise the title or structure of the rule so that activity described in Proposed Rule 3260(c)(1)(C) is not considered to involve the exercise of "discretion." Under this provision, bulk transfers of customer accounts and changes to the broker-dealer of record are considered to constitute "discretionary power" or involve "discretionary accounts" or "discretionary transactions" (by virtue of the first sentence in

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[8] SEC FAQs at Answer 15.

[9] NTM 02-57 at p. 563.

[10] *See, e.g.*, FINRA Rule 5130, which provides that FINRA staff, for good cause shown and after taking into consideration all relevant factors, may conditionally or unconditionally exempt any person, security or transaction (or any class or classes of persons, securities or transactions) from the rule to the extent that such exemption is consistent with the purposes of the rule, the protection of investors and the public interest.

Proposed Rule 3260(c)(1), which ties back to paragraph (a) of the Rule), even though such activity does not involve "investment discretion" as defined under the Exchange Act.[11] Under Section 3(a)(35) of the Exchange Act the phrase "investment discretion" has meaning only with respect to the purchase or sale of securities or other property for an account. Moving accounts or the "broker-dealer of record" from firm A to firm B typically does not involve the purchase or sale of securities or other property for an account. Therefore, such activity generally does not involve "investment discretion." To ensure that there is no confusion between Proposed Rule 3260 and section 3(a)(35) of the Exchange Act, the Committee recommends that FINRA revise the title or structure of the rule so that activity described in Proposed Rule 3260(c)(1)(C) is not considered to involve the exercise of "investment discretion" within the meaning of section 3(a)(35) of the Exchange Act.

CONCLUSION

The Committee appreciates the opportunity to offer these comments on the Notice. We are happy to provide more specific input on the issues raised in this letter and answer any questions the staff may have regarding our comments.

Please do not hesitate to contact Holly Smith (202.383.0245) or Michael Koffler (212.389.5014) if you have any questions regarding this letter.

Respectfully submitted,

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FOR THE COMMITTEE OF ANNUITY INSURERS

[11] Section 3(a)(35) of the Exchange Act provides that a person exercises "investment discretion" with respect to an account if, directly or indirectly, such person (A) is authorized to determine what securities or other property shall be purchased or sold by or for the account, (B) makes decisions as to what securities or other property shall be purchased or sold by or for the account even though some other person may have responsibility for such investment decisions, or (C) otherwise exercises such influence with respect to the purchase and sale of securities or other property by or for the account as the SEC, by rule, determines, in the public interest or for the protection of investors, should be subject to the operation of the provisions of the Exchange Act and the rules and regulations thereunder.

Appendix A

THE COMMITTEE OF ANNUITY INSURERS

AIG Life & Retirement
Allianz Life
Allstate Financial
Ameriprise Financial
Athene USA
AXA Equitable Life Insurance Company
Fidelity Investments Life Insurance Company
Genworth Financial
Global Atlantic Life and Annuity Companies
Great American Life Insurance Co.
Guardian Insurance & Annuity Co., Inc.
Jackson National Life Insurance Company
John Hancock Life Insurance Company
Life Insurance Company of the Southwest
Lincoln Financial Group
MassMutual Financial Group
Metropolitan Life Insurance Company
Nationwide Life Insurance Companies
New York Life Insurance Company
Northwestern Mutual Life Insurance Company
Ohio National Financial Services
Pacific Life Insurance Company
Protective Life Insurance Company
Prudential Insurance Company of America
Symetra Financial Corporation
Transamerica
TIAA-CREF
USAA Life Insurance Company
Voya Financial, Inc.