



June 11, 2009

Ms. Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File No. SR-FINRA-2009-028 -- Proposed Rule Change to Adopt FINRA Rule 2231 (Customer Account Statements) in the Consolidated FINRA Rule Book

Dear Ms. Murphy:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ appreciates this opportunity to comment on the above-referenced proposed rule change filed by the Financial Industry Regulatory Authority, Inc. (“FINRA”) with the Securities and Exchange Commission (the “Commission”).² The proposed rule change would incorporate NASD Rule 2340 (Customer Account Statements), with certain changes, as FINRA Rule 2231 (the “Proposed Rule”) and would delete NYSE Rule 409 (Statements of Accounts of Customers) except for paragraph (f), and certain of its related interpretations. The principal substantive change proposed by FINRA is a new requirement to provide monthly, rather than quarterly, statements of any account that had activity during the reporting period.

Under the current NASD Rule 2340, members are required to send a quarterly account statement containing a description of any securities positions, money balances or account activity to each customer whose account had a securities position, money balance or account activity during the period since the last such statement was sent to the customer. The Proposed Rule establishes a two-tiered structure requiring a monthly statement where there is

¹ SIFMA is a non-profit industry association that represents the shared interests of participants in the global financial markets. SIFMA members include more than 600 international securities firms, U.S.-registered broker-dealers, and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong. More information about SIFMA and its members and activities is available on its website www.sifma.org.

² Release No. 34-59921 (May 14, 2000), 71 Fed. Reg. 34174 (June 13, 2006) (the “Release”).

“account activity” and a quarterly statement where the account has a security position or money balance. FINRA stated in the Release that it believes the proposed monthly statement requirement better reflects industry practice and, in furtherance of its investor protection mandate, that receipt of monthly statements will allow customers to review their statements in a timely manner for errors, possible identity theft or other potential problems.³

SIFMA fully supports initiatives to improve customer protection and to keep pace with industry practice. We therefore generally support the move from quarterly to monthly statements for the majority of ordinary customer accounts. We are concerned, however, that the Proposed Rule in its current form extends the monthly statement requirement too broadly.

As a preliminary matter, we note that the significance of customer account statements has diminished in recent years. The overwhelming majority of account providers now offer at least one of three ways for customers to access current information about their accounts: (i) through secure, online channels generally accessible 24 hours a day; (ii) by calling live customer service centers or (iii) by accessing automated call systems. Accordingly, for a large and increasing proportion of customers, the periodic account statement delivered to the customer either in paper form or by electronic means is not the customer’s primary source of account information. Nevertheless, at this time, SIFMA believes that account statements still serve an important customer protection function for a number of customers. However, we also believe that monthly statements are unnecessary to protect customers who have certain types of limited account activity or who make an affirmative choice to receive quarterly statements, that it is not industry practice to provide monthly account statements for such customers, and that it would be unduly burdensome to require members to provide monthly account statements for such customers.

Our suggestions below are intended to reflect industry practice, to foster consistency between the Proposed Rule and Commission rules and guidance in the context of Rule 10b-10 (“Rule 10b-10”) under the Securities Exchange Act of 1934 (the “Exchange Act”), and to strike an appropriate balance between providing timely customer account information and managing the costs associated therewith.⁴ SIFMA would welcome the opportunity to discuss these comments with FINRA and the Commission and to engage in ongoing dialogue regarding the most effective and efficient means to ensure customers can access and review their account information in a timely manner.

I. Account activities that should not trigger monthly account statements

The Proposed Rule sets up a two-tiered structure requiring monthly account statements where there is “account activity” and quarterly account statements where the account

³ Release, *supra* note 2 at 23913.

⁴ We also make several technical comments on the Proposed Rule.

has a security position or money balance. “Account activity” is broadly defined to include (without limitation) any “purchases, sales, interest credits or debits, charges or credits, dividend payments, transfer activity, securities receipts or deliveries, and/or journal entries relating to securities or funds in the possession or control of the member.” This broad definition would require many members that currently provide only quarterly account statements to generate monthly account statements for almost every account, even when the limited types of “activity” in the account do not justify a more frequent review by customers for errors, possible identity theft or other potential problems, and even when the customer may prefer to receive a quarterly statement. In particular, SIFMA believes that FINRA should permit quarterly account reporting where the only activity in the customer’s account consists of (A) certain types of routine activity that does not involve the active participation of the customer (“Passive Activity”); (B) activity that the Commission has determined need only be reported on quarterly account statements rather than in Rule 10b-10 transaction confirmations (“10b-10 Exempt Activity”); and (C) occasional transactions in retirement accounts for which an immediate confirmation is sent to the customer when the predominant activities in such account are either Passive Activity or 10b-10 Exempt Activity.

A. Passive activity

As noted above, one of FINRA’s stated reasons for moving to monthly statements is to empower customers to guard against errors, identity theft or other problems. While customer account statements can play a vital role in uncovering such problems, for certain types of activity, the risk involved can be amply managed through quarterly account statements. For example, where account activity is routine and does not require active customer participation, the risk of error or other potential problems is greatly diminished. In such cases, the utility of a monthly as opposed to quarterly statement is significantly reduced and any potential benefit is outweighed by the costs, which will ultimately be borne by the customers. SIFMA believes that the requirement of monthly account statements should not be triggered by any of the following types of activity (collectively, “Passive Activity”):

- the receipt of interest, dividends or amounts representing capital gains or the return of principal or capital;
- the reinvestment of such receipts pursuant to standing instructions from the customer (*e.g.*, a dividend reinvestment plan);
- the transfer of credit balances into or out of money market mutual funds or bank deposits pursuant to a “sweep program” implemented consistent with applicable regulatory guidance;⁵

⁵ See, *e.g.*, NYSE Information Memo 05-11 (Feb. 2005); SEC Release 34-55431, 72 Fed. Reg. 12862, 12866 (Mar. 19, 2007) (proposing Rule 15c3-3(j)).

- routine charges to the account that have been fully disclosed to the customer (*e.g.*, account fees, short position charges, interest on debit balances or charges for dividends on securities held short in the account); or
- pre-authorized and regularly scheduled investments in and redemptions from registered investment companies and related distributions from the account (*e.g.*, required minimum distributions from certain tax-qualified accounts).

In each case, the exemption from the monthly account statement requirement should be limited to members that allow customers to access current information about their accounts through other means.⁶

B. 10b-10 exempt activity

Rule 10b-10 generally requires that, at or before the completion of a securities transaction for a customer, a broker-dealer must deliver to the customer written notification (a “confirmation”) that contains certain prescribed information about the transaction. However, the Commission, through Rule 10b-10(b), rule interpretations, no-action guidance and exemptive relief, has considered the disclosures appropriate for certain types of transactions, balanced risks to investor protection against cost savings for broker-dealers, and determined that it is unnecessary for broker-dealers to send confirmations of certain transactions if certain information regarding the transactions is disclosed in a quarterly statement.⁷ These transactions (all of which are referred to herein as “10b-10 Exempt Activity”) include, but are not limited to, transactions effected pursuant to a “periodic plan”⁸ or “investment company plan”,⁹ the

⁶ As discussed above, other means of access currently available to customers include (i) secure, online channels generally accessible 24 hours a day; (ii) live customer service centers or (iii) automated call systems. Such a condition is consistent with the class exemption granted earlier this year under Rule 10b-10(f) in relation to mutual fund dividend reinvestment. *See* note 10, *infra*.

⁷ *See, e.g.*, SEC Release 34-15219 (Oct. 6, 1978) (adopting Rule 10b-10).

⁸ A “periodic plan” is defined in paragraph (d)(5) of Rule 10b-10 as “any written authorization for a broker acting as agent to purchase or sell for a customer a specific security or securities (other than securities issued by an open end investment company or unit investment trust registered under the Investment Company Act of 1940), in specific amounts (calculated in security units or dollars), at specific time intervals and setting forth the commissions or charges to be paid by the customer in connection therewith (or the manner of calculating them).”

⁹ An “investment company plan” is defined in paragraph (d)(6) of Rule 10b-10 as:

[An]y plan under which securities issued by an open-end investment company or unit investment trust registered under the Investment Company Act of 1940 are purchased by a customer (the payments, being made directly to, or made payable to, the registered investment company, or the principal underwriter, custodian, trustee, or other designated agent of the registered investment company), or sold by a customer pursuant to:

- (i) an individual retirement or individual pension plan qualified under the Internal Revenue Code;
- (ii) a contractual or systematic agreement under which the customer purchases at the applicable public offering price, or redeems at the applicable redemption price, such securities in specific

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automatic reinvestment of dividends in the shares of money market funds,¹⁰ other open-end investment companies and unit investment trusts¹¹ and transactions in certain sorts of “wrap fee”¹² or “payroll deduction”¹³ arrangements. SIFMA believes that FINRA should respect the

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amounts (calculated in security units or dollars) at specific time intervals and setting forth the commissions or charges to be paid by such customer in connection therewith (or manner of calculating them); or

(iii) any other arrangement involving a group of two or more customers and contemplating periodic purchases of such securities by each customer through a person designated by the group:

Provided, That such arrangement requires the registered investment company or its agent-

A. To give or send to the designated person, at or before the completion of the transaction for the purchase of such securities, a written notification of the receipt of the total amount paid by the group;

B. To send anyone in the group who was a customer in the prior quarter and on whose behalf payment has not been received in the current quarter a quarterly written statement reflecting that a payment was not received on his behalf; and

C. To advise each customer in the group if a payment is not received from the designated person on behalf of the group within 10 days of a date specified in the arrangement for deliver of that payment by the designated person and thereafter to send to each such customer the written notification described in paragraph (a) of this section for the next three succeeding payment.

¹⁰ Rule 10b-10(b) permits monthly statements in lieu of immediate confirmations for “transactions effected in shares of any open-end management investment company registered under the Investment Company Act of 1940 that holds itself out as a money market fund and attempts to maintain a stable net asset value per share” provided certain prescribed conditions are met. In Legg Mason Investor Services, LLC (April 7, 2009), the Commission found it was “appropriate in the public interest and consistent with the protection of investors” to grant a class exemption under Rule 10b-10(f) permitting:

[A]ny broker-dealer to send quarterly account statements (in lieu of a monthly statements) to customers whose only account activity consists of transactions involving the automatic reinvestment of the receipt of dividends in the shares of no-load, diversified, open-end investment companies registered under the 1940 Act that meet the requirements of Rule 2a-7 under that Act and that endeavor to maintain a stable net asset value of \$1.00 per share, provided that the broker-dealer satisfies the following conditions: (1) the broker-dealer will continue to confirm all account activity, except the automatic reinvestment of dividends, as required by Rule 10b10; (2) customers will be able to obtain current information on automatic dividend reinvestment transactions via the Internet and by telephone; and (3) customers will receive quarterly statements confirming account activity, including automatic dividend reinvestments.

¹¹ See e.g. Investment Company Institute (January 7, 1993).

¹² See e.g. Wachovia Securities (April 30, 2007), UBS Financial Services (May 24, 2007) and Money Management Institute and Securities Industry Association (August 23, 1999).

¹³ There is a long line of no-action guidance in the context of “payroll deduction” arrangements, permitting quarterly account statements that do not technically comply with Rule 10b-10(d)(6)(iii)(C). See e.g. Variable Annuity Life Insurance Company of America (March 1, 1979, January 28, 1982, December 20, 1985 and August 23, 1991); College Retirement Equities Fund (May 1, 1988 and January 31, 1990); Integrated Capital Services, Inc. (January 30, 1987); The Mutual Life Insurance Company of New York (May 23, 1985); Mutual of America Life

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Commission's determination that quarterly disclosure of 10b-10 Exempt Activity reflects the proper balance of customer protection against costs to broker-dealers and revise the Proposed Rule so that 10b-10 Exempt Activity does not trigger a monthly statement requirement.

C. Occasional non-exempt transactions in retirement accounts

Although monthly account statements have become the industry practice for certain segments of the brokerage business, this is not true for all segments of the industry. In particular, many brokers continue to provide quarterly account statements for retirement accounts, in part because the predominant activity in such accounts generally is 10b-10 Exempt Activity or Passive Activity. Quarterly account statements are also the norm for bank and trust companies that provide similar services¹⁴ as well as for plan sponsors under the Employee Retirement Income Security Act ("ERISA").¹⁵

Given that plan and recordkeeping services are often provided to retirement plan sponsors and participants by multiple service providers, including banks or trust companies, requiring members to send monthly statements in this context would not only impose a disproportionate cost burden on members but would create confusion for customers who are accustomed to receiving quarterly statements. Although customers occasionally effect transactions in their retirement accounts that are not 10b-10 Exempt Activity or Passive Activity ("non-exempt transactions"), they are adequately notified of such transactions by the confirmation sent at or before the completion of the transaction pursuant to Rule 10b-10. Accordingly, we believe the Proposed Rule should be revised to permit members carrying retirement accounts¹⁶ to continue to report non-exempt transactions on the quarterly account

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Insurance Company (December 6, 1984); and Equitable Life Assurance Society of the United States and AXA Advisors, LLC (October 20, 2004).

¹⁴ See 12 CFR Part 12, "Recordkeeping and Confirmation Requirements for Securities Transactions" which applies to national banks and 12 CFR Part 551, "Recordkeeping and Confirmation Requirements for Securities Transactions" which applies to thrifts. Both largely track the confirmation and statement requirements, including the alternative periodic reporting provisions, of Rule 10b-10.

¹⁵ Section 105 of ERISA, as amended by the Pension Protection Act of 2006, requires the administrator of an individual account plan to send provide account statements once each calendar quarter to certain prescribed persons or upon request to a plan beneficiary not otherwise described.

¹⁶ For this purpose, SIFMA recommends that "retirement account" be defined as (i) any employee pension plan covered by ERISA; (ii) any plan described in Internal Revenue Code ("IRC") sections 401(a), 401(k), 403(b), 408(k), 408(p) or 457(b); (iii) any government or church plan defined in IRC section 414; (iv) any deferred compensation plan of a state or local government or tax-exempt organization under IRC section 457(f); (v) any nonqualified deferred compensation arrangement established or maintained by employers or plan sponsors; or (vi) any individual retirement account or annuity described in IRC section 408.

statement rather than providing monthly statements for the months in which a non-exempt transaction occurs.

II. Customer choice

Given that the costs of measures designed to promote customer protection are ultimately paid for in large part by the customer, SIFMA believes that customers who do not wish to receive monthly statements should be permitted to make an affirmative choice to receive quarterly statements. Indeed, SIFMA members have reported that many customers have asked how to reduce the frequency or eliminate their account statements and that, when given the choice between monthly and quarterly statements, a significant number of customers currently choose to receive statements quarterly rather than monthly. Customers may prefer to receive their account information through other means (e.g. online) and may reasonably prefer not to be burdened by more frequent statements.¹⁷ SIFMA believes FINRA should respect customer choice and therefore permit members to send quarterly account statements where the customer has made an affirmative choice to receive quarterly rather than monthly statements.

III. DVP/RVP accounts

A. *Quarterly account statements are sufficient for DVP/RVP accounts.*
Proposed Rule 2231(b) maintains the opt-out provision for delivery versus payment/receive versus payment (“DVP/RVP”) accounts and permits a member to cease sending account statements completely where the account is carried solely for the purposes of execution on a DVP/RVP basis and where, among other conditions, the customer consents to the suspension of such statements in writing. Where such conditions are not met, however, the Proposed Rule would require members to send a monthly rather than quarterly statement.

The DVP/RVP exception was added to former NASD Rule 2340 in 2006, in large part because “rather than using the information provided in quarterly statements, DVP/RVP customers generally rely on trade runs or customer confirmations issued pursuant to Rule 10b-10 for transaction-related information.”¹⁸ Thus, given that DVP/RVP customers do not rely on the account statements provided pursuant to the Proposed Rule as their primary source of account information, customer protection will not be enhanced if the frequency of such statements is increased. FINRA should therefore preserve the quarterly statement requirement in former NASD Rule 2340 as the default requirement for DVP/RVP accounts. Members should, however, be required to provide monthly statements to any DVP/RVP customer who so requests.

B. *The person who opened the account should be able to provide consent to suppress the account statement.* We also request that FINRA take this opportunity to clarify the

¹⁷ Where statements are sent monthly, some customers may also be more likely to ignore the statements than if statements are delivered less frequently.

¹⁸ NASD Notice to Members 06-68 (November 2006).

source of the consent required under the provision by making clear that a member may rely on authorization provided by the person or entity that opened the account (which may be an investment advisor to, or other authorized agent of, the account owner).

IV. Technical comments

A. *Members should not be required to obtain written instructions from the customer before sending duplicate account statements in certain instances.* Proposed Supplementary Material .01 would require written instructions from the customer in all instances in order to address and/or send customer statements, confirmations or other communications to other persons or entities.¹⁹ This requirement would conflict with NYSE Rule 407 and NASD Rule 3050, which require any member carrying an account in which an employee of another member has an interest to send duplicate confirmations and accounts statements²⁰ to such other member. FINRA should clarify that members are not required to obtain the written consent of the customer before sending duplicate statements, confirmations or other communications pursuant to NYSE Rule 407 or NASD Rule 3050. In addition, SIFMA believes a customer's oral consent should be sufficient in order to send a duplicate account statement, confirmation, or other communication, provided that the customer also receives such account statement, confirmation or other communication and the member relying on such oral consent lists on the customer's (quarterly or monthly) account statement the names of any other persons to whom duplicate communications are being sent.

B. *FINRA should resolve the inconsistency as to where the identity of the clearing firm must be displayed.* Proposed Supplementary Material .03(a) requires members to prominently disclose on the front of the account statement the identity of the introducing firm and its respective contact information for customer service. The identity and contact information of the clearing firm (if different) may be disclosed on the back of the statement provided such information is in bold or highlighted letters. Paragraph (a) is inconsistent with paragraph (b), which requires members to disclose on the front of the statement that the clearing firm is a member of SIPC (which cannot intelligibly be accomplished without disclosing the clearing firm's identity). FINRA should clarify that the identity of both the introducing firm and clearing firm (if different) must appear on the front of the statement, but that the contact information of the clearing firm may appear on the back of the statement, provided such information is in bold or highlighted letters.

¹⁹ Proposed Rule 2231.01 replaces NYSE Rule 409(b), but with important differences. 409(b) prohibited, without NYSE's consent, the delivery of communications to non-member customers (1) in case of a person holding a power of attorney over the customer's account unless the customer has provided written instructions or duplicate copies are sent to the customer at some other address designated by the customer in writing; and (2) at the address of any member, member organization, or in care of any partner, stockholder, who is actively engaged in the member's business or employee of the member.

²⁰ And, in the case of NASD Rule 3050 "other information with respect to the account".

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C. *FINRA should confirm that members are not required to send account statements to other broker-dealers.* NASD Rule 0120(g) provides that the term “customer” shall not include a broker or dealer. While we expect FINRA to adopt this definition at some point during its rule consolidation process, in the meantime, we request that FINRA clarify that the statement requirement is not meant to apply to accounts carried for other broker-dealers.

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SIFMA thanks the Commission for affording it the opportunity to comment on the Proposed Rule. If you have any questions concerning these comments, or would like to discuss our comments further, please feel free to contact me at 212-313-1118 or via email at sdavy@sifma.org.

Sincerely,



Sean C. Davy
Managing Director, Corporate Credit Markets Division

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