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May 26, 2011

VIA ELECTRONIC DELIVERY

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

Re: SR-FINRA-2011-018; Proposed Rule Change and Amendment No. 1 to Adopt NASD Rule 2830 as FINRA Rule 2341 (Investment Company Securities) in the Consolidated FINRA Rulebook

Dear Ms. Murphy:

TIAA-CREF Individual & Institutional Services, LLC ("TC Services")[1] appreciates the opportunity to comment on proposed Financial Industry Regulatory Authority ("FINRA") Rule 2341 ("Proposed Rule") governing investment company securities.[2] TC Services endorses the policy goals stated in the Proposed Rule—namely, that investors in investment company securities should have access to information enabling them to make informed investment decisions—and TC Services is pleased that FINRA has modified constructively the prior version of the Proposed Rule in light of comments received.[3] Nevertheless, TC Services believes FINRA

[1] TC Services is registered with the Securities and Exchange Commission ("Commission") as a broker-dealer and is a member of FINRA. TC Services is wholly owned by Teachers Insurance and Annuity Association of America ("TIAA"), and both TC Services and TIAA are members of the TIAA-CREF group of companies, which comprise one of the world's largest private retirement plan systems. For over 90 years, TIAA-CREF has helped people in the academic, research, medical and cultural fields plan for and live through retirement.

[2] Notice of Filing of Proposed Rule Change and Amendment No. 1 to Adopt NASD Rule 2830 as FINRA Rule 2341 (Investment Company Securities) in the Consolidated FINRA Rulebook, Exch. Act Rel. No. 64,386 (May 3, 2011), 76 Fed. Reg. 26,779 (May 9, 2011) (the "Proposed Rule Notice").

[3] FINRA sought and received comments on a prior version of FINRA Rule 2341 in FINRA Notice to Members 09-34 (June 2009) ("June 2009 NTM"). Among other requests, the June 2009 NTM asked whether FINRA Rule 2341 "should allow firms to provide generalized disclosure (in either paper or electronic format) to an investor when an account is opened regarding the receipt of cash compensation that refers the investor to a Web site address or toll-free number that provides [the

should reconsider key aspects of the Proposed Rule and the accompanying guidance regarding the Proposed Rule. In particular, and as described below, TC Services believes that: (1) certain brokerage relationships (*e.g.*, clients who self-direct unsolicited trades) do not present the opportunity for actual conflicts of interest that the "customer disclosure"[4] is intended to identify, thus obviating the need for such disclosure; (2) in the context of brokerage services offered to certain employer-sponsored retirement plans, the customer disclosure requirements are unduly duplicative of disclosure requirements under the Employee Retirement Income Security Act of 1974 ("ERISA") and rules issued by the Department of Labor ("DOL"); (3) the Proposed Rule should specifically state that a plan fiduciary responsible for selecting investment companies as options for a plan is a member's "customer"; and (4) given the changes to the proposal and the almost two year lapse since the issuance of the June 2009 NTM, FINRA members would benefit from a re-proposal in a notice to members rather than rushing to seek Commission approval.

I. Certain Relationships Should be Exempt from the Customer disclosure Requirement

TC Services believes that two types of transactions should be exempt from the customer disclosure requirements: self-directed trades and trades in investment company securities based on advice from a fiduciary unrelated to the broker. Investors making these investment decisions would not be influenced by the customer disclosure, so there is no benefit in making those disclosures let alone one commensurate with the burden imposed by doing so.

A. Transactions that are not Recommended

FINRA believes that the provision of the customer disclosures would enable investors to evaluate whether a member's particular product recommendation was influenced by an additional cash compensation arrangement, thereby raising a potential conflict of interest.[5] TC Services recognizes this laudable policy goal, and we believe FINRA's statement of this goal correctly implies that the same conflicts

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more extensive disclosure]." Commentators responded affirmatively, and FINRA accordingly modified the rule.

[4] Paragraph (l)(4)(A) of the Proposed Rule would, if adopted, require a member firm that within the previous calendar year received, or has entered into an agreement to receive, any "additional cash compensation" to make certain customer disclosures. Specifically, the member would have to: (1) prominently disclose that it has received, or has entered into an arrangement to receive, additional cash compensation from investment companies and their affiliates other than traditional sales charges and service fees; (2) prominently disclose that this additional cash compensation may influence the selection of investment company securities that the member offers or recommends to investors; and (3) provide prominent reference (or in the case of electronically delivered documents, a hyperlink) to a web page or toll-free telephone number where the investor could obtain additional information concerning these arrangements. In the Proposed Rule, additional cash compensation is any cash compensation other than standard sales charges or service fees paid in connection with the sale of shares disclosed in the prospectus fee tables of investment companies sold by the member.

[5] Proposed Rule Notice at 26,780.

do not arise, and need not be specially disclosed, where a member effects transactions that are not recommended. Thus, the customer disclosure requirements should not apply to transactions that are not recommended.

B. Transactions under the SunAmerica Model

Additionally, TC Services believes that transactions brokered by a member for employer-sponsored retirement plans under the so-called "SunAmerica model" should be exempt from the customer disclosure requirements under the Proposed Rule. By way of background, many members effect transactions in investment company securities for participants in participant-directed retirement plans where a fiduciary for each plan is responsible for selecting the investment options that will be made available under the plan.[6] In each such case, the selecting fiduciary is required to act prudently and solely in the interests of the plan and participants when selecting the menu of available plan investment options.

Participants in such plans often seek professional advice regarding the allocation of their account balances among the investment options. If a plan's investment options include proprietary investment companies of a service provider engaged by the plan to provide allocation advice, the arrangement could be deemed to involve fiduciary self-dealing or a conflict of interest prohibited under Section 406(b) of ERISA. In an opinion issued by the DOL to SunAmerica,[7] the DOL agreed that, where an independent financial expert retained by, but unrelated to SunAmerica, designs, controls and operates an algorithmic investment program to generate recommended allocations among a plan's investment options, including those funds related to SunAmerica, SunAmerica would not violate ERISA's prohibited transaction rules in implementing the independent financial expert's recommendations. This advisory opinion provides the framework under which many financial service providers, including TC Services, provide to retirement plan participants investment advice that may include allocations to related funds (*e.g.*, the TIAA-CREF family of mutual funds). Under this framework, the advice provided is generated by an independent expert with no financial interest in the plan's investments.

Moreover, under the SunAmerica model, TC Services cannot influence the allocation advice and must compensate the independent financial expert in a manner that does not vary based on the investment recommendations. Because TC Service is not exercising its own fiduciary authority, the fact that compensation received by TC Services (or its affiliates) may vary does not implicate ERISA's prohibition against fiduciary self-dealing or conflict of interest. The customer disclosures would not

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[6] The selecting fiduciary may or may not be the plan sponsor or employer. For example, the selecting fiduciary may be a named fiduciary identified in a plan document, appointed by the plan sponsor pursuant to procedures identified in the plan document or an unrelated investment manager appointed by a named fiduciary. Regardless of how the selecting fiduciary is chosen, it will be someone other than the member firm in this model.

[7] DOL Advisory Opinion 2001-09A.

provide meaningful information to the plans or participants relating to conflicts of interest for participant-directed retirement plans served under the SunAmerica model because TC Services neither selects the available investment options nor recommends the allocation of monies among such options. We therefore request that FINRA exempt from the customer disclosure requirement all transactions effected pursuant to the SunAmerica model.

II. The Proposed Rule is Unduly Duplicative of Existing Plan Requirements

More broadly, TC Services believes that the customer disclosure requirement significantly overlaps with disclosures required by the DOL's recent regulations under Section 408(b)(2) of ERISA.[8] In brief, the regulations require key service providers, including brokers, to (1) provide extensive disclosures of anticipated direct and indirect compensation to the fiduciaries responsible for hiring them in advance of providing services and (2) promptly update these disclosures if any of the information previously disclosed will become inaccurate.[9] The purpose of these disclosures is to permit the hiring fiduciary to evaluate whether the service provider is subject to any conflicts of interest and whether the plan is paying more than reasonable compensation, taking into consideration any indirect compensation received by the service provider in connection with plan transactions. FINRA should take heed of the careful assessment of burden versus benefit conducted by the DOL in this context. The DOL recognized the balancing act between requiring the information to be disclosed in a specific format for ease of comparison and increasing administrative costs to the detriment of plan participants:

> The [DOL] is persuaded that plan fiduciaries may benefit from increased uniformity in the way that information is presented to them. However, the [DOL] does not want to unnecessarily increase the cost and burden for service providers to furnish required information, especially to the extent such cost may be passed along to plan participants and beneficiaries, unless it is clear that the benefit to plan beneficiaries outweighs such cost and burden.[10]

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[8] *See* Reasonable Contract or Arrangement under Section 408(b)(2)—Fee Disclosure, 72 Fed. Reg. 70,988 (Dec. 13, 2007); Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans, 73 Fed. Reg. 43,014 (July 23, 2008); and Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure, 75 Fed. Reg. 41,600 (July 16, 2010) (adopting interim final rules initially effective as of July 16, 2011, but subsequently delayed until Jan. 1, 2012).

[9] Once effective, the DOL's interim final rule will require these service providers to disclose, among other information, a description of all direct and indirect compensation reasonably expected to be received, including any compensation that will be paid among the service provider, an affiliate or a subcontractor in connection with covered services if it is set on a "transaction" basis (*e.g.*, commissions, soft dollars, finder's fees or other similar incentive compensation based on business placed or retained). The disclosure must include an identification of the services for which the compensation will be paid and identification of the payer and recipients of the compensation, and applies even if the compensation is otherwise disclosed.

[10] *Id.* At 41,607.

Further, the DOL revised Schedule C of the Form 5500 for the 2009 and subsequent reporting years to require plan administrators to obtain and report direct and indirect compensation of plan service providers, including brokers, and to report to DOL any service providers who refuse to provide the necessary information to the plan administrator.

TC Services believes that multiple disclosure documents addressing the same subject matter but on a different basis and scope are likely to confuse, not inform retirement plans and/or participants.[11] In the Proposed Rule, FINRA dismisses without appropriate analysis this concern by stating that the DOL interim final rule does not "cover sales of shares of mutual funds outside of employee pension benefit plans" but instead focuses "on disclosures required in connection with the sale of mutual funds to retirement plans."[12] Although FINRA may believe that the Proposed Rule and the DOL interim final rule are complementary, the Proposed Rule notice acknowledges that the Proposed Rule is indeed duplicative but discounts the problem by noting that the duplication is limited. This brief justification does not meet the standards imposed upon FINRA by Section 15A(b)(6) and (9) of the Securities Exchange Act of 1934, as amended, which require in part that FINRA establish its rulemaking initiatives do not impose undue burden upon member firms. It is also inconsistent with the instructions to Form 19b-4, which require that FINRA explain in detail why the proposed rule change does not unduly burden competition or efficiency.

TC Services respectfully suggest that a more considered approach, and one in line with the above rulemaking standards, would be to exempt transactions with ERISA plans from the customer disclosure requirements under the Proposed Rule because multiple layers of duplicative disclosures will only serve to confuse investors. Short of that, members subject to the DOL interim final rule should be deemed to have satisfied paragraph (l)(4)(iii) of the Proposed Rule if they satisfy the disclosure requirements under the interim final rule under Section 408(b)(2) of ERISA.

III. Definition of "Customer"

In response to a comment received on the June 2009 NTM, FINRA attempts to address in the Proposed Rule the question of who a member should consider to be a "customer" when serving retirement plans. Specifically, FINRA stated that "[i]f a member sells investment company securities to a retirement plan, the disclosure should be made to the retirement plan sponsor."[13] Although this response may seem to resolve the issue in the abstract, it fails to acknowledge or accommodate the wide variations in retirement plan design and structure. TC Services believes the recent

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[11] Similarly, the Proposed Rule should be coordinated and reconciled with any future "point of sale" or similar disclosure requirements adopted by the Commission.

[12] Proposed Rule Notice at 26,782.

[13] *Id.* at 26,785.

DOL regulations under 408(b)(2) provide a useful construct for more specifically identifying the most appropriate recipient of disclosures about broker compensation—namely, the fiduciary responsible for selecting the plan's investment options. Accordingly, TC Services believes that FINRA should clarify that this fiduciary is the "customer" for purposes of the Proposed Rule.[14] TC Services also believes that the interpretation of customer is far too significant to appear as an afterthought in the Proposed Rule. Instead, it should be expressly codified in the Proposed Rule or a formal supplementary interpretation thereto, preferably after an appropriate notice and comment period.

In this regard, in light of the wide variety of retirement plans—some sponsored by employers such as 403(b) and 401(k) plans and others established purely for the benefit of an individual such as individual retirement accounts—FINRA also should define the term "retirement plan" for use in the Proposed Rule. To that end, TC Services respectfully suggests that FINRA define retirement plan in the Proposed Rule or supplementary materials to include:

1. Employee pension plans covered by ERISA;
2. Plans described in Internal Revenue Code ("IRC") sections 401(a), 401(k), 403(b), 408(k), 408(p) or 457(b);
3. Government and church plans defined in IRC section 414;
4. Deferred compensation plans of state and local governments and tax-exempt organization under IRC section 457(f); and
5. Nonqualified deferred compensation arrangements established or maintained by employers or plan sponsors.

IV. The Proposed Rule should be Re-Proposed by FINRA for Comment

TC Services believes that the Proposed Rule is materially different than that proposed initially by FINRA in the June 2009 notice to members. Further, as noted above, there are many areas in which the Proposed Rule would benefit from additional revision and industry comment. Unfortunately, the relatively short comment period (21 days) expiring on the day after the Memorial Day holiday combined with the length of time since the issuance of the June 2009 notice to members will depress the number and quality of comments received. In light of these logistical challenges and the likelihood that the DOL will further modify its interim final rule before its January 1, 2012 effective date, TC Services believes there is much to be gained and little or nothing to be lost by asking FINRA to re-propose the Proposed Rule in a regulatory notice before seeking Commission approval.
By way of analogy, a rule adopted by an agency subject to the Administrative Procedure Act ("APA") that is materially changed from its proposing noticed form is

[14] As noted above, the detailed disclosures required by 408(b)(2) and Schedule C of Form 5500 already provide the type of disclosures to this fiduciary that FINRA seeks through the Proposed Rule.

generally subject to re-proposal, and in the absence of that, may be voided on the basis that the public did not have opportunity to review it.[15]

If adopted as is, the Proposed Rule will present compliance challenges for members and impose significant costs. If FINRA does not provide for exemptions or exclusions as requested above, TC Services believes that the Proposed Rule will be inconsistent with the requirements of Section 15A(b)(9) of the Securities Exchange Act of 1934, which prohibits FINRA from adopting rules that impose any burden on competition not necessary or appropriate in furtherance of the purposes of that Act. This is especially true where the Proposed Rule will create duplicative disclosure requirements for plans and participants.

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TC Services very much appreciates the opportunity to comment on the Proposed Rule and welcomes the opportunity to further discuss our views with you. If you have any questions regarding this comment letter, please contact me at (303) 626-4535.

Very truly yours,

Pamela Lewis Marlborough
Associate General Counsel
TIAA-CREF Individual & Institutional Services, LLC

cc: Chairman Mary L. Schapiro
Commissioner Kathleen L. Casey
Commissioner Elisse B. Walter
Commissioner Luis A. Aguilar
Commissioner Troy A. Paredes
Robert Cook, Director, Division of Trading and Markets
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Mark Cohn, General Counsel, Office of the General Counsel
Katherine England, Assistant Director, Division of Trading and Markets
Joe Savage, Vice President and Counsel, Investment Companies Regulation, FINRA
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[15] *See* Weyerhauser Co. v. Costle, 590 F.2d 1011, 1031 (D.C. Circ. 1978) (An agency adopting final rules that differ from its proposed rules is required to re-notice when the changes are so major that the original notice did not adequately frame the subjects for discussion. The purpose of the new notice is to allow interested parties a fair opportunity to comment upon the final rules in their altered form. The agency need not re-notice changes that follow logically from or that reasonably develop the rules it proposed originally.)