

## Center for Clinical Programs

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**VIA Email: [rule-comments@sec.gov](mailto:rule-comments@sec.gov)**

Mr. Robert W. Errett  
Deputy Secretary  
Securities and Exchange Commission  
100 F Street NE, Washington, DC 20549-1090

Re: SR-FINRA-2015-057  
Comments on Proposed Rule Change to Adopt FINRA Rule 2273

Dear Mr. Errett:

We appreciate the opportunity to comment on SR-FINRA-2015-057, the proposal to adopt FINRA Rule 2273, Educational Communication Related to Recruitment Practices and Account Transfers (the "Proposal"). We submit these comments on behalf of the Georgia State University College of Law's Investor Advocacy Clinic ("IAC"). The IAC provides free legal representation to investors who have suffered losses resulting from broker misconduct but cannot afford or find private legal representation because of the size of their claim. We advocate for investors who otherwise would not have a voice.

We appreciate FINRA's intent to create more protections for investors and believe Rule 2273 is a very positive step in that direction. While we support the Proposal generally, FINRA's goal of protecting vulnerable investors in this position of transferring assets to follow a registered representative to a new firm could be further enhanced with a few changes. Our recommended changes mirror some of the characteristics in the prior proposals: FINRA Regulatory Notice 15-19 and FINRA Regulatory Notice 13-02.

First, Rule 2273 should require disclosure of representative compensation plans or should require a registered representative or recruiting firm to provide written answers to the questions included on the educational communication if a customer so inquires. Second, Rule 2273 should apply to all customers (current, new, and former) deciding to transfer assets. Third, Rule 2273(b)(3) should require delivery of the educational communication for a period of at least 6 months—though preferably a year—from the date the registered person commences employment with the member. Fourth, Rule 2273(b)(2) should be amended to require delivery of the educational communication to the former customer, where there is no individual contact, before transmittal of account transfer approval documentation. Fifth, Rule 2273 should require customer affirmation of delivery of the educational communication to ensure compliance with Rule 2273 and ensure investors are informed of the potential implications of transferring assets. The

changes suggested in this comment support the intent of FINRA in enacting Rule 2273 as well as the interests of the IAC in ensuring that investors are educated and well informed.

**I. FINRA SHOULD REQUIRE CERTAIN DISCLOSURES OF REPRESENTATIVE COMPENSATION PLANS TO CUSTOMERS CONTACTED TO TRANSFER ASSETS OR ALTERNATIVELY BE REQUIRED TO ANSWER THE QUESTIONS POSED BY THE RULE 2273 EDUCATIONAL COMMUNICATION**

In order to make investors aware of the implications of transferring assets to a recruiting firm, FINRA should either: (1) reinstate Notice 13-02's proposal requiring specific written disclosures to former customers regarding recruitment compensation and how that compensation may present a conflict of interest in transferring assets to the recruiting firm or (2) require the recruiting firm or registered representative to provide the former customer with written answers to the questions posed in the educational communication before the customer transfers assets to the recruiting firm. Because the prior disclosure proposal of Notice 13-02 raised privacy and operational concerns from members, the latter option seems to strike a more appropriate balance and still ensures greater protection to investors than the current proposal.

FINRA's intent in proposing Rule 2273 is to protect former customers unaware of the potential implications of transferring assets to the recruiting firm of their registered representative. Thus, FINRA's current rule proposal requires an educational communication to be delivered to former customers highlighting the following potential implications: (1) whether financial incentives received by the investor's registered representative may create a conflict of interest; (2) whether the investor can transfer all assets to the recruiting firm and what implications and costs will result to the investor if some assets are not directly transferrable; (3) whether there are potential short term and/or ongoing costs to the investor if the investor decides to follow the registered representative to the recruiting firm; and (4) whether there are differences in products and services between the investor's current firm and the recruiting firm. Although the educational communication is certainly a step in the right direction,<sup>1</sup> it is in itself not enough to accomplish FINRA's stated purpose because it only makes former customers aware of the potential implications but does not provide them with any concrete information specific to their account.

Shifting the burden to customers requires customers to not only ask uncomfortable questions about their registered representative's salary, but also provides no guarantee that customers will receive adequate responses. In a comment letter responding to Notice 15-19, the North American Securities Administrators Association ("NASAA") opined that "failing to require specific, substantive disclosures unfairly shifts the burden to customers to obtain the material information necessary to evaluate potential conflicts of interest created when a

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<sup>1</sup> See SR-FINRA-2015-057 Text of the Proposed Rule Change, p. 31-32, available at [http://www.finra.org/sites/default/files/rule\\_filing\\_file/SR-FINRA-2015-057.pdf](http://www.finra.org/sites/default/files/rule_filing_file/SR-FINRA-2015-057.pdf). When FINRA tested the educational communication with a diverse group of investors, the investors indicated that the communication identified issues they had not been aware of previously but were issues that would be meaningful to consider in a decision to transfer assets to a representative's new firm. *Id.*

representative transitions to a new firm.”<sup>2</sup> PIABA similarly advocates a return to Notice 13-02’s requirement of disclosing a registered representative’s compensation agreement.<sup>3</sup> PIABA reasons that because compensation agreements present material conflicts of interest between a registered representative and investor, that disclosure of such potential conflicts should be required where a former customer may transfer assets to a recruiting firm. We agree with NASAA and PIABA about the importance of requiring a registered representative moving to a new firm to disclose compensation agreements presenting material conflicts of interest for a former customer transferring assets.

Further, we find that placing this burden on customers to detect conflicts of interest arising from representative compensation agreements and to elicit information about the other implications of transferring assets described in the educational communication without any guarantee that such disclosures or information will be provided, does not effectuate FINRA’s intent in adopting Rule 2273. Thus, the IAC agrees with NASAA and PIABA’s comments to require, at a minimum, a disclosure of representative compensation plans as part of Rule 2273. Alternatively, the IAC supports PIABA’s proposal to change Rule 2273 to require members and registered representatives to truthfully and completely respond in writing when a former customer inquires about the information suggested on the educational communication.<sup>4</sup>

## **II. THE REQUIREMENT TO PROVIDE AN EDUCATIONAL COMMUNICATION SHOULD ENCOMPASS MORE THAN JUST A REGISTERED REPRESENTATIVE’S FORMER CUSTOMERS**

We propose that the educational communication should be delivered to all customers who seek to transfer assets, as new customers are subject to the same risks of being unaware of the potential implications of transferring assets to a new firm or transferring to a new registered representative within the old firm, as are former customers. Expanding the application of the educational requirement will ensure that all customers are able to make an informed decision about whether or not to transfer their assets. If FINRA amended Rule 2273 to require disclosure of enhanced compensation agreements, we would similarly support extending disclosure to all clients, not just former clients.

As previously discussed, FINRA’s purpose for proposing Rule 2273 is to protect former customers who may not be able to make an informed decision when deciding whether to transfer assets to a recruiting firm of their registered representative. Rule 2273’s educational communication seeks to remedy this uninformed decision making by highlighting potential implications of transferring an account. As PIABA discussed in its comment letter to Notice 15-

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<sup>2</sup> Letter from William Beatty, NASAA President, to Marcia E. Asquith, Office of the Corporate Secretary, FINRA (July 13, 2015), *available at* [https://www.finra.org/sites/default/files/notice\\_comment\\_file\\_ref/15-19\\_nasaa\\_comment.pdf](https://www.finra.org/sites/default/files/notice_comment_file_ref/15-19_nasaa_comment.pdf).

<sup>3</sup> Letter from Joseph C. Peiffer, PIABA President to Marcia E. Asquith, Office of the Corporate Secretary, FINRA (July 13, 2015), *available at* [https://www.finra.org/sites/default/files/notice\\_comment\\_file\\_ref/15-19\\_PIABA\\_comment.pdf](https://www.finra.org/sites/default/files/notice_comment_file_ref/15-19_PIABA_comment.pdf).

<sup>4</sup> *Id.*

19, the concerns with which FINRA intended to address in proposing Rule 2273 seem to apply to current and new clients just as seamlessly as they do to former clients.<sup>5</sup>

PIABA emphasized the potential conflicts of interest that might exist between a registered representative and investor due to that registered representative's compensation agreement. Such potential conflicts of interest are often not known to customers, as is evidenced by Rule 2273's educational communication. Although Rule 2273 does attempt to make former customers aware that such conflicts of interest may exist, PIABA asserts that it is not just *former* customers who need protection. PIABA proposes: "all enhanced compensation agreements should be disclosed to all of the recruiting firm's customers, not just to the former customers of a registered representative who has changed firms."<sup>6</sup> We agree with this proposition that all customers should be protected.

### **III. RULE 2273(b)(3) SHOULD REQUIRE DELIVERY OF THE EDUCATIONAL COMMUNICATION AT LEAST 6 MONTHS FROM THE DATE THE REGISTERED PERSON COMMENCES EMPLOYMENT**

The Proposal should include a longer time period for delivery of the educational communication. Notice 15-19 required the recruiting firm to provide the educational communication to former customers for 6 months following the date the registered representative began employment with the firm. Unfortunately, in FINRA's current proposal for Rule 2273, that period of time has been shortened to a mere 3 months. In support of shortening the period, FINRA said it: (1) believed that the representatives who contact former customers to transfer assets typically do so within a short time of being hired and (2) recognized that a longer period would impose greater operational and supervisory burdens on firms. We disagree with FINRA's reasoning and its decision to shrink the prior 6-month period of application to a 3-month period.

FINRA should at a minimum require delivery of the educational communication for 6 months from the date the registered person commences employment at the recruiting firm. Extending the time period requiring an educational communication to former customers helps further FINRA's purpose in enacting Rule 2273. Although FINRA believes that some transfers of assets will occur within the 3-month period, there is no indication that FINRA is certain that all former customers will transfer their assets within that 3-month window. Further, there is no reason to protect some former customers who are hasty to transfer assets but not former customers who decide to wait to transfer assets or are not contacted by the registered representative until a later date. In fact, there may be a chance that registered representatives and recruiting firms may wait until 3 months and 1 day to avoid the Rule 2273 requirement. Finally, FINRA has acknowledged that members are already obligated to supervise representatives' communications with clients. Therefore, FINRA's reasoning that supervisory burdens are enhanced with a longer applicable period because of tracking contacts with former clients is unfounded. There is no reason not to extent the applicable period back to 6 months to ensure

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

greater protection of investors.

#### **IV. RULE 2273(b)(2) SHOULD REQUIRE DELIVERY OF THE EDUCATIONAL COMMUNICATION BEFORE TRANSMITTAL OF ACCOUNT TRANSFER APPROVAL DOCUMENTATION**

The Proposal would be strengthened by requiring transmission of the educational communication before any account transfer documents. The text of Rule 2273(b)(2) provides: “If a former customer attempts to transfer assets to an account assigned, or to be assigned, to the registered person at the member, but no individualized contact with the former customer...occurs before the former customer seeks to transfer assets, the member shall deliver the educational communication...to the former customer *with* the account transfer approval documentation” (emphasis added). We believe delivering the educational communication at the same time as the account transfer approval documentation undermines the purpose of the educational communication.

We agree with the sentiments expressed by some commentators on Notice 15-19—Charles Schwab<sup>7</sup> and PIABA<sup>8</sup>—in requiring the delivery of the educational communication prior to the time a former customer decides to transfer assets to the recruiting firm. Although we do not propose Rule 2273 be changed to provide delivery of the education communication prior to the first individualized contact, we do propose such change with regard section (b)(2) of Rule 2273. Delivering the educational communication before rather than alongside the account transfer documentation protects investors in two ways: (1) it provides former customers sufficient time to consider and respond to the educational communication; and (2) it enhances the importance of the educational communication to the customer in not having it delivered at the same time as a host of other documents and communications. Further, providing the educational communication before the account transfer documentation cannot be said to impose an undue burden on members as Rule 2273 requires in other circumstances of first individualized contact with a former customer delivery of the educational communication, which is surely not always at the same time as account transfer approval documentation.

#### **V. FINRA SHOULD REQUIRE CUSTOMER AFFIRMATION OF DELIVERY OF THE EDUCATIONAL COMMUNICATION**

In order to ensure FINRA’s purpose in proposing Rule 2273, requiring an educational communication to protect investors and make them aware of implications in transferring assets to a recruiting firm, FINRA should also require customer affirmation of delivery of the educational communication. Customer affirmation ensures compliance with Rule 2273.

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<sup>7</sup> Letter from Jeffrey T. Brown, Senior Vice President and Head of Legal and Regulatory Affairs, to Marcia E. Asquith, Office of the Corporate Secretary, FINRA (July 13, 2015), *available at* [https://www.finra.org/sites/default/files/notice\\_comment\\_file\\_ref/15-19\\_charlesSchwab\\_comment.pdf](https://www.finra.org/sites/default/files/notice_comment_file_ref/15-19_charlesSchwab_comment.pdf).

<sup>8</sup> Letter from Joseph C. Peiffer, PIABA President to Marcia E. Asquith, Office of the Corporate Secretary, FINRA (July 13, 2015), *available at* [https://www.finra.org/sites/default/files/notice\\_comment\\_file\\_ref/15-19\\_PIABA\\_comment.pdf](https://www.finra.org/sites/default/files/notice_comment_file_ref/15-19_PIABA_comment.pdf).

Rule 2273 does not include supervisory procedures for members to comply with Rule 2273. Although some commentators have expressed concern with member compliance without such supervisory procedures, FINRA has found it sufficient to rely on Rule 3110, which requires members to have supervisory procedures reasonably designed to achieve compliance with FINRA rules. We do not agree that compliance will be ensured without implementation of such supervisory procedures. However, we understand FINRA's concern of developing a one-size-fits-all supervisory provision and also understand the burdens that may befall members.

As such, we propose, as PIABA did in its comment letter to Notice 15-19,<sup>9</sup> requiring customer affirmation of the educational communication. A customer affirmation requirement would ease concerns about member compliance in providing evidence of compliance with Rule 2273 without imposing burdensome supervisory procedures on members. Additionally, a customer affirmation requirement would strengthen the purpose of Rule 2273 to protect investors by ensuring customers actually receive the educational communication.

FINRA's efforts to protect investors and ensure they are well informed should be commended. However, the instant Proposal would further protect investors with the modifications suggested herein. We appreciate the opportunity to comment on the Proposal. Thank you for your consideration and we look forward to any further discussion.

Best regards,



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<sup>9</sup> *Id.*