COMMONWEALTH *financial network*®

January 15, 2016

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

RE: File Number SR-FINRA-2015-057

Dear Mr. Errett:

In its Proposed Rule Change to Adopt FINRA Rule 2273 (Disclosure and Reporting Obligations Related to Recruitment Practices) ("Proposed Rule"), FINRA has proposed establishing an obligation for members to deliver an "educational communication" related to member firms' recruitment practices and account transfers. The Proposed Rule would require member firms that associate with a registered representative ("RR") to deliver the educational communication to each former customer of the RR when: 1) the RR individually contacts a former customer to transfer assets, or 2) absent individual contact by the RR, a former customer chooses on their own to transfer assets to the RR at the new member firm. The Proposed Rule would require member firms to deliver the educational communication within specific time of delivery requirements based upon various contact scenarios between the RR and a former customer. The delivery obligations would be in effect for a period of three months following the date the RR begins employment or associates with the member.

Commonwealth Financial Network® ("Commonwealth") is an independent broker/dealer and an SEC-registered investment adviser with home office locations in Waltham, Massachusetts, and San Diego, California, and more than 1,600 RRs who are independent contractors conducting business in all 50 states.

Commonwealth appreciates the opportunity to comment on the Proposed Rule. While FINRA's requirement that firms deliver a uniform, FINRA-created disclosure document represents a substantial improvement over the initial proposal filed with the SEC in March 2014, FINRA's continued insistence on imposing specific delivery obligations on firms based on the "time of first individualized contact" between an RR and a former customer is unreasonable, unenforceable by member firms, unduly burdensome, and unnecessary in light of specific, workable alternatives that were proposed by several previous commenters, including Commonwealth. We urge the Commission to reject the Proposed Rule in its current form and direct FINRA to redraft the proposal's delivery requirements in a manner that may be reasonably implemented and enforced by all member firms, as discussed more fully below.

Purpose and Content of Educational Communication

Commonwealth agrees that customers should understand the potential implications of a decision to transfer assets to a new firm, particularly when a RR will receive material, incentive-based compensation from their new firm that creates a material conflict of interest, such as signing bonuses

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and other cash payments that are intended to provide a financial incentive to encourage RRs to switch firms. Commonwealth supports the delivery of a uniform educational communication to former customers of an RR who choose to transfer assets to the RR's new member firm, *provided that* firms have the reasonable and enforceable means to routinely deliver in a timely manner such a communication to all former customers of the RR who choose to transfer assets to the member firm.

Timing and Means of Delivery of Educational Communication

As written, Proposed Rule 2273(b)(1) requires the member firm to provide the written disclosure to a former customer "at the time of first individualized contact with a former customer by the member, directly or through the representative, regarding the former customer transferring assets to the member." If the first contact is in writing, Proposed Rule 2273(b)(1)(A) would require that the educational communication "accompany the written communication." If the first contact is electronic, members would be permitted "to hyperlink directly to the educational communication." If the first contact is oral, Proposed Rule 2273(b)(1)(B) would require the member or RR "to notify the former customer orally that an educational communication … will be provided not later than three business days from such oral contact or with any other documentation sent to the former customer … whichever is earlier." Finally, if the former customer decides on their own, without any contact by the RR before the customer seeks to transfer assets – that is, absent any contact between the RR and the former customer – to the member firm, Proposed Rule 2273(b)(2) "would mandate that the member deliver the educational communication to the former customer with the account transfer approval documentation." These various delivery obligation triggers are unnecessarily complex and impossible for member firms to reasonably and practically implement.

<u>"Time of First Individualized Contact" Requirement Unworkable</u>

The requirement that the educational communication must be provided by the member "at the time of first individualized contact with a former customer by the member, directly or through the representative, regarding the former customer transferring assets to the member" is fundamentally unworkable. In its July 13, 2015 comment letter ("Comment Letter"), Commonwealth pointed out that member firms will not reasonably know when an RR has actually had "the first contact" with a customer that would trigger the delivery requirement, particularly when that first contact is oral. In SR-FINRA-2015-057 (the "Release"), FINRA states that it "believes that a representative reasonably should know whether an individual had an account assigned to him or her at the representative's prior firm and whether the representative has individually contacted the former customer regarding transferring assets to the recruiting firm." We agree that the RR should know whether or not the RR has initiated contact with a former customer regarding transfer of assets to the RR's new member firm. Our point is that it is the member's obligation, rather than the RR's obligation, to deliver the educational communication within the specific timeframes of the Proposed Rule. It is a factual matter that the member firm will not reasonably know if or when individualized contact occurs or has occurred between an RR and each former customer of the RR at any point in time. Compliance with the Proposed Rule's delivery requirements, as proposed, is not workable in that it is completely dependent upon the proactive and *immediate* reporting by the RR to the member firm with respect to

each and every instance of "time of first individualized contact" between an RR and each former customer, in order for the member firm to comply with the respective delivery requirements of the rule.

In the Release, FINRA contends that "the burdens associated with tracking whether there has been individualized contact with a former customer" are not unreasonable "relative to the value in providing the educational communication to such customers." To be clear, Commonwealth has no objection to providing the educational communication to customers. Our only contention with the Proposed Rule is the impractical and unrealistic implementation of the "time of first individualized contact" delivery trigger requirements and the related tracking requirements. In order for member firms to attempt to comply with the delivery requirements, firms would need to implement policies and procedures that require RRs to record and immediately report to the firm the time and nature of each first individualized contact, including whether such contact was written or oral, with respect to each former customer of the RR. Firms would also need to require RRs to maintain a "time of first individualized contact" log or some similar record, and to communicate the time of first individualized contact and the nature of that contact to firms on a *daily* basis, as it happens, to provide firms with any ability to meet the respective delivery trigger requirements. Firms would further need to implement policies and procedures to review all written (including electronic) correspondence *prior to mailing* in an effort to prevent unreported contact by RRs with former customers, and firms would need to implement other exhaustive policies and procedures determined to be necessary in a desperate attempt to monitor, identify, track and investigate each RR's time of first individualized contact with each former customer. Since the Proposed Rule would require that the educational communication "accompany the written communication", if the first individualized contact is in writing, any efforts taken by the firm to review written communications that have already occurred between a RR and a former customer for purposes of enforcing the delivery requirements will be too late to prevent a rule violation.

If the first contact is oral, the Proposed Rule "would require the member or representative to notify the former customer orally that an educational communication that includes important considerations in deciding whether to transfer assets to the member will be provided not later than three business days after the contact." Commonwealth knows of no reliable method that any firm could reasonably determine when the first oral contact occurs between an RR and a former customer, other than relying on the RR to inform the member firm upon the first instance of such oral contact *immediately* following each such occurrence. Successfully implementing such a requirement is unrealistic and will surely set firms up for failure. In its Comment Letter, Commonwealth noted that without having any reasonable means for firms to determine when the first oral contact occurs between an RR and a former customer, compliance with the "not later than three business days after the contact" delivery requirement cannot be met. FINRA provided no response to this concern in the Release, nor did FINRA propose any reasonable means by which firms could comply with the Proposed Rule's "time of first individualized contact" delivery requirements.

Finally, if the former customer decides, on their own and without any contact by the RR, to transfer assets to the RR, the Proposed Rule "would mandate that the member deliver the educational communication to the former customer with the account transfer approval documentation." Similar to the concerns expressed above, Commonwealth knows of no reasonable means by which it could reasonably determine that the receipt of account transfer paperwork was the result of *no contact*

between the RR and the former customer, without undertaking an exhaustive review of all available facts in each case with respect to the transfer paperwork received by the firm.

Any policies and procedures that firms might attempt to adopt and implement to meet the Proposed Rule's delivery requirements would not only be unreasonably burdensome and inefficient for firms and RRs, but more importantly, they would fail to achieve compliance with the Proposed Rule because in many cases a violation would have already occurred by the time the firm discovered and investigated the nature of the contact – or lack thereof. There will be failures by firms to meet the delivery requirements simply because the firm did not know that individualized contact had occurred between an RR and a former customer, despite all reasonable means that could be undertaken by firms to implement policies and procedures in an attempt to comply with the rule.

In its Comment Letter, Commonwealth raised the impracticality of firms implementing policies and procedures in an attempt to enforce the timing of delivery requirements of the Proposed Rule. Specifically, Commonwealth pointed out that if the first contact is in writing, such communications would likely constitute "correspondence" under FINRA Rule 2210. Correspondence does not require prior approval by a supervising principal, and the supervision and review requirements of FINRA Rules 3110(b), and 3110.06 through 3110.09 do not require review by a supervising principal of each written piece of correspondence. Many firms, including Commonwealth, employ various parameters to review a sample of correspondence sent and received by its RRs. By their nature these reviews occur *after* the communication has already been sent. As a result, firms will have no reasonable means to identify the first written contact between an RR and a customer for purposes of preventing a rule violation.

In the Release FINRA stated that it did "not believe that setting up policies and procedures to supervise a registered person's communications with former customers presents an unreasonable burden to members." FINRA's response only serves to illustrate that it does not understand or appreciate the practical steps firms must take in a reasonable attempt to comply with the "time of first individualized contact" requirement. Commonwealth acknowledged its correspondence supervisory obligations in its Comment Letter, but made the point that such obligations *do not* require the review of each and every communication between an RR and a customer, much less prior to mailing, a point that FINRA also appears to have ignored in the Release. The typical nature of a firm's supervisory review of correspondence is that a sample review of correspondence occurs *after* the correspondence has already been sent. Additionally, firms will not have a list of the RR's former customers that would be necessary for the firm to differentiate between a RR's written communications with a former customer, versus communications with an existing customer or even a non-customer. Requiring firms to implement a surveillance routine of this magnitude for this sole purpose will be profoundly burdensome, impractical, and ultimately ineffective in preventing a rule violation.

For purposes of illustration, there were more than *10 million* outgoing email messages sent from Commonwealth branch offices during the 2015 calendar year. Based upon the number of RRs that joined Commonwealth from a prior member firm in 2015, we can provide a rough estimate that of the 10 million outgoing emails that were sent by RRs in 2015, approximately 1.3 million of them were associated with RRs who joined Commonwealth during the year. Assuming a three month period

applies during which the firm must monitor the outgoing emails of RR's who transfer from another member firm, Commonwealth would need to review approximately 325,000 outgoing emails each year for the specific purpose of determining whether such emails *may* have constituted the first individualized contact with a former customer of the RR. Without substantially looking at *each* outgoing email; conducting the requisite research to determine whether the recipient is, or is not, an existing customer; spending an exhaustive amount of time attempting to determine whether each email reviewed was the RR's "first individualized contact" with a former customer; and contacting the RR to ask relevant questions to determine the status of the recipient as a former customer, it will be impossible to know which of those emails were actually sent by RRs to former customers, or whether the specific email under review was the "first individualized contact" between the RR and the former customer. This same process would also need to be undertaken with respect to the review of all hard-copy (paper) correspondence. The massive time and effort that would need to be spent by firms to conduct a review of this magnitude for this purpose alone is incomprehensible, would result in unimaginable costs, and would ultimately prove to be an effort in futility because the violation would have already occurred at the point in time that the communication was sent.

In many instances the first time member firms will learn even of the *existence* of a RR's former customer, let alone that the first individualized contact with that customer may have already occurred, will be upon the receipt of a signed new account form, transfer form, or similar document from the customer. Further, firms will not know whether the account opening documentation or transfer paperwork received from an RR or a customer is in fact associated with a former customer of an RR without substantial due inquiry into *each* account or transfer document received. In this regard, firms will be obligated to undertake a resource-intensive review of whatever records they may have in their possession to determine the applicability of the Proposed Rule (e.g. Does an account already exist for the customer? Is there a record of the date that the first written or oral contact occurred? Is there a record that the customer has already been provided the educational communication?).

Each time the firm determines that no existing accounts exist for the customer, firms will need to contact the RR to determine whether the customer is a former customer of the RR, and if so, firms will need to determine exactly when and by what means the time of first individualized contact occurred between the RR and the customer. Firms will further need to determine whether or not the educational communication was provided to the customer in compliance with the rule. These processes would need to occur each time the firm receives new account or transfer paperwork from the RR or directly from a customer. FINRA's expectation that firms should undertake such exhaustive processes for each account opened or transfer paperwork received associated with a new RR is unreasonable and unduly burdensome, does not make economic sense, and does not provide meaningful investor protection when compared to the massive resources that firms will need to devote to procedural processes in an attempt to comply with the rule. Most importantly, such investigations and reviews would be undertaken by firms only *after* the time of first individualized contact (or no contact) has occurred, or only *after* the three business day period would have elapsed in the event the first contact was oral, and will therefore be too late to avoid a rule violation in any case.

To illustrate the scope of the burden that would need to be undertaken by firms to review the new account forms and transfer forms received from new RRs or their former customers, there were more

than 48,000 former customer accounts that were transferred to RRs who joined Commonwealth in calendar year 2015. Expecting firms to perform an investigative review of each new account or transfer documentation received from a new RR or former customer of the RR for purposes of determining whether the Proposed Rule applies in each instance is impractical, unreasonable, and a gross and unnecessary waste of valuable and costly resources. Critically, such reviews would do nothing to prevent a rule violation in any case since the time of first individualized contact would likely have already occurred by the time the firm receives the transfer documentation and undertakes the requisite investigative review.

Simply stated, the triggers for the delivery requirements under the Proposed Rule will fail to achieve FINRA's goal of routinely delivering the educational communication to customers *before* the customer agrees to transfer assets to the RR's new firm.

An Alternative to the "Time of First Individualized Contact" Requirement

In comment letters, Commonwealth and several other commenters proposed reasonable alternatives to the "time of first individualized contact" delivery requirements. Commonwealth proposes that firms be required to deliver the educational communication along with, and at the same time that, the initial account transfer documentation is delivered to the customer for the customer's completion and signature. The account transfer documents that would cause an account to be transferred to the recruiting firm are within the reasonable knowledge and control of member firms, and therefore firms will have reasonable means to ensure compliance with our proposed alternative delivery requirement. Importantly, and consistent with the primary goal of the Proposed Rule, the customer will routinely be in possession of the educational document delivered by the firm *before* the customer signs any document authorizing the transfer of the customer's assets. Customers will have the opportunity to review the educational communication they receive from the firm, and they will have the opportunity to ask relevant questions of the RR *prior to* signing any transfer paperwork and agreeing to transfer their assets to the firm.

In the Release addressing this alternative, FINRA stated that it "believes requiring delivery of the communication at the time of first individualized contact is more effective than requiring delivery of the communication at or prior to account opening because customers typically have already made the decision to transfer assets by that point in the process." There are profound failures in FINRA's logic in this regard.

First, for the reasons discussed above, requiring delivery of the communication in a manner that requires a firm to depend upon its RRs to immediately inform the firm that the first individualized contact between the RR and a former customer has occurred is unrealistic and fatally flawed. The implementation of a rule that is dependent upon determining the time of first individualized contact will not be more effective than the alternatives we and other commenters proposed, because firms will not know when the time of first contact actually occurred unless *every* new RR informs the firm about *every* first individualized contact with *every* former customer of the RR *every* time. Such an expectation is not reasonable.

Second, it is a fact that account transfer forms are provided prior to, and in advance of, obtaining any requisite signatures from customers on the transfer forms used to cause the transfer of a customer's assets. No assets have or will be transferred until the client signs an account transfer form. The transfer of assets would be initiated only after the firm has delivered the educational communication to the customer, and only after the customer has had the opportunity to ask questions of the RR or firm prior to making any decision to initiate or agree to the transfer. If FINRA believes that the educational communication will be relevant to a customer who chooses to follow an RR to a new firm, which presumably is a prerequisite for this Proposed Rule, then FINRA must also accept the fact that any customer who receives the educational communication prior to signing any authorization to transfer assets, and who is concerned about the RR's or firm's responses to the customer's questions in relation to the educational communication, will have ample opportunity and ability to withhold their signature from the account transfer form and not transfer their assets to the firm or RR.

Conclusion

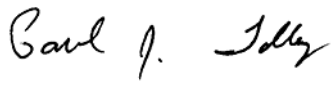
Notwithstanding FINRA's assertion to the contrary, the Proposed Rule change will in fact impose undue operational costs on members to comply with the Proposed Rule's delivery requirements. The Proposed Rule will not nearly be as effective or efficient as the alternatives proposed by Commonwealth and other firms.

Further, there will be impractical and substantial costs and unnecessary burdens incurred by firms in attempting to track whether there has been individualized contact with a former customer of an RR. These costs and burdens are unreasonable relative to the viable, efficient and effective alternatives that we have proposed in this letter. FINRA does not appear to comprehend or appreciate the time, effort, costs and ultimate futility of firms attempting to establish and implement policies and procedures to supervise a RR's communications with former customers for purposes of compliance with the time of first individualized contact trigger requirements, particularly in light of the fact that all such processes would occur only *after* a rule violation has transpired. That is not sound rulemaking and it sets firms up for certain failure.

We therefore urge the Commission to direct FINRA to modify the Proposed Rule in a straightforward manner that requires member firms to deliver the educational communication to the customer along with the requisite account transfer documentation.

Thank you for the opportunity to comment on the Proposed Rule.

Sincerely,
COMMONWEALTH FINANCIAL NETWORK



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