

April 27, 2018

Submitted Electronically to pubcom@finra.org
Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: FINRA Regulatory Notice 18-08, Outside Business Activities, FINRA Requests Comment on Proposed New Rule Governing Outside Business Activities and Private Securities Transactions

Dear Ms. Mitchell:

LPL Financial LLC (“LPL”) appreciates the opportunity to provide these comments in response to the Financial Industry Regulatory Authority’s (“FINRA”) Regulatory Notice 18-08 (“Notice”).¹ LPL commends FINRA for recognizing that the current approach with respect to outside investment advisory activities of a registered representative (“Representative”) presents significant challenges and imposes an unnecessary burden without providing meaningful investor protections over the activities.

As currently proposed, any investment advisory activity conducted for a dually-registered broker-dealer/investment adviser (“Dual Registrant”) or for an investment adviser affiliate of a member firm (“Affiliated Adviser”) would be excluded from proposed FINRA Rule 3290, and any investment advisory activity conducted for a third-party, non-affiliated investment adviser (“Third-Party Adviser” and, together with Dual Registrant and Affiliated Adviser, the “Investment Advisers” and each, an “Investment Adviser”) would be subject to proposed FINRA Rule 3290 as an “investment-related” activity. Rule 3290 would require that a Representative provide prior written notice of such activity to the member firm, and the member would be required to conduct a risk assessment of the investment advisory activity and, based on its assessment, approve or disapprove the activity. Rule 3290 would not, however, impose a general supervisory obligation over the investment advisory activity and would not require the member to record on its books and records transactions resulting from such activities.

LPL fully supports FINRA’s recognition that the industry has significantly evolved over the years since the implementation of FINRA Rules 3270 and 3280, as well as the issuance of related guidance.² LPL commends FINRA’s efforts to clarify the obligations of outside business activities of Representatives and thinks it is an important initiative to ameliorate burdensome regulatory duplication. We believe that Rule 3290 will achieve the goals of providing regulatory clarity while tailoring the guidance to better achieve investor protection by focusing a member

¹ See Regulatory Notice 18-08, *Outside Business Activities, FINRA Requests Comment on Proposed New Rule Governing Outside Business Activities and Private Securities Transactions*, Feb. 26, 2018, available at <http://www.finra.org/industry/notices/18-08>.

² See, e.g., *Notice to Members 94-44* (May 1994); *Notice to Members 96-33* (May 1996).

firm's compliance resources on a Representative's outside broker-dealer activities as opposed to outside investment advisory activities, which are already subject to the investment adviser regulatory regime. We respectfully submit that FINRA should also specifically clarify that the absence of a general supervisory obligation over the investment advisory activities conducted for an Investment Adviser also means that materials that are used by a Representative to solicit investment advisory clients and/or communicate with existing advisory clients and that are not used to promote the sale of any brokerage products or services offered by a member firm are not subject to FINRA Rule 2210.

I. Overview of LPL

LPL is a diversified financial services company and is dually-registered as a broker-dealer and an investment adviser with the U.S. Securities and Exchange Commission (the "SEC"). LPL is also a FINRA member firm. As of December 31, 2017, LPL served approximately \$615.1 billion in advisory and brokerage assets. We provide proprietary technology, comprehensive clearing and compliance services, practice management programs and training, and independent research to more than 15,000 independent financial advisors and over 700 banks and credit unions. LPL has been the nation's largest independent broker-dealer since 1996.³ LPL and its affiliates have more than 3,700 employees. Among its various arrangements with its registered representatives, LPL allows certain individuals to provide brokerage services on LPL's broker-dealer platform while providing advisory services on behalf of an Investment Adviser that is separately registered with the SEC or a state, or on behalf of LPL, which is dually-registered as an investment adviser and a broker-dealer.

II. Application of Rule 3290 with respect to Communications of Dually-Registered Representatives and Rule 2210

LPL believes, based on FINRA's proposed allocation of responsibilities in the Notice, that FINRA intends to exclude materials that are used to solicit investment advisory clients from FINRA Rule 2210 and the supervisory obligations of the broker-dealer. Individuals who are dually-registered Representatives of a member firm and an Investment Adviser prepare materials that are used by the Representative or the Investment Adviser to solicit investment advisory clients and/or communicate with existing advisory clients of the Investment Adviser. These materials do not promote the sale of any brokerage products or services. Instead, the materials promote advisory services and the views and experiences of the Investment Adviser and the Representative in their capacity as an investment adviser representative as reflected in the Investment Adviser's Form ADV. The materials may reference investment products (such as mutual funds or other securities) in connection with the investment advisory services. In determining the applicability of Rule 2210⁴ to these types of materials, LPL believes additional clarification may be appropriate because such materials historically were treated in certain circumstances as materials of the

³ Based on total revenues, Financial Planning magazine June 1996-2015.

⁴ Rule 2210 governs a registered broker-dealer's communications with the public, including third-party materials used by a member or its registered members. The rule sets out certain standards for content, approval, recordkeeping and filing of communications with FINRA.

broker-dealer. We reference the interpretive letter issued by the NASD to Dawn Bond of FSC Securities Corporation (“FSC”) in July 30, 1998.⁵

At the time of the Dawn Bond Letter, wrap programs were offered primarily by sponsors that were Dual Registrants and highlighted the execution of trades as an integral component of the package of services offered under the wrap program. In the intervening years, opportunities for wealth managers to sponsor advisory programs and other arrangements utilizing the brokerage platforms of third-party broker-dealers, as well as Dual Registrants, have expanded significantly. As a consequence, the marketing emphasis for these types of programs or arrangements is focused on investment advisory services and not on the ancillary broker-dealer services, demonstrating that the industry has significantly evolved in a way that necessitates a modification to the current guidance with respect to these materials.

III. Request for Clarification under Rule 3290

LPL requests specific clarification under Rule 3290 that, consistent with the absence of a general supervisory obligation, Rule 2210 similarly does not apply to the materials used by a Representative or the Investment Adviser that promote investment advisory services, even if the materials include a reference to securities or relate to a program or arrangement that may be executed or implemented through a member firm.⁶ We agree with FINRA’s rationale for limiting the supervisory responsibility of a member firm over the investment advisory activities of a Representative since these activities, including the use of investment advisory marketing materials, are already subject to SEC or state rules and regulations applicable to an Investment Adviser.⁷ We also agree with FINRA’s assessment that Rule 3290 would eliminate the disparate treatment that currently exists with respect to Representatives. Subjecting a Representative’s materials to Rule 2210’s content, approval, recordkeeping and filing requirements puts the Representative at a competitive disadvantage to those advisers that are not also registered representatives of a broker-dealer, without a balanced benefit of advancing investor protection since the materials are already subject to SEC or state rules and regulations.

Consistent with the purpose of proposed FINRA Rule 3290, the clarification that marketing materials of a Representative that are used to solicit investment advisory clients and/or communicate with existing advisory clients are not subject to Rule 2210 would achieve the goal of reducing unnecessary and duplicative burdens while strengthening investor protections. The duplicative regulatory review of the marketing materials by a member firm is unnecessary because the materials are already subject to SEC or state requirements that require marketing materials to be fair, balanced and not misleading.

⁵ *Interpretive Letter to Dawn Bond, FSC Securities Corporation*, NASD Interpretive Letter (July 30, 1998) (the “Dawn Bond Letter”).

⁶ For similar views in connection with the Dawn Bond Letter, *see* Comment Letter of Morgan, Lewis & Bockius LLP on behalf of Money Management Institute to Regulatory Notice 14-14 (May 23, 2015).

⁷ *See, e.g.*, Rule 206(4)-1 under the Investment Advisers Act of 1940 and NASAA Model Rule 102(a)(4)-1(m), which apply to “advertisements.”

Ms. Jennifer Piorko Mitchell
April 27, 2018

LPL appreciates the opportunity to comment on the Notice. If you have any questions regarding this letter, please do not hesitate to contact me.

Sincerely,

A handwritten signature in blue ink, reading "Michelle Oroschakoff". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Michelle Oroschakoff
Managing Director, Chief Legal Officer