

Ralph C. Derbyshire
Senior Vice President and
Deputy General Counsel

FMR LLC Legal Department

Mail: 82 Devonshire Street V7A, Boston, MA 02109-3614
Office: 245 Summer Street, Boston, MA 02210
Phone: 617-563-0296 Fax: 508-357-8568
Ralph.Derbyshire@fmr.com



December 27, 2010

Via email to pubcom@finra.org

Marcia E. Asquith
Office of the Corporate Secretary
Financial Industry Regulatory Authority
1735 K Street, N.W.
Washington, D.C. 20006-1506

Re: FINRA Regulatory Notice 10-54: Concept Proposal to Require a Disclosure Statement for Retail Investors at or Before Commencing a Business Relationship

Dear Ms. Asquith:

Fidelity Investments¹ ("Fidelity") appreciates the opportunity to comment on the Financial Industry Regulatory Authority's ("FINRA") Regulatory Notice 10-54 (the "Concept Proposal" or "Proposal").² The Concept Proposal seeks comment on the contours of a rule that would require a member firm, at or prior to commencing a business relationship with a retail customer, to provide a written disclosure statement ("Disclosure Statement") to the customer describing the types of accounts and services it provides, as well as conflicts associated with such services and any limitations on the duties the firm otherwise owes to retail customers.

Fidelity generally agrees with the views expressed by the Securities Industry and Financial Markets Association ("SIFMA") and Investment Company Institute ("ICI") in their comment letters to FINRA. We submit this letter to supplement the SIFMA and ICI letters on specific issues.

Fidelity shares FINRA's conviction that retail customers benefit by understanding the nature and cost of accounts and services provided to them by broker-dealers with whom they do business. We firmly believe that simple, clear disclosure empowers investors to make investing decisions that are in their best interests. Fidelity has long sought to provide investors the tools they need to make informed investment decisions. To this end, we provide financial education to investors across accounts and products, both proprietary and non-proprietary, on our platform.

¹ Fidelity Investments is a diversified financial services company that includes several FINRA registered broker-dealers, including a retail broker-dealer with the nation's largest fund supermarket offering as well as a clearing firm, a limited purpose broker-dealer, principal underwriter and distributor of mutual funds, several registered investment advisers and registered transfer agents. Fidelity is also one of the largest retirement plan service providers, providing investment management, recordkeeping, brokerage, consulting, directed trustee and custodial services to over 18,000 defined contribution plans that cover more than 12 million participants.

² See FINRA Regulatory Notice 10-54 (October 2010) <http://www.finra.org/Industry/Regulation/Notices/2010/P122362>

With this background, we question whether the areas outlined in FINRA's Concept Proposal will increase a retail customer's ability make informed investment decisions. Disclosure is useful when it provides information necessary to make informed decisions in a format and context that is understandable and actionable by the average customer. Fidelity is concerned that the breadth of the information contemplated in the Concept Proposal will not be helpful to investors because it may not be targeted to the actual services that they receive from the member firm. In addition, Fidelity is concerned that the disclosure contemplated by the Concept Proposal will not advance customer understanding because it does not take into consideration additional (and potentially overlapping) disclosure requirements from other regulators. The Concept Proposal has been released at a time when several significant disclosure proposals have just been initiated or are currently under consideration by the Securities and Exchange Commission ("SEC"), the Department of Labor ("DoL") and FINRA itself.³ We should seek to avoid a patchwork of rules for investors who desire a consistent and coordinated investment experience across all of their financial affairs, regardless of the regulatory regime. Thus, we encourage FINRA to consider carefully how any disclosure proposal it advances will work, in the context of related regulatory disclosure proposals, to meet the needs of the average investor.

Our comments on the Concept Proposal are summarized as follows:

- FINRA should await the results of the SEC's current study on the effectiveness of broker, dealer and investment adviser regulation as well as any potential SEC rulemaking on this topic, prior to issuing a Disclosure Statement rule proposal;
- Any Disclosure Statement rule proposal should (i) carefully consider retail customers' need for additional disclosure in light of similar disclosure proposals already being considered by other regulatory organizations; (ii) allow retail customers to receive information that is the most relevant and understandable to them; (iii) permit a Notice and Access delivery model and (iv) clarify that only broker-dealers with direct retail customer relationships have an obligation to deliver a Disclosure Statement; and
- To facilitate compliance and consistency with a Disclosure Statement requirement, FINRA should provide clear, specific rules on the content to be included in a Disclosure Statement.

Each of these comments is discussed in more detail below.

³ See, e.g., Dodd Frank Act, Pub.L. No. 111-213, § 919, regarding SEC's grant of authority to require point-of-sale disclosure; SEC's 2004 and 2005 point-of-sale disclosure proposals; See Pub.L. No. 111-213 at § 913, requiring the SEC to "facilitate the provision of simple and clear disclosures to investors regarding the terms of their relationships with broker-dealers and investment advisers, including any material conflicts of interest."; SEC Release No. 33-9128 (July 21, 2010); FINRA Regulatory Notice 09-34 (June 2009), concerning, among other items, FINRA's proposed changes to broker-dealer disclosure of cash compensation; 29 C.F.R. § 3550, regarding fee disclosures to plan participants.

FINRA Should Await The Results Of The SEC's Current Study.

As referenced in the Concept Proposal and as required by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), the SEC is currently conducting a study on the effectiveness of existing legal or regulatory standards of care for brokers, dealers and investment advisers when providing personalized investment advice and recommendations about securities to retail customers. Once the SEC concludes this study, the SEC may exercise rulemaking authority granted to it under Dodd-Frank to "address the legal standards of care for brokers, dealers and investment advisers" and further to establish a standard of conduct for broker-dealers and investment advisers when providing personalized investment advice about securities to retail customers that would require they act in the best interest of the customer, and to disclose material conflicts of interest to such customers. Section 913 of Dodd-Frank also specifically requires the SEC to "facilitate the provision of simple and clear disclosures to retail customers regarding the terms of their relationships with brokers, dealers and investment advisers, including any material conflicts of interest."

Fidelity believes that any FINRA disclosure proposal must take into account the standard of care that will apply to broker-dealer conduct and the disclosure obligations the SEC will impose, if any, on broker-dealers. Accordingly, we believe that it is premature for FINRA to issue a rule proposal on this topic until the SEC completes its study and potential rulemaking as mandated by Congress. Moreover, awaiting the results of the SEC's study and potential rulemaking would serve to coordinate regulatory efforts on this topic, hopefully resulting in simple, uniform and clear disclosures for retail customers.

FINRA Should Limit Disclosure To Meaningful Information From Broker-Dealers With The Direct Customer Relationship, And Allow A Notice and Access Delivery Model.

(i) Carefully consider retail customers' need for additional disclosure in light of other disclosure proposals currently under consideration.

As contemplated, the possible new rule proposal would require a member firm, at or prior to commencing a business relationship with a retail customer, to provide to the customer a written statement that sets forth, among other items, the types of brokerage accounts and services the firm provides to retail customers and the conflicts associated with such services. As mentioned above, Fidelity is concerned that the Concept Proposal is being released at a time when several significant disclosure proposals are under consideration by the SEC, the DoL, and FINRA itself. We strongly believe that any changes to disclosure that retail customers receive should be viewed in totality across regulatory agencies to help ensure that the sum of such disclosure is helpful to retail customers and appropriate based on the nature of their relationship with the member firm. More disclosure does not always result in a more informed retail customer. We are concerned that adding a proposed Disclosure Statement requirement without coordinating with other disclosure proposals may increase the amount of information provided without improving customer understanding.

(ii) Allow retail customers to receive information that is the most relevant and understandable to them.

There are significant logistical challenges concerning content, timing and method of delivery of a proposed Disclosure Statement that must be considered and addressed. For example, given that multiple business lines within a firm might use the same broker-dealer to deliver their services, providing a single, comprehensive document concerning the broker-dealer's activities may present retail customers with information that is not applicable to them based on their relationship with the member firm. Also, customers might have different levels of interest in the Disclosure Statement and requiring a single, comprehensive document to be delivered at a single point in time may not be the most effective means of providing this information. To help ensure that a proposed Disclosure Statement that retail customers' receive is relevant and understandable, we suggest that FINRA consider the following points.

- Limit required disclosure to specific products and services offered to that customer, or allow disclosure in a tiered format. Many financial service firms use a single broker-dealer to provide services to retail customers through multiple channels. For example, a single broker-dealer might provide products and services through a direct retail channel to plan sponsors and plan participants in a retirement channel, and to retail customers through non-affiliated broker-dealers, advisors, banks and family offices. Providing a single Disclosure Statement concerning the broker-dealer's activities across the diverse channels may present retail customers with information that is simply not applicable to them. Additionally, requiring a single, comprehensive document to be delivered at a single point in time likely will confuse or overwhelm retail customers, defeating the purpose of the document. Fidelity believes that a Disclosure Statement should be required to address only the specific type of products and services provided to the retail customer by that broker-dealer. Alternatively, Fidelity suggests that FINRA permit disclosure in a tiered format, containing specific information relevant to the applicable business unit servicing the customer, and more general disclosures on a firm's other lines of business.
- Limit disclosure to member firm, not affiliates. As mentioned above, including information across business units supported by a single broker-dealer is likely to be voluminous, and given that many member firms are part of larger financial services complexes, including information concerning affiliate involvement in products and services will potentially magnify the amount of information retail customers receive. To help provide retail customers with the information that is most relevant to them, we urge FINRA to limit the scope of a proposed Disclosure Statement document to products and services of a member firm and not include information about affiliated entities of the broker-dealer.

(iii) Permit a Notice and Access delivery model for a proposed Disclosure Statement.

To help ensure that retail customers receive information that is most relevant to them and as a cost-effective means of compliance, Fidelity believes that a proposed Disclosure Statement should be

permitted to be delivered electronically under a Notice and Access model.⁴ Under this model, member firms would be required to post their Disclosure Statement on an internet site and provide customers and prospective customers with a notice of the internet availability of the Disclosure Statement.⁵ At their discretion, a member firm might choose to furnish paper copies of the Disclosure Statement along with the notice, or a customer or prospective customer might request delivery of a copy of the Disclosure Statement from the member firm at no charge. This approach would help ensure that customers and prospective customers would continuously have access to the most current Disclosure Statement available from a member firm. Moreover, electronic disclosure would facilitate the use of hyperlinks for additional detail. Fidelity believes that this web-based presentation would allow users to easily find the information most pertinent to them at any stage in a brokerage relationship, thus allowing for easier comparison of accounts and services across firms.

(iv) Clarify that only broker-dealers with a direct retail customer relationship should have an obligation to deliver a Disclosure Statement.

Under the Concept Proposal, a member firm would be required to provide a Disclosure Statement to retail customers at or before the time the member commences a business relationship with such customer. We believe that the scope of this requirement should be modified to avoid unnecessary and confusing duplication of disclosure to retail customers by clarifying that only broker-dealers with a direct retail customer relationship should have an obligation to deliver a Disclosure Statement. We suggest that FINRA specifically exempt certain categories of broker-dealers based on their business model, such as clearing firms and principal underwriters and distributors of mutual funds, from a Disclosure Statement requirement, as these firms do not have a direct relationship with the end, retail customer. We also urge FINRA to allow broker-dealers that provide brokerage services to retail customers through independent, non-affiliated third-parties such as banks, family offices and investments advisers (both registered and exempt from registration) (collectively "Intermediaries") to permit the broker-dealer to deliver the Disclosure Statement to the Intermediary, to in turn provide to the retail customer, as applicable. In these cases, the Intermediary has a direct relationship with the retail customer, not the broker-dealer. Further, we believe that broker-dealer clients that do not meet the asset threshold for "institutional accounts"⁶ should be exempted from the definition of retail customer under a potential rule proposal, as a Disclosure

⁴ See SEC Release No. 34-56135 (January 1, 2008), (File No. S7-03-07), regarding shareholder choice with respect to proxy materials.

⁵ The Concept Proposal describes the proposed Disclosure Statement as "written statement." In a future rule proposal, FINRA may wish to reconsider this language, as a requirement that the Disclosure Statement appear in writing would submit the requirement to the consumer protection provisions of E-Sign and would potentially take FINRA out of being able to determine alternative means of delivery of a proposed Disclosure Statement, such as via a Notice and Access model.

⁶ Under NASD Rule 3110 (c)(4), the terms "institutional account" means the account of: (A) a bank, savings and loan association, insurance company, or registered investment company; (B) an investment adviser registered either with the Securities and Exchange Commission under Section 203 of the Investment Advisers Act of 1940 or with a state securities commission (or any agency or office performing like functions); or (C) any other entity (whether a natural person, corporation, partnership, trust, or otherwise) with total assets of at least \$50 million.

Marcia E. Asquith
December 27, 2010
Page 6 of 6

Statement would not be particularly helpful or influential in order for that broker-dealer to reach informed investment decisions.

FINRA Should Provide Clear, Specific Rules on Content.

To help facilitate member firm compliance with a proposed Disclosure Statement any future FINRA rule proposal on disclosure of a member firm's activities should include clear and specific rules on what broker-dealers should include in a Disclosure Statement. A rules-based proposal would follow the existing FINRA framework of rules-based regulation and would address uncertainty concerning what information or types of information should be disclosed. To the extent that the proposed Disclosure Statement is intended to be used as a comparison guide for retail customers, disclosure that is subject to specific parameters would also help promote consistency of disclosure across member firms. Similarly, standards for updates to disclosures should be definitive and clear.

* * * * *

We thank FINRA for considering our comments.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Ralph C. Derbyshire". The signature is fluid and cursive, with a prominent flourish at the end.

Ralph C. Derbyshire