FINRA

January 4, 2022

Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Via email to rule-comments@sec.gov

Re: File No. SR-FINRA-2021-024: Proposed Rule Change to Amend FINRA Rule 2231 (Customer Account Statements)

Dear Ms. Countryman:

The Financial Industry Regulatory Authority, Inc. ("FINRA") submits this letter to respond to comments the Securities and Exchange Commission ("SEC" or "Commission") received to the above-referenced rule filing. The proposed rule change adopts, among other things, several supplementary materials, including those to address the transmission of customer account statements to other persons or entities, and the information to be disclosed on customer account statements with respect to externally held assets and the use of summary statements.

The Commission published the proposed rule change for public comment in the Federal Register on October 6, 2021,[1] and received four comment letters on the proposed rule change.[2] The following are FINRA's responses, by topic, to the comments.

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1 See Securities Exchange Act Release No. 93215 (September 30, 2021), 86 FR 55641 (October 6, 2021) (Notice of Filing of File No. SR-FINRA-2021-024).

2 See Letters from Eric Arnold & Clifford Kirsch, Eversheds Sutherland (US) LLP on behalf of the Committee of Annuity Insurers, to Vanessa A. Countryman, Secretary, SEC, dated October 27, 2021 ("CAI"); Emily Micale, Director, Federal Regulatory Affairs, Insured Retirement Institute, to Vanessa A. Countryman, Secretary, SEC, dated October 27, 2021 ("IRI") (supporting "SIFMA's specific comments presenting recommendations, clarifications, and proposals as detailed in its October 27th Letter."); Bernard V. Canepa, Vice President and Assistant General Counsel, Securities Industry and Financial Markets Association, to Vanessa A. Countryman, Secretary, SEC, dated October 27, 2021 ("SIFMA"); and Anonymous to Vanessa A. Countryman, Secretary, SEC, dated October 28, 2021 ("Anonymous").

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General Support for Proposal

SIFMA states that it understands and fully supports FINRA in its effort to protect sensitive customer information from unauthorized persons. CAI notes that it is generally supportive of the proposed changes.

Transmission of Customer Account Statements to Other Persons or Entities (Proposed Rule 2231.02)

In general, proposed Rule 2231.02 allows a firm to transmit customer account statements to other persons or entities where the customer has provided written instructions to do so and the firm continues to send statements directly to the customer either in paper format or electronically. Subject to specified conditions, a firm may cease sending account statements to the customer only where there is a court-appointed fiduciary. Two commenters express concerns pertaining to the proposed exception made to the general continuous statement delivery requirement for court-appointed fiduciaries. One commenter suggests that FINRA consider streamlining Rule 3210 (Accounts At Other Broker-Dealers and Financial Institutions) and questions whether the Consolidated Audit Trail ("CAT") can be leveraged to address operational aspects of sending duplicate account statements to other persons or entities.

Exception to the Continuous Statement Delivery Requirement

SIFMA and IRI express concern that the continuous statement delivery requirement in proposed Supplementary Material .02 would contravene the instructions of a customer or an agent or attorney-in-fact appointed under a valid power of attorney ("POA") to stop account statement delivery to the customer. While the commenters appreciate the exception given to a court-appointed fiduciary to stop account statement delivery to the customer, they state that this exception should be expanded to include the customer's agent or attorney-in-fact appointed under a valid POA. The commenters indicate that not excepting agents or attorneys-in-fact from the continuous statement delivery requirement would undermine their ability to exercise fiduciary responsibilities over the customer's account and would erode their legal authority granted under state law. The commenters state that not allowing an agent or attorney-in-fact to instruct the firm to suppress delivery of account statements to the customer, especially where the customer becomes vulnerable or is in a vulnerable state (e.g., disabled, diminished capacity), could result in an increased risk of violations of the customer's privacy, account compromises, identity theft and fraud. The commenters note that it is very common for the agent or attorney-in-fact not to contact the member firm until the customer becomes incapacitated by which time the customer cannot provide the consent required to establish electronic delivery of account statements. They further highlight that a customer whose sensitive customer information may be regularly accessed by third party caregivers in an assisted living facility or at-home care environment may be vulnerable to fraud. Finally, the commenters indicate that the

provision stands in contrast to FINRA's other efforts to address financial exploitation of seniors and vulnerable adult investors.[3]

FINRA appreciates the concerns the commenters raise about the customers for whom their agent or attorney-in-fact may have a protective reason to instruct a firm to stop the delivery of account statements, particularly for those customers who may still receive their account statements in paper format. FINRA emphasizes that the effort to protect customers, especially those who are or may become vulnerable, is achieved not just through the proposed suppression of account statement delivery in the limited situation provided in proposed Rule 2231.02, but through a variety of approaches under FINRA rules and guidance.[4] As stated in the proposed rule change, the general requirement for a member firm to deliver account statements to a customer is intended to serve investor protection functions by ensuring that the customer is able to monitor and verify the transactions occurring in the customer's account. Moreover, proposed Rule 2231.03 (Use of Electronic Media to Satisfy Delivery Obligations) allows a customer that is concerned about the delivery of account statements in paper format to elect to receive such statements electronically, subject to specified conditions. FINRA believes the ability to review account statements, in paper format or electronically, is a way that customers may discover inaccuracies or discrepancies in their accounts, and potentially, unauthorized transactions or financially exploitative activities that have occurred in their accounts. FINRA believes that this ability must be preserved in all but compelling circumstances. FINRA notes that fraud or financially exploitative or abusive activity may manifest through a variety of ways, including through the misuse of a POA.[5] FINRA maintains that limiting the exception to

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3 See, e.g., FINRA Rules 2090 (Know Your Customer), 2165 (Financial Exploitation of Specified Adults), 4512 (Customer Account Information).

4 See generally Regulatory Notice 20-34 (October 2020) (reporting on the results of FINRA's retrospective rule to assess the effectiveness and efficiency of its rules and administrative processes related to suspected financial exploitation and other circumstances of financial vulnerability for senior investors and describing member firms' procedures and practices in this area); see also Regulatory Notice 07-43 (September 2007) (reminding firms of their obligations relating to senior investors and highlighting industry practices to serve these customers, including those who may exhibit signs of diminished mental capacity); see note 3, supra.

5 Under Rule 2165(a)(4), "financial exploitation" is defined broadly to mean, among other things, "any act or omission by a person, including through the use of a power of attorney, guardianship, or any other authority regarding a Specified Adult to: (i) obtain control, through deception, intimidation or undue influence, over the Specified Adult's money, assets or property; or (ii) convert the Specified Adult's money, assets or property." A "specified adult" means a natural person age 65 and older, or a natural person age 18 and older who the member reasonably believes has

the continuous account statement delivery requirement to a court-appointed fiduciary achieves the appropriate balance between the important investor protection functions in ensuring that a customer is able to monitor and verify transactions occurring in the account and limiting a firm's ability to deliver account statements to persons or entities other than the customer only in the kind of exigent circumstances that would require the existence of a court-appointed fiduciary; such court process affords a process for an objective determination and review.

Delivery of Duplicate Account Statements

Under proposed Rule 2231.02(c), a member firm may provide, without obtaining prior written instructions from its associated person, duplicate account statements with respect to such associated person's accounts that were subject to Rule 3210, Rule 2070 (Transactions Involving FINRA Employees) or other similar applicable federal securities laws, rules, and regulations in accordance with the requirements of such rule.

Anonymous highlights Rule 3210, stating that FINRA should consider streamlining that rule in connection with the proposed changes to Rule 2231 and consider whether the CAT can be leveraged to eliminate the need for firms to send duplicate statements. Anonymous indicates that the operational challenges in obtaining duplicate statements for their associated persons are burdensome, noting that some brokerage firms will not deliver statements electronically, or will not "backfill statements that were not received whether because of their error or otherwise." With respect to potentially leveraging the CAT, Anonymous contends that in theory, if CAT is able to capture the ultimate party behind each trade, firms should be able to use it to surveil the activity of registered personnel with it, which would mostly eliminate the duplicate statement process, adding that reviewing paper statements is an outdated process that should be replaced with new available tools.

FINRA notes that Rule 3210 does not prescribe any particular methodology as to transmission of the specified information. The rule is intended to permit members all reasonable flexibility as to the manner of obtaining and reviewing the information, whether by hard copy or electronic means.[6] In general, the CAT is intended to enhance regulatory oversight of securities markets by facilitating cross-market oversight and analysis of trading activity and is governed by Rule 613 under the Securities Exchange Act of 1934.[7]

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a mental or physical impairment that renders the individual unable to protect his or her own interests. See Rule 2165(a)(1).

6 See generally Regulatory Notice 16-22 (June 2016).

7 17 CFR 242.613. See also Securities Exchange Act Release No. 67457 (July 18, 2012), 77 FR 45722 (August 1, 2012).

While FINRA appreciates Anonymous' comments, FINRA considers them to be outside the scope of the proposed rule change.

Assets Externally Held (Proposed Rule 2231.06)

Proposed Rule 2231.06 incorporates, without substantive changes, NYSE Rule Interpretation 409T(a)/04. Under the proposed supplementary material, where the account statement includes assets that the member firm does not carry on behalf of a customer and that are not included on the member firm's books and records, such assets must be clearly and distinguishably separated on the statement. In addition, in such cases, the statement must: (1) clearly indicate that such externally held assets are included on the statement solely as a courtesy to the customer; (2) disclose that information, including valuation, for such externally held assets is derived from the customer or other external source for which the member firm is not responsible; and (3) identify that such externally held assets may not be covered by SIPC.

CAI expresses general support for the proposed rule change, and does not oppose the specific terms of proposed Rule 2231.06. Instead, CAI requests clarification and confirmation on whether a "Registered Annuity Contract" would be deemed "externally held" under the proposed supplementary material when such contract is held by the issuing insurance company.

To the extent any particular scenario raises questions regarding the application of the rule, FINRA expects to address such issues with members through its interpretative process on a case-by-case basis or through future rulemaking, as appropriate. FINRA notes, however, the underlying NYSE rule filing adopting NYSE Rule Interpretation 409T(a) that included the disclosures that must be made for externally held assets explained that "where the account statement includes assets not within the possession or control of the member organization, such assets must be clearly separated on the statement. In addition, the statement must clearly indicate that such externally held assets: are not within the possession or control of the member organization and are included on the statement solely as a service to the customer; and are not covered by SIPC."[8] The subsequent NYSE guidance reiterated that explanation and added that the statement must indicate that the information "is derived from the customer or other external source for which the member organization is not responsible."[9]

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8 See Securities Exchange Act Release No. 39190 (October 2, 1997), 62 FR 52801 (October 9, 1997) (Order Approving File No. SR-NYSE-96-27) ("NYSE Rule Interpretation 409T(a) Adopting Release").

9 See NYSE Information Memo 97-56 (December 1997).

The proposed rule change is not intended to change the substantive terms or existing guidance pertaining to the NYSE's interpretation for the required disclosures on account statements for externally held assets.

Use of Summary Statements (Proposed Rule 2231.08)

Proposed Rule 2231.08 incorporates, without substantive changes, NYSE Rule Interpretation 409T(a)/06 (Use of Summary Statement), which sets forth several parameters governing the use of summary statements. One of these parameters is that a member firm is required to:

> (d) Ensure that there is a written agreement between the clearing firm and each other person jointly providing its respective customer account statements attesting that each such person has developed procedures and controls for reviewing and testing the accuracy of the information included on its respective statements[.]

In the proposed rule change, FINRA described proposed Rule 2231.08(d) in an abbreviated fashion as requiring a member firm to ensure that there is a written agreement between the parties jointly formulating or distributing the combined statements with the summary attesting that each entity has developed procedures and controls for testing the accuracy of its own information included on the statements, and that the summary statement complies with Rule 2231.

In its comment letter, SIFMA states that a "wording difference" between the way the proposed rule change describes proposed Rule 2231.08(d) and the rule text itself creates an "odd requirement that does not make sense in some situations."[10] SIFMA contends that proposed Rule 2231.08(d) "would require a tri-party agreement between the clearing firm, the broker-dealer, *and* a registered investment advisory affiliate[.]" SIFMA requests that FINRA "clarify in the final rule that written agreements can be required between affiliates for jointly prepared statements, but not between the clearing firm and an affiliate that is not a broker-dealer."

FINRA notes that subject to some technical changes, proposed Rule 2231.08(d) is not materially different from the language currently appearing in paragraph 4 of NYSE Rule Interpretation 409T(a)/06.[11] FINRA's description of proposed Rule 2231.08(d),

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10 IRI expresses its support for SIFMA's comments. See note 2, supra.

11 Paragraph 4 of NYSE Rule Interpretation 409T(a)/06 states: "That there be a written agreement between the carrying organization and each other person jointly formulating and/or distributing its respective customer account statements attesting

derived from the predecessor descriptions of this provision found in the adopting NYSE rule filing and subsequent guidance, does not change the requirement in proposed Rule 2231.08(d).[12]

As stated in the proposed rule change, FINRA is not intending to change the requirements under proposed Rule 2231.08(d). Therefore, similar to NYSE Rule Interpretation 409T(a)/06, under proposed Rule 2231.08(d), a clearing firm must be a party to a written agreement with each other person jointly providing its respective customer account statements. Based on such earlier guidance, if, for example, there is an arrangement among a clearing firm, a bank, and a futures commission merchant to "jointly provide their respective customer account statements together with a statement summarizing or combining assets held in different accounts,"[13] then proposed Rule 2231.08(d) would require the clearing firm to ensure that the bank and the futures commission merchant each attests in a written agreement with the clearing firm that each of them has developed "procedures and controls for reviewing and testing the accuracy of the information included on [their] respective statements[.]"[14] This requirement may be

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that each such person has developed procedures/controls for reviewing and testing the accuracy of the information included on its respective statements."

12 The underlying NYSE rule filing adopting the interpretation for the use of a summary statements explained that "there must be a written agreement between the parties jointly distributing the statements that each has developed procedures and controls for testing the accuracy of its own information on the summary statement." See NYSE Rule Interpretation 409T(a) Adopting Release, supra note 8. This description also appeared in subsequent NYSE guidance, stating in part, that "there must be a written agreement between the parties that are jointly distributing the combined statements with the summary, that each entity has developed procedures/controls for testing the accuracy of its own information included on the customer statement." See NYSE Information Memo 97-56 (December 1997).

13 See proposed Rule 2231.08.

14 It appears that SIFMA's reference to an "odd requirement" may be with respect to a situation under which a carrying firm may, in accordance with Rule 4311(c)(2), "authorize an introducing firm to prepare and/or transmit statements of account to customers on the carrying firm's behalf with the prior written approval of FINRA." If FINRA were to approve a carrying firm's request to authorize an introducing firm to prepare and/or transmit customer account statements, such preparation and transmission would be *on behalf of the carrying firm*. Accordingly, an agreement with the introducing firm would not satisfy proposed Rule 2231.08(d) unless the carrying firm was also a party to that agreement and a beneficiary of the

satisfied by two bilateral agreements (one between the clearing firm and the bank, and a separate agreement between the clearing firm and the futures commission merchant) or one triparty agreement (among the clearing firm, the bank and the futures commission merchant).[15]

Moreover, FINRA notes that in the underlying NYSE rule filing adopting then NYSE Rule Interpretation 409(a), the NYSE stated that the interpretation for customer account statements, including for the use of summary statements, was directed only to those persons or entities that themselves were subject to NYSE jurisdiction, expressing the belief that the interpretation "will apply generically to the practice of formulating and disseminating summary statements together with combined statements of various entities, regardless of whether these entities are members. (citation omitted).[16] Further, the NYSE stated that it was "not seeking to directly impose regulation on third parties; however, to the extent that member organizations entered into contractual arrangements with third parties, these relationships would necessarily be affected by [NYSE] regulation. (citation omitted)."[17] Finally, NYSE indicated that the interpretation "does not seek to address the responsibility for the preparation of statements or accuracy of information related to assets not held at the broker-dealer. (citation omitted). Thus, concerning customer information provided by non-member entities, the responsibility of ensuring the accuracy and transmission of their information lies solely with them."[18]

FINRA emphasizes that the proposed rule change does not substantively change the terms of the NYSE rule interpretation nor does FINRA intend to attribute an interpretation of proposed Rule 2231.08(d) that differs from existing guidance. However, as a general matter, once this proposed rule change becomes effective, FINRA will continue to review the substance of the rule and as appropriate, propose substantive changes to some or all aspects of the rule as part of future rulemakings.

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attestation(s) from the other person(s) jointly providing its customer account statements as part of the summary statement.

15 If, as in the example, the persons jointly providing customer account statements as part of the summary statement include persons that are not broker-dealers (e.g., a bank, a futures commission merchant) or affiliates of the broker-dealer, proposed Rule 2231.08(d) (again, adopting NYSE Interpretation 409T(a)/06 with technical changes) may require the clearing firm to ensure it has a written agreement with persons that are not broker-dealers or affiliates of the broker-dealer.

16 See NYSE Rule Interpretation 409T(a) Adopting Release, supra note 8.

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Implementation of Proposed Amendments

Subject to SEC approval of the proposed rule change, SIFMA and IRI request that FINRA consider setting the effective date of the proposed amendments to Rule 2231 to a date not earlier than June 1, 2023. The commenters state that firms have already budgeted their technological and operational expenses for year 2022 to account for the ongoing technological enhancements for the remote work environment and the implementation of other significant rules such as residual Regulation Best Interest elements, the Department of Labor's Prohibited Transaction Exemption 2020-02, and the SEC's amendments to Rule 206(4)–1, among others.

FINRA appreciates these considerations and intends to give firms sufficient time to comply with Rule 2231, as amended. As stated in the proposed rule change, the effective date will be no later than 365 days following the publication of a Regulatory Notice announcing SEC approval of the proposed rule change.

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FINRA believes that the foregoing responds to the material issues raised by the commenters on the rule filing and has determined not to amend the proposed rule change in response to comments. If you have any questions, please contact me at (202) 728-8471, email: sarah.kwak@finra.org.

Best regards,

/s/ Sarah Kwak

Sarah Kwak
Associate General Counsel
FINRA Office of General Counsel