Financial Industry Regulatory Authority

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January 13, 2011

Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: File No. SR-FINRA-2010-052 – Response to Comments

Dear Ms. Murphy:

On October 20, 2010, FINRA filed with the Securities and Exchange Commission ("SEC" or "Commission") SR-FINRA-2010-052,[1] a proposed rule change to adopt the consolidated FINRA books and records rules as detailed in the Proposing Release. The proposed rule change was published for comment in the Federal Register on November 1, 2010. The Commission received three comment letters in response to the proposed rule change.[2] This letter responds to those comments.

A. Requirements When Using Predispute Arbitration Agreements for Customer Accounts (Proposed FINRA Rule 2268)

One commenter requests that FINRA confirm that the proposed disclosure language will only apply to predispute arbitration agreements entered into after the effective date of FINRA Rule 2268.[3] In response, FINRA confirms that the

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1 See Securities Exchange Act Release No. 63181 (October 26, 2010), 75 FR 67155 (November 1, 2010) (Notice of Filing of SR-FINRA-2010-052) ("Proposing Release"). The comment period closed on November 22, 2010.

2 See Letter from Holly H. Smith and Susan S. Krawczyk, Sutherland Asbill & Brennan LLP, for the Committee of Annuity Insurers, to Elizabeth M. Murphy, Secretary, SEC, dated November 22, 2010 ("CAI"); Letter from William A. Jacobson, Associate Clinical Professor of Law and Director, the Cornell Securities Law Clinic, Cornell University Law School, to Elizabeth M. Murphy, Secretary, SEC, dated November 22, 2010 ("Cornell"); and Letter from Melissa MacGregor, Managing Director and Associate General Counsel, the Securities Industry and Financial Markets Association, to Elizabeth M. Murphy, Secretary, SEC, dated November 23, 2010 ("SIFMA"). (Available at http://www.sec.gov/comments/sr-finra-2010-052/finra2010052.shtml.)

3 CAI.

requirement will apply prospectively to predispute arbitration agreements entered into on or after the effective date of FINRA Rule 2268.

B. General Requirements (Proposed FINRA Rule 4511)

The proposed rule requires members to preserve for a period of at least six years those FINRA books and records for which there is no specified retention period under the FINRA rules or applicable SEA rules. One commenter argues that this requirement is too vague.[4] Another commenter requests that the proposed rule provide a start date for the six-year retention period, such as six years after the closing of an account.[5] The proposed six-year retention period is a default retention period for those FINRA rules that require members to preserve certain books and records, but do not specify a retention period, and where there is no retention period specified under the SEA rules. In the absence of contrary guidance in a rule, if the books and records pertain to an account, the retention period is for six years after the date the account is closed; otherwise, the retention period is for six years after such books and records are made.

C. Customer Account Information (Proposed FINRA Rule 4512)

One commenter requests that FINRA provide guidance regarding the use of "electronic" signatures to satisfy any FINRA signature requirements relating to a member's books and records.[6] This comment is outside the scope of the proposed rule change. As discussed in the Proposing Release, the signature and approval requirements of FINRA Rules 4512(a)(1)(D) and 4515, respectively, may be satisfied through the use of "electronic" means consistent with existing FINRA guidance.[7] For purposes of compliance with FINRA Rules 4512(a)(1)(D) and 4515, FINRA will consider a valid electronic signature to be any electronic mark that clearly identifies the signatory and is otherwise in compliance with the Electronic Signatures in Global and National Commerce Act ("E-Sign Act"), the guidance issued by the Commission relating to the E-Sign Act,[8] and the guidance provided by FINRA through its

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7 See, e.g., Letter to Jeffrey W. Kilduff, O'Melveny & Myers, LLP, from Nancy Libin, NASD, dated July 5, 2001. (Available at: http://www.finra.org/Industry/Regulation/Guidance/InterpretiveLetters/P005336.)

8 See Securities Exchange Act Release No. 44238 (May 1, 2001), 66 FR 22916 (May 7, 2001) (Commission Guidance to Broker-Dealers on the Use of Electronic Storage Media Under the Electronic Signatures in Global and National Commerce Act of 2000 with Respect to Rule 17a-4(f)).

interpretive letters,[9] which address electronic approval processes generally. Additionally, FINRA does not believe that the use of electronic signatures is appropriate to satisfy all FINRA signature requirements. For instance, as stated in the Proposing Release, FINRA Rule 4512(a)(3) requires members to obtain a "manual" dated signature of each named, natural person authorized to exercise discretion in a discretionary account.

The same commenter requests clarification regarding the scope of FINRA Rule 4512(a)(3).[10] More specifically, the commenter is concerned that the provision could be interpreted to require members to obtain manual dated signatures of all authorized agents, not just associated persons, who exercise "discretion" in a client's account. By its terms, the provision applies to "discretionary accounts." For purposes of FINRA Rule 4512(a)(3), the term "discretionary accounts" is not limited to accounts in which associated persons are authorized to exercise discretion. Rather, it includes any account that is considered a "discretionary account." Further, FINRA will address the requirements applicable to other types of accounts in which a person is authorized by a customer to act on the customer's behalf in the context of the proposed changes to NASD Rule 2510 (Discretionary Accounts).[11]

The commenter also argues that FINRA Rule 4512(a)(1)(B) should be amended to require members to maintain a customer's date of birth information instead of information regarding whether the customer is of legal age.[12] FINRA disagrees. Members are required to maintain a customer's date of birth information pursuant to other regulatory requirements, such as the Treasury rule pertaining to customer identification programs[13] and SEA Rule 17a-3(a)(17),[14] while FINRA Rule 4512(a)(1)(B) requires members to maintain information establishing that the customer is of legal age to engage in transactions with the member.

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9 See supra note 7.

10 SIFMA.

11 See Regulatory Notice 09-63 (November 2009) (Proposed Consolidated FINRA Rule Governing Discretionary Accounts and Transactions).

12 SIFMA.

13 See 31 C.F.R. § 103.122 (Customer Identification Programs for Broker-Dealers).

14 See also FINRA Rule 2111 (Suitability), which the SEC has approved, but has not yet become effective (a customer's investment profile includes, but is not limited to, the customer's age). Securities Exchange Act Release No. 63325 (November 17, 2010), 75 FR 71479 (November 23, 2010) (Order Approving Proposed Rule Change; File No. SR-FINRA-2010-039).

FINRA Rule 4512(a)(1)(C) requires members to maintain the name of the associated person, if any, responsible for the account. Moreover, where a member designates multiple individuals as being responsible for an account, the member is required to maintain each of their names and a record indicating the scope of their responsibilities with respect to the account. One commenter requests that the registered representative signature requirement in current NASD Rule 3110(c)(1)(C) be retained.[15] The commenter argues that the signature is evidence of the identity of the representative who introduced the account. As stated in the Proposing Release, for regulatory purposes, FINRA believes that it is sufficient for a member to maintain the name of the associated person (if any) responsible for the account together with the signature of the partner, officer or manager denoting that the account has been accepted in accordance with the member's policies and procedures for acceptance of accounts. In this regard, the signature of the partner, officer or manager also serves to validate the identity of the named associated person. One commenter asks that FINRA clarify that commission sharing on a customer account or sharing responsibility for a specific customer transaction does not necessarily mean that the individual engaged in such activities is "responsible" for the account.[16] For purposes of the proposed rule, FINRA believes that it is the member's obligation to determine whether a particular individual is "responsible" for the account based on the scope of the individual's activities with respect to that account.

With respect to an account that was opened pursuant to a prior FINRA rule, FINRA Rule 4512(b) requires members to update the information for such an account in compliance with FINRA Rule 4512 whenever they update the account information in the course of their routine and customary business, or as required by other applicable laws or rules. One commenter believes that this requirement is too burdensome.[17] Specifically, the commenter suggests that members should not be required to obtain the name and address of a customer's employer and the customer's tax identification or Social Security number for accounts that were opened prior to January 1, 1991 (the cut-off date specified in current NASD Rule 3110(c)). As discussed in the Proposing Release, FINRA believes that to promote greater consistency and uniformity of account record information, it is necessary that members update the account information in the manner specified in the proposed rule. Regarding the requirement to obtain the name and address of a customer's employer and the customer's tax identification or Social Security number for accounts opened prior to January 1, 1991, FINRA believes that the iterative burden is necessitated by prudent public policy in obtaining a consistency of information pertaining to customer accounts. FINRA Rule 4512(a)(2) requires members to make "reasonable efforts" to obtain such information. In addition, pursuant to other regulatory requirements,

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members were required to make reasonable efforts to obtain a customer's tax identification or Social Security number for accounts opened after June 30, 1972.[18]

D. Records of Written Customer Complaints (Proposed FINRA Rule 4513)

Two commenters recommend maintaining the current three-year retention period for customer complaint records, rather than the proposed four-year retention period.[19] One of these commenters also suggests that use of the term "written customer complaints" in the proposed rule does not make it sufficiently clear that the proposed rule applies only to written complaints and recommends that the definition of a "customer complaint" expressly include only a "written grievance."[20] As stated in the Proposing Release, in response to similar comments, the proposed four-year retention period accommodates FINRA's four-year routine examination cycle for certain members and serves a clear regulatory purpose. Moreover, FINRA continues to believe that the proposed rule makes it sufficiently clear that it applies only to "written" customer complaints, and not oral complaints.

E. Allocations of Orders Made by Investment Advisers (Proposed FINRA Rule 4515.01)

FINRA Rule 4515.01 clarifies that members may not knowingly facilitate the allocation of orders from investment advisers in a manner other than in compliance with both (i) the investment adviser's intent at the time of trade execution to allocate shares on a percentage basis to the participating accounts and (ii) the investment adviser's fiduciary duty with respect to allocations for such participating accounts, including but not limited to allocations based on the performance of a transaction between the time of execution and the time of allocation. One commenter is concerned with the scope of this requirement.[21] The commenter asks whether this provision requires broker-dealers to make a legal determination regarding an adviser's fiduciary duty. The "knowingly facilitate" standard means that a broker-dealer may not act recklessly or with knowledge in facilitating an investment adviser's breach of its fiduciary duty to its clients, and compliance with that standard turns on the facts and circumstances.

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18 See 31 C.F.R. § 103.35 (Additional Records to be Made and Retained by Brokers or Dealers in Securities) (which applied to accounts opened between June 30, 1972 and October 1, 2003).

19 SIFMA and CAI.

20 SIFMA.

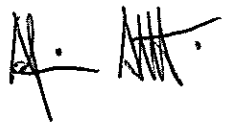
21 CAI.

F. Other Comment

One commenter requests that FINRA expressly state that the proposed requirements apply only to books and records generated after the effective date of the proposed rule change.[22] The requirements will apply prospectively on or after the effective date of the proposed rule change, unless stated otherwise. For instance, as noted above, for accounts opened pursuant to prior FINRA rules, members will be required to update the information for such accounts in compliance with FINRA Rule 4512 whenever they update the account information in the course of their routine and customary business, or as required by other applicable laws or rules.

FINRA believes that the foregoing, along with the discussion in the Proposing Release, fully responds to the issues raised by the commenters. If you have any questions, please contact me at 202-728-8902.

Very truly yours,



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