

July 13, 2015

**VIA ELECTRONIC MAIL**

Marcia E. Asquith  
Office of the Corporate Secretary  
FINRA  
1735 K Street  
Washington, DC 20006

**Re: FINRA Regulatory Notice 15-19  
Recruitment Practices: FINRA Requests Comment on a Proposed Rule to  
Require Delivery of an Educational Communication to Customers of a  
Transferring Representative**

Dear Ms. Asquith:

We are submitting this letter on behalf of our client, the Committee of Annuity Insurers (the "Committee"),<sup>1</sup> in response to Regulatory Notice 15-19, *Recruitment Practices: FINRA Requests Comment on a Proposed Rule to Require Delivery of an Educational Communication to Customers of a Transferring Representative* (the "Notice," or "RN 15-19") issued by the Financial Industry Regulatory Authority, Inc. ("FINRA") on May 27, 2015.<sup>2</sup> The Notice requests comments on a proposed rule change by FINRA to adopt FINRA Rule 2272 (the "Proposed Rule"), which would require a member firm that hires or associates with a registered representative to provide an educational communication to his or her former customers who transfer assets to the registered representative's new firm.

**COMMITTEE COMMENTS**

The Committee appreciates the opportunity to comment on the Proposed Rule. By way of background, the Committee submitted a comment letter to FINRA in response to Regulatory

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<sup>1</sup> The Committee was formed in 1982 to address legislative and regulatory issues relevant to the annuity industry and to participate in the development of securities, banking, and tax policies regarding annuities. For three decades, the Committee has played a prominent role in shaping government and regulatory policies with respect to annuities, working with and advocating before the SEC, CFTC, FINRA, IRS, Treasury, Department of Labor, as well as the NAIC and relevant Congressional committees. Today the Committee is a coalition of many of the largest and most prominent issuers of annuity contracts. The Committee's member companies represent more than 80% of the annuity business in the United States. A list of the Committee's member companies is attached as Appendix A.

<sup>2</sup> RN 15-19 is available at [http://www.finra.org/sites/default/files/notice\\_doc\\_file\\_ref/Regulatory\\_Notice\\_15-19.pdf](http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory_Notice_15-19.pdf)

Notice 13-02 which initially proposed the recruitment practices rules in 2013,<sup>3</sup> and also submitted a comment letter in response to FINRA's filing of an amendment of such rules with the SEC in 2014 under File No. SR-FINRA-2014-010.<sup>4</sup> The Committee believes that, since the initial rule proposal announced under Regulatory Notice 13-02, the Proposed Rule has made significant progress in reducing certain of the operational burdens while at the same time providing simpler, easier to understand disclosure for investors. For example, the Committee strongly supports the removal of the obligations under the earlier rule proposals that required reporting information related to recruited registered representatives to FINRA. In addition, the Committee also strongly supports the elimination of the detailed and individualized compensation disclosures that were required under previous iterations of the rule.

While the Committee supports a number of the changes under the Proposed Rule, the Committee believes a number of burdensome operational issues remain and there are other areas where additional clarity could be provided. The Committee is also concerned that the timing requirements related to the delivery of the educational communication are needlessly complex and will be difficult to monitor and supervise. In addition, the Committee believes that in certain circumstances the educational communication may confuse investors, and in such cases the rule should allow member firms to refrain from delivering the document altogether.

#### **PROVIDING THE EDUCATIONAL COMMUNICATION IN CONNECTION WITH ORAL CONTACT WITH FORMER CUSTOMERS**

Under Proposed Rule 2272(b)(1)(B), if the first individualized contact with a former customer during which the registered representative or member firm attempts to induce such customer to transfer assets to the new firm is oral, rather than in writing, the firm or registered person "must 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." The Committee has several concerns related to the process associated with the oral disclosures and follow-up by firms with the written educational communication. More specifically, our concerns relate to the difficulties of documenting compliance regarding the delivery of the oral disclosures; the limited time provided to a member firm to send the required educational communication; and the lack of clarity as to whether the timing requirement applies to member transmission or rather customer receipt of the written disclosure. We discuss each of these below.

**Documenting Compliance Regarding the Delivery of the Oral Disclosure.** The initial oral contact between the registered representative and the former customer could take place in a number of ways, including formal meetings, telephone calls initiated by the registered representative or the former customer, or chance meetings in the local community or elsewhere. As a practical matter, neither the member firm nor the registered representative has control over the circumstances related to the initial contact. As a result, there are a number of different

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<sup>3</sup> A copy of the Committee's comment letter is available here:

<http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/noticcomments/p220108.pdf>.

<sup>4</sup> A copy of the Committee's comment letter from 2014 is available here: <http://www.sec.gov/comments/sr-finra-2014-010/finra2014010-29.pdf>.

factors that impact the manner in which a firm will be able to monitor and surveil its registered representatives with respect to the initial oral inducement. The Committee urges FINRA to recognize the varied manner in which these initial oral contacts may take place and to acknowledge that a member firm will need to rely almost solely on training and/or certifications related to the delivery of the oral disclosures to former customers and defer to member firm procedures that are reasonably designed to ensure that recruited registered representatives understand their obligations with respect to providing the appropriate information at the time of first oral contact related to transferring assets to the new firm.

**Timing of Sending the Communication After the Initial Oral Contact.** In addition, given the different scenarios under which the initial oral contact may occur, and the different ways in which firms will build out the delivery of the written educational communication to the former customer, the Committee believes that three business days is not a sufficient amount of time to send the educational communication after such initial oral contact. The Committee recommends that the Proposed Rule be revised to extend the amount of time for sending the educational communication after the initial oral contact from three business days to at least ten business days. The Committee notes that the timing requirement for the delivery of such disclosure under the 2014 rule filing FINRA made with the SEC in March, 2014 (SR-FINRA-2014-10) included a ten business day timeframe.<sup>5</sup>

**Timing Requirement Should Focus on Member Transmission Not Receipt by Customer.** The Committee notes that the Proposed Rule language is somewhat unclear with respect to when the written disclosure is required in the context of an initial oral contact. Under Proposed Rule 2272(b)(1)(B), the initial reference indicates that the educational communication “will be provided no later than three business days” after the contact while the second reference indicates that it “must be sent within three business days from such contact.” The Committee is concerned that the “will be provided” language could be read as indicating that the former customer will have possession of the educational communication within three business days. Therefore, if FINRA determines to maintain the general structure of the Proposed Rule with respect to the timing of the delivery of the educational communication, the Committee recommends that the language be revised to clearly indicate that the obligation under the Proposed Rule focuses on when the member firm sends the educational communication, not when the former customer receives it.

#### **THE TIMING REQUIREMENTS FOR DELIVERY OF THE EDUCATIONAL COMMUNICATION SHOULD BE SIMPLIFIED**

As an alternative to extending the delivery obligation to ten business days after the initial oral contact, the Committee recommends that the Proposed Rule adopt a different timing standard with respect to the delivery of the educational communication, regardless of whether the customers are initially contacted orally, in writing, or not at all. The Committee believes that a clearer standard would be to simply require that the educational communication be provided to the former customer prior to transferring the assets to the new firm. More specifically, the

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<sup>5</sup> See Proposed FINRA Rule 2243(b)(1).

Committee would be in favor of using the delivery of the customer's account transfer documentation as a more simplified triggering event rather than the point of first oral or written inducement.

#### **SUPERVISORY PROCEDURES RELATED TO THE DELIVERY OF THE EDUCATIONAL COMMUNICATION**

RN 15-19 indicates that FINRA expects firms to implement supervisory procedures "reasonably designed to achieve compliance with the delivery requirements through training, spot checks, certifications or other measures." The Committee recommends that either the Proposed Rule, or a Supplementary Material, make clear that appropriate procedures to implement the delivery of the educational communication would be deemed to exist if a firm were to include only training, spot checks and certification. The Committee is very concerned that, over time and through the course of the examination process, the only procedures deemed satisfactory will become producing copies of a signed and dated copy of the educational communication. The Committee is concerned that firms will feel compelled to create a process of individual customer acknowledgment of receipt of the educational communication to document compliance with the Proposed Rule unless there is an explicit indication that such documentation is not required.

#### **STAND-ALONE EDUCATIONAL COMMUNICATION**

The Proposed Rule calls for the educational communication to be a stand-alone document. The Committee believes that firms may want to integrate the educational communication into the account transfer process, and therefore recommends that the Proposed Rule or a Supplementary Material indicate that the educational document may be integrated into a firm's individualized account transfer process provided that (1) the timing requirements of the Proposed Rule are satisfied, and (2) the substantive content of the educational communication drafted by FINRA is substantially similar to the content included in the firm's documentation for the account transfer process.

#### **APPLICABILITY OF THE PROPOSED RULE'S REQUIREMENTS WHERE TRANSFERS OCCUR "ABSENT CONTACT"**

Under RN 15-19, there is a brief description of the treatment of a former customer who transfers to the recruiting firm "absent contact (e.g., where a customer decides to transfer assets after learning from a general announcement or other sources that his or her representative has changed firms)." The Committee believes that the Proposed Rule or a Supplementary Material should include an explicit reference to the concept that a former customer may be viewed as determining to transfer to the recruiting firm without individualized contact, and should include examples of those situations such as where the customer learns through a general announcement, word-of-mouth, or some other means.

**EXEMPTION FROM DELIVERY OBLIGATION UNDER CERTAIN CIRCUMSTANCES**

The premise behind the educational communication is to “highlight the potential implications of transferring assets to the recruiting firm and suggest questions a customer may want to ask to make an informed decision.” In certain situations, it is possible that the registered representative’s move to the new firm will not trigger any of the concerns that are discussed in the educational communication. For example, a customer may be solely a customer of the firm as a result of a variable annuity purchase made through the transferring registered representative, and such representative may not be receiving any recruiting-based compensation from the new firm, and there may be no impact on the fees imposed on the customer’s account from the proposed transfer. The Committee believes that in this case, the educational document could create confusion, and do more harm than good with respect to explaining the implications of the registered representative’s transfer to the recruiting firm. The Committee recommends that the Proposed Rule include an exemption to delivery of the educational communication where none of the issues identified in such communication are applicable to the registered representative’s association with the new firm.

**CONCLUSION**

The Committee appreciates the opportunity to comment on the Proposed Rule. Please do not hesitate to contact Eric Arnold (202.383.0741) or Cliff Kirsch (212.389.5052) if you have any questions regarding this letter.

Respectfully submitted,

**SUTHERLAND ASBILL & BRENNAN LLP**

BY:  BTM  
Eric Arnold

BY:  BTM  
Cliff Kirsch

**FOR THE COMMITTEE OF ANNUITY INSURERS**

**Appendix A**

**THE COMMITTEE OF ANNUITY INSURERS**

AIG Life & Retirement  
Allianz Life  
Allstate Financial  
Ameriprise Financial  
Athene USA  
AXA Equitable Life Insurance Company  
Fidelity Investments Life Insurance Company  
Genworth Financial  
Global Atlantic Life and Annuity Companies  
Great American Life Insurance Co.  
Guardian Insurance & Annuity Co., Inc.  
Jackson National Life Insurance Company  
John Hancock Life Insurance Company  
Life Insurance Company of the Southwest  
Lincoln Financial Group  
MassMutual Financial Group  
Metropolitan Life Insurance Company  
Nationwide Life Insurance Companies  
New York Life Insurance Company  
Northwestern Mutual Life Insurance Company  
Ohio National Financial Services  
Pacific Life Insurance Company  
Protective Life Insurance Company  
Prudential Insurance Company of America  
Symetra Financial Corporation  
The Transamerica companies  
TIAA-CREF  
USAA Life Insurance Company  
Voya Financial, Inc.