

August 17, 2015

Submitted Electronically – pubcom@finra.org

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: Regulatory Notice to Member 15-22
Discretionary Accounts and Transactions

Dear Ms. Asquith:

Charles Schwab & Co., Inc.; Fidelity Brokerage Services LLC; TD Ameritrade, Inc.; and Pershing Advisor Solutions LLC, a BNY Mellon company (“Custodian-Members” or “we”) appreciate the opportunity to comment on FINRA’s “revised proposal to adopt a consolidated FINRA rule regarding discretionary accounts and transactions” as set forth in Regulatory Notice 15-22 (“RN 15-22”).

We generally understand the basis of and support most of FINRA’s proposal. We also generally support the positions set forth in the comment letter submitted by the Securities Industry and Financial Markets Association, including its focus on the unnecessary and outdated proposed requirement of “manual signatures” under parts of the proposal. We write to express our concerns and to offer our additional perspective on Proposed FINRA Rule 3260(b) and in particular its requirement – **to the extent it applies to investment advisers** – that members and associated persons must obtain the “prior manual dated signature” of the named natural person(s), or a natural person on behalf of an entity, authorized to exercise discretion in customer accounts.¹ It appears that this additional signature would be on an account-by-account or order-by-order basis.

As custodians that collectively hold more than \$2.5 trillion in assets for approximately 10,000 independent registered investment advisers and their clients, we believe that Proposed Rule 3260(b) should not apply to accounts advised by investment advisers because they are fully regulated already by the U.S. Securities Exchange Commission (SEC) and/or the various state securities administrators for investor protection purposes, and a signature requirement (manual or otherwise) would not provide any investor protection benefits. Just like the proposed

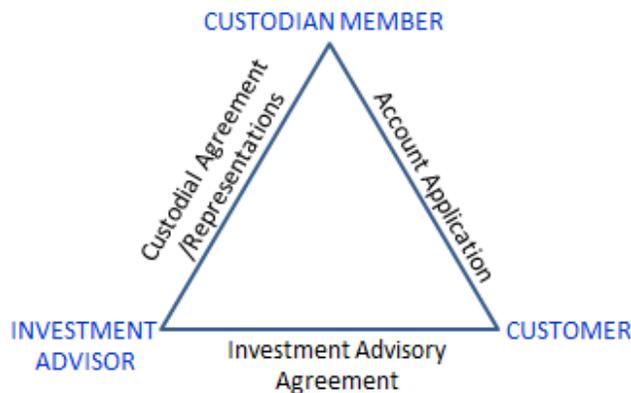
¹ FINRA Regulatory Notice 15-22 (June 2015) at 25.

requirements of 3260(a) would exclude fee-based accounts because there is little risk of excessive or unauthorized trading, the requirements of 3260(b) should exclude accounts managed by investment advisers for the same reason. Failure to do otherwise would raise serious competitive fairness concerns about favoring one form of financial adviser over another.

I. The Investment Adviser Business Model Contains Adequate Safeguards.

FINRA’s preamble to the proposed rule notes that the new, additional signature requirement is “expected to provide the benefits of a heightened standard of investor protection.”² Yet nowhere does FINRA explain how this additional signature requirement will accomplish this. We do not think it will. Numerous operational and regulatory safeguards are already in place to protect investors who have hired an investment adviser, making an additional account-by-account signature requirement unnecessary and cumbersome.

The Custodian-Member, the investment adviser, and the customer (or “end client”) comprise a tripartite relationship. The investment adviser and customer relationship is generally memorialized by a signed investment advisory agreement. The Custodian-Member’s relationship with the investment adviser is memorialized by an agreement which sets forth the responsibilities of the investment adviser when providing instructions to the Custodian-Member on the customer’s behalf. The Custodian-Member’s relationship with the customer is memorialized by a signed account application and agreement and related signed forms.



The investment advisory agreement between the investment adviser and the customer sets forth the obligations of each, including the authority the investment adviser has on the customer’s account. Section 205 of the Investment Advisers Act of 1940 (“Advisers Act”) governs the substance of these agreements, and the SEC routinely reviews these agreements in its regular examinations.

The agreement signed by the investment adviser and for some firms countersigned by the Custodian-Member sets forth the terms and conditions under which the investment adviser will

² *Id.* at 17.

operate on the Custodian-Member's platform and provide instructions to the Custodian-Member on customer accounts. This agreement requires the investment adviser to maintain written authorization, in the form of an advisory agreement, power of attorney or other authorization, to take actions on every client account opened and maintained with the Custodian-Member. It also requires the investment adviser to certify that it has the requisite authority for any instructions submitted to the Custodian-Member, including trading or money movement. Pursuant to this agreement, advisers determine which employees of the investment adviser may act on behalf of the firm on the customer account.

The account application or related form submitted to the Custodian-Member by the customer contains the customer's authorization for the Custodian-Member to take instructions from the investment adviser and its authorized persons for certain actions acting as the customer's agent, which may include trading, money movement and deducting fees from the account. The customer designates the type of authority vested with the investment adviser, and signs the application or other form. The Custodian-Members are responsible to make sure that only advisers with the requisite authority take actions in customer accounts.³

The three arrangements noted above provide the framework that governs the tripartite relationship. They document the agreed-upon level of authority to act on behalf of a customer in a customer account. From an investor protection standpoint, they also provide customers with a right of action if advisers act beyond the scope of their authority. Another signature – especially a manual signature as contemplated by proposed Rule 3260(b) – would add no investor protection benefit.

Despite these already existing agreements and safeguards, we understand that FINRA's purpose in requiring an additional signature on each account (the investment adviser's signature on the agreement or form the customer sends to the Custodian-Member) is to increase the accountability of authorized persons. It is unclear what additional accountability such a requirement would impose in light of the contractual provisions already in place. Authorized persons are employees who act on behalf of their investment advisory firms, and those firms are already accountable under the agreements they currently sign. They are also potentially liable to the SEC and/or state securities board—via an enforcement action—if they are deemed to have violated applicable regulations.

Unlike other persons who might be granted discretionary authority on a customer account within the context of proposed Rule 3260(b), investment advisers are highly regulated entities. The Advisers Act requires that investment advisers must have compliance programs, must prepare certain reports and file them with the SEC, must provide clients and prospective clients with a written disclosure statement, must have a code of ethics governing their employees, must maintain certain books and records, must obtain best price and best execution for their clients'

³ See, e.g., FINRA Rule 3110(b) and (c).

securities transactions, and must submit to compliance examinations by SEC staff. If an adviser fails to fulfill the requirements set forth by the SEC, it could be subject to fines and other penalties. A FINRA rule requiring a signature from an adviser's authorized agent on a customer account held at the Custodian-Member would be additional regulation that would impose needless burdens and expense.

II. Obtaining An Investment Adviser Signature For Every Account Opened Would Be Operationally Burdensome.

In its discussion of economic impacts, FINRA expresses a belief that “the additional obligations may be limited as FINRA understands that most firms currently do not accept an order from someone other than the customer without some form of authorization from the customer, such as trading authorization.”⁴ Although it is true that Custodian-Members do not permit investment advisers to act on an account without authorization from the customer, this does not mean that we collect the investment adviser's manual signature at the time we collect the customer's authorization. In fact, imposing this additional signature requirement would result in significant additional expense and burden on customers, Custodian-Members, and investment advisers.

Operational Problems and Questions. To open a new account at a Custodian-Member, a customer must designate the authority he or she grants to an investment adviser firm on the account application or related form and sign it. As described above, this form permits the Custodian-Member to take instructions from the customer's investment adviser for certain actions. The investment adviser does not sign this form; the investment adviser has already signed a separate agreement regarding how the investment adviser will conduct business in the customer account at the Custodian-Member.

If Proposed Rule 3260(b) is adopted, Custodian-Members would have to amend our account opening paperwork to allow for a signature from the adviser, and phase out the use of prior forms. We would need to add steps to the account open process to ensure that an appropriate authorized agent had properly executed the paperwork on behalf of the investment adviser. We would need to modify our record-keeping systems to ensure that each account had an associated signature for each employee of the investment adviser. We would also have to train staff on the new account opening procedures. In the event that an authorized agent left an advisory firm, we would need to have procedures in place to update every account with his/her name on file. We would also need to design controls and testing for this requirement. This would require a significant increase in our time, money and human capital.

There would also be an increased burden on investment advisers and customers. Customers would have to send account opening paperwork to their investment advisers, who would need to print, sign, scan, and send the paperwork back to the Custodian-Member. This process could significantly delay the account opening process. Also, any time a signing individual leaves an

⁴ RN 15-22 (June 2015) at 16.

advisory firm, the firm would be forced to replace signatures on every affected account. Depending on the size of the firm and the scope of responsibilities of that particular individual, this could be a large and costly undertaking.

Investment advisers are likely to have additional questions about the practical implementation of the proposed rule. While it allows a scanned or faxed copy of a manual signature, does it allow the use of a stamp of an adviser's manual signature? If copied signatures are acceptable, could advisers electronically "cut and paste" signatures? Must the natural person sign at the time of account opening, or could advisers maintain an inventory of "pre-signed" forms? None of these scenarios appear to be contemplated by the proposed rule.

Prospective only. The Custodian-Members collectively have millions of accounts advised by investment advisers. Any project to add a signature to millions of active customer accounts would be monumental. As described by SIFMA in its comment letter, the process of identifying and reviewing all affected accounts and collecting signatures will likely cause significant delays in trading to the financial detriment of customers. If FINRA decides to adopt Proposed Rule 3260(b) as applied to investment advisers, it should clarify that the rule applies only on a going-forward basis to new accounts opened after the effective date of the Proposal.

III. Conclusion

The Custodian-Members respectfully submit that FINRA should remove the requirement or make an exception for investment advisers for the signature requirement (manual or otherwise) set forth in Proposed Rule 3260(b). It would provide no additional investor protection, yet would impose substantial burdens on member firms, investment advisers, and customers.

Very truly yours,

[signed]

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