
August 14, 2015

Via Electronic Mail to pubcom@finra.org

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

RE: FINRA Regulatory Notice 15-22: Revised Proposal to Adopt a Consolidated FINRA Rule Regarding Discretionary Accounts and Transactions as FINRA Rule 3260

Dear Ms. Asquith:

TD Ameritrade, Inc.¹ (“TD Ameritrade” or “the Firm”) appreciates the opportunity to comment on FINRA Regulatory Notice 15-22 (“RN 15-22”), the revised proposal to adopt FINRA Rule 3260 (Discretionary Accounts and Transactions by Persons Other Than the Customer) in the consolidated FINRA rulebook.

While TD Ameritrade fully supports the adoption of a consolidated FINRA Rule regarding discretionary accounts and transactions, the Firm is concerned that the manual signature requirement mandated in proposed FINRA Rule 3260(b) will place significant and unnecessary burdens and costs on independent registered investment advisers (“RIAs”), the member firms that act as custodians for RIAs, and, most importantly, their clients, without providing additional investor protection. Furthermore, the expanded mandatory signature requirement in proposed Rule 3260(b) runs counter to the efficiencies brought about by the Electronic Signatures in Global and National Commerce Act (“E-Sign Act”) and the resulting technological advancements in the brokerage and advisory industries.

I. Proposed Rule 3260(b) Will Expand Significantly the Number of Discretionary Accounts Requiring Manual Signatures Beyond the Books and Records that Broker-Dealers are Required to Maintain.

FINRA currently only requires member firms to maintain a record of the dated, manual signature for discretionary accounts where a “named, natural person” is authorized to exercise discretion in the account.² There is no existing requirement for maintaining a record of a manual signature where the customer provides written authorization to an entity, and certainly not an entity that is registered and regulated by the U.S. Securities and Exchange Commission (“SEC”) or the States.

Proposed Rule 3260(b) will expand the scope of the manual signature requirement to situations where a customer provides written authorization to an entity by requiring the firm to “obtain the prior

¹ TD Ameritrade is a wholly owned broker-dealer subsidiary of TD Ameritrade Holding Corporation (“AMTD”). AMTD has a 40-year history of providing financial services to self-directed investors. TD Ameritrade, provides investing and trading services to over 6.5 million client accounts that total more than \$702 billion in assets, and custodial services for more than 5000 independent registered investment advisors.

² FINRA Rule 4512(a)(3) requires member firms to “maintain a record of the dated, manual signature of each named, natural person authorized to exercise discretion in the account.”

manual dated signature of a natural person authorized to act on behalf of the entity” before the firm can accept an order for the customer’s account from the entity.³

II. The Expanded Manual Signature Requirement in Proposed Rule 3260(b) Unnecessarily Will Increase the Burdens and Costs for RIAs, Member Firms and the Investing Public Without Increasing Customer Protection.

The expansion of the manual signature requirement in Proposed Rule 3260(b) does not fulfill FINRA’s stated regulatory objective of increasing customer protection. Instead it unnecessarily and significantly will expand the number of discretionary accounts that require manual signatures, which will place unwarranted burdens and costs on RIAs, member firms and their clients.

A. The Expanded Manual Signature Requirement in Proposed Rule 3260(b) Does Not Provide Additional Customer Protection.

One of FINRA’s stated regulatory objectives for proposed Rule 3260(b) is to protect customers by reducing the opportunities for unauthorized and excessive trading to occur in discretionary accounts.⁴ TD Ameritrade fully supports protecting customers from such abuses. But there is nothing to suggest that expanding the scope of the manual signature requirement to entities will reduce or eliminate unauthorized and excessive trading in customer accounts.

Although FINRA’s stated regulatory objective specifies that discretionary power over customer accounts can “create opportunities for **firms** to compromise the interests of customers,” the expanded manual signature requirement appears disproportionately to target RIAs, who will be required to submit the manual signatures, rather than firms.⁵ (emphasis added). Such a focus is misplaced since RIAs generally do not receive transaction-based fees so they lack the incentive to engage in unauthorized and excessive trading. Furthermore, RIAs are regulated under the Investment Advisers Act of 1940, which obligates RIAs to act as a fiduciary to their clients.

As financial professionals regulated by the SEC or states, RIAs have a robust new account process that involves: (1) the signing of a limited power of attorney provided to the member firm custodian; (2) the execution of a client agreement; and (3) the delivery of numerous disclosures to clients, including the Form ADV, which contains extensive disclosures about the RIA, its business operations and conflicts of interest. Given their fiduciary duties and the attendant disclosures investment advisers

³ RN 15-22 at 5, 25.

⁴ *Id.* at 15.

⁵ As specified in RN 15-22, the requirements of proposed FINRA Rule 3260(b) would apply to:

(1) an investment adviser, other than an associated person, engaged in investment adviser discretionary activities in a customer’s account at the firm; (2) any person, other than an associated person, granted noninvestment adviser discretionary authority by a customer of the firm, such as a family member; (3) any person, including an associated person, engaged in non-discretionary trading in a customer’s account; or (4) transactions by firms or associated persons in fee-based accounts exempted from proposed FINRA Rule 3260(a).

Id. at 5.

provide to their clients, it is not clear to us how requiring a manual signature of an authorized person at an RIA will somehow heighten the RIAs attention as to what obligations they are taking on by receiving discretionary authority and, thereby, increase investor protection.⁶ Rather, requiring a manual signature will simply add to the compliance costs and burdens on RIAs, who have structured their businesses to take advantage of electronic processes.

B. The Expanded Manual Signature Requirement Will Increase the Burdens and Costs for RIAs, Member Firms and the Investing Public.

In 2000, Congress enacted the E-Sign Act to facilitate the use of electronic signatures in interstate and international commerce.⁷ Section 101 of the E-Sign Act provides that a “signature contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form.”⁸ The SEC and FINRA have incorporated the E-Sign Act into their rules and regulations. In fact, in adopting amendments to the SEC books and records rules, the SEC stated that the amendments were “a recognition of technological developments that will provide economic as well as time-saving advantages for broker-dealers by expanding the scope of recordkeeping options.”⁹ Likewise, in the late 1990s and early 2000s, NASD provided interpretive guidance that member firms could utilize electronic signatures to meet the signature requirements of NASD Rule 3110(c)(1)(C).¹⁰

Over the past twelve years, the brokerage and investment adviser industries have incorporated electronic signatures throughout their businesses. From account opening, to margin and options approvals, to signing up for new services, TD Ameritrade and its clients enjoy the safety, cost effectiveness and ease of signing documents electronically. Similarly, RIAs have dramatically reduced the cost and time involved in opening accounts, giving them more time to focus on providing advisory services to their clients. In fact, TD Ameritrade has worked with DocuSign, Inc. to offer the 5000 RIAs using its platform a digital transaction management product to streamline business operations, which benefits investors.¹¹ Many of the RIAs are small businesses and TD Ameritrade understands that the

⁶ The Firm believes that it is unclear why a broker or associated person receiving discretionary authority for a fee-based or flat fee account is excluded from the manual signature requirement under Rule 3260(a), but under Rule 3620(b), an SEC or state registered investment adviser with fiduciary duties to the client and the same fee-based or flat fee approach is subject to a manual signature requirement – TD Ameritrade believes that these two situations should be treated the same, and no manual signature should be required.

⁷ See Pub. L. 106-229, 114 Stat. 464 (June 2000).

⁸ 15 U.S.C. § 7001.

⁹ 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), SEA Rel. No. 44238 (May 1, 2001), 66 FR 22916 (May 7, 2001).

¹⁰ See NASD Interpretive Letter to Laura Monet, American Express Financial Corporation (Nov. 26, 1997); NASD Interpretive Letter to Jeffrey W. Kilduff, Esq., O’Melveny & Myers (Jul. 5, 2001); and NASD Interpretive Letter to Selwyn Notelovitz, Global Compliance (June 4, 2002).

¹¹ TD Ameritrade Holding Corporation Press Release, “Filling Out Forms No Longer a Pain in the App for Busy Advisors,” (August 21, 2013) <<http://www.amtd.com/newsroom/press-releases/press-release-details/2013/Filling-Out-Forms-No-Longer-a-Pain-in-the-App-for-Busy-Advisors/default.aspx>> (last visited August 7, 2015).

RIAs' use of such technologies significantly reduces account opening time from days to minutes, and improves the overall accuracy of the process.

FINRA's proposed expansion of the manual signature requirement, which will require personnel of RIAs to sign manually when receiving discretion over a client's account, will increase significantly the time and costs of the account opening process. In addition, it is not entirely clear what personnel at the RIA will be required to sign for the entity. For example, if it is unclear at account opening which strategies the client will use, can an officer or employee of the entity sign? What if there are multiple authorized representatives on an account – do each of them have to sign? What happens if the client changes strategies – is a new manual signature required? The answer to these questions could create even further inefficiencies, delays and distractions for the RIAs. Such delays, inefficiencies and potential increased costs will adversely impact investors.

Moreover, the costs of the manual signature requirement will increase dramatically over time as FINRA has proposed that firms will be “required to update accounts established prior to the effective date of proposed FINRA Rule 3260 whenever they update the account information in the course of their routine and customary business.” Retroactive application of the standard will be particularly onerous for the hundreds of thousands of accounts currently advised by RIAs on the TD Ameritrade platform. For example, under the proposal it appears that if a client of an RIA calls in to change his home address, the member firm could be required to obtain a new discretionary authorization form signed by the client and manually signed by the RIA. More concerning is that a strict reading of the proposed rule would require the firm to stop accepting any trades until the signed documents are obtained. Obviously, clients could be financially harmed as their accounts are essentially frozen awaiting signed documentation. If FINRA continues to believe the benefits of the RIA's manual signature outweigh the costs (and potential risk of causing investor losses), TD Ameritrade strongly recommends that FINRA only require the signed documentation on a going forward basis at account opening, and not when account information is updated. In addition, FINRA should clarify that member firms are not required to freeze client accounts until updated documentation is obtained.¹²

III. Conclusion

TD Ameritrade supports FINRA's adoption of a consolidated FINRA Rule 3260 regarding discretionary accounts and transactions, but the consolidated rule should not expand the manual signature requirement to entities receiving discretionary authority. Expanding the manual signature requirement as proposed will increase unnecessarily the burdens and costs for RIAs, firms and the investing public, without accomplishing FINRA's stated goal of providing increased protection for customers with discretionary accounts.

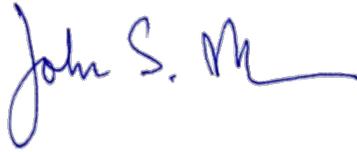
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¹² Even if FINRA decides to not require member firms to freeze client accounts while awaiting updated signed documentation, member firms may have difficulty obtaining new signatures. That is, some clients will consider the re-execution of documentation as a significant inconvenience and will not submit new documentation in a timely manner, or at all. If FINRA goes forward with Rule 3260(b) as proposed, TD Ameritrade requests that it clarify that member firms will not be considered to have violated the rule if they make a good faith basis to obtain the updated documentation.

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TD Ameritrade appreciates the opportunity to comment. Please feel free to contact me at 443-539-2128, with any questions regarding the Firm's comments.

Respectfully Submitted,

A handwritten signature in blue ink that reads "John S. Markle". The signature is written in a cursive style with a long horizontal flourish at the end.

John S. Markle