

**BY EMAIL (PUBCOM@FINRA.org)**

July 13, 2015

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

**RE: Comment on Proposed Rule to Require  
Delivery of an Educational Communication to Customers of a  
Transferring Representative (Reg. Notice 15-19)**

Dear Ms. Asquith:

Two years ago, in response to Regulatory Notice 13-02, I sent you a comment letter in which I stated that "I would be in favor of a rule requiring the publication of an educational bulletin flagging potential issues that a client should consider when considering moving accounts to a new firm."<sup>1</sup> Therefore, I enthusiastically support the present rule proposal and applaud FINRA's thoughtful consideration of this particularly tricky issue. The new rule proposal successfully focuses on truly advancing investor protection by arming investors with relevant questions and flagging potential issues they should be aware of when deciding whether to follow their broker to a new firm.

By way of background, I have represented clients on both sides of transitions. On behalf of broker-dealers I have sued brokers for violating the Protocol for Broker Recruiting, obtained temporary restraining orders, and litigated and settled hundreds of promissory note cases. I have also represented Registered Representatives by negotiating their recruitment compensation packages, advising them regarding best practices to transition their clients, defending them in injunction proceedings, and helping them resolve promissory notes owed to their former employers. I have also represented retail and institutional investors in arbitrations and in court in connection with sales practice violations.

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<sup>1</sup> Brent A. Burns Ltr. to Marcia E. Asquith, Office of the Corporate Secretary, FINRA, Re: Comment on Proposed Rule to Require Disclosure of Conflicts of Interest Relating to Recruitment Compensation Practices (Reg. Notice 13-02), March 5, 2013.

**I. Prior Rule Proposal and Comment**

I previously criticized the prior rule proposal regarding mandatory disclosure of recruitment compensation to brokers moving firms (Reg Notice 13-02) because it focused customers' attention on the wrong issues:

By forcing disclosure of recruitment compensation, clients will be given a false sense that they have been given complete information when, in fact, they have only been shown a sliver of the truth. This partial disclosure of a piece of a very large complex compensation package is misleading to clients and will distract them from asking more relevant questions. Clients should not be focusing on how a broker's pay or bonuses are derived from the broker's entire book of business, but instead the clients' focus should be on issues that more directly relate to their client's accounts. FINRA should empower investors by giving them a guideline of questions they may want to ask when considering following their broker to a new firm.

I instead proposed questions akin to those previously suggested by the NYSE:

In 2006, NYSE Regulation published a bulletin as part of their "Informed Investor" series entitled, "If Your Broker Changes Firms, What Do You Do?"<sup>2</sup> The bulletin provides a list of questions that clients should ask their brokers, among other questions of interest to the clients, when evaluating whether or not they want to move their accounts to their broker's new firm:

- Why is the broker changing firms?
- How will the change affect your account?
- Will certain products or services that you like be available at the next firm?
- Can your existing investments be transferred to the new firm?
- How are fees different at the new firm?
- Will you have to pay any fees to the old or new firm to make the change?
- Are there any tax consequences if you are asked to sell any of your existing products?
- Are there elements of the broker's transition package that relate to the commissions, fees or costs associated with your account?

I believe FINRA should create a comparable updated disclosure that should be attached to all ACAT forms. With this information, clients can make their own determination as to what information they consider important in evaluating whether they should follow their broker to a new firm. To the extent a client wants additional information, a client can ask their broker for it.

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<sup>2</sup> Attached hereto.

## **II. Responses to Specific Requests for Comment**

The current Notice ask for comment on the anticipated “usefulness of such a disclosure to a representative’s former retail customers.” In my opinion, 85-95% of customers follow their brokers to their new firm. I expect that will continue. However, the proposed guidance will allow customers to ask intelligent and relevant questions and provide more meaningful insight into whether or not following their brokers is in their best interests.

I believe a customer should have to confirm receipt of the educational communication by simply signing the form and returning it with the account transfer documentation. I would expect that there may be some criticism regarding this approach that the disclosure may be lost in the pile of papers clients are asked to sign. While there is truth to that criticism, the proposed rule is still the best alternative. Delaying the ability of a customer to transfer their accounts until such time as they sign off and new firm receives the disclosure may effectively freeze the account and unnecessarily expose a client’s account to market risk. Moreover, the delay of a two step process will provide an unfair advantage to the customer’s current firm in its attempts to retain that client.

The disclosures of educational materials should not be limited to six months. The relevant information contained in the educational material is relevant to any customer contemplating switching firms regardless of when the broker changes firms. Indeed, without the educational materials, customers would have no way of uncovering potential conflicts of interest that may be relevant to them.

## **III. Potential Criticism and a Solution**

At the time brokers will be soliciting the client from their prior firm, they will not have any client information other than what they can remember. If the firms they left and joined are both members of the Protocol for Broker Recruiting, the brokers will only have contact information. This will make it more difficult for brokers to accurately answer customer specific questions relating to their individual customer’s accounts. The brokers will not have access to what is in the customers’ accounts at the old firm, pricing or other aspects of the old accounts.

However, this should not change the dynamic. Customers should still be allowed to ask the questions and brokers should be required to answer those questions to the best of their ability with the limited information they have and can recall. Some may argue that this will incentivize brokers to take private customer information so that they may better solicit their former customers. I disagree. Privacy rules are already in place that protect this information, and the consequences for violating those rules are severe. The existing rules

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and firm's being able to seek private actions to prevent such misappropriations will, for the most part, deter such wrongful conduct. Additionally, if a customer requests more specific information, nothing prevents the customer from providing the broker with detailed account information without violating the privacy rules. FINRA should provide guidance that it will not be considered improper conduct for a broker to inform a customer that specific information may not be available unless the customer provides account information.

In addition, I would also include an option for customers to request a follow-up written statement from their broker and new firm regarding the specific oral representations made by the broker during the solicitation process that particularly relate to the customer's individual accounts. For example, the letter could address any customer questions relating to whether or not specific products they own will transfer, what they can expect to pay in fees for their accounts, the availability of products they have inquired about, potential tax consequences of the transfer, any enhanced compensation that could pose a potential conflict of interest, and how long that conflict will be in place—i.e. how many years of back-end bonuses for which the broker is potentially eligible. Allowing the customer to obtain such a written statement will memorialize the oral representations the broker made to the client and clarify the existing relationship. If the request is made after the client transitions, it will allow the broker to review the relevant customer accounts and information enabling him or her to more accurately respond to the request.

#### **IV. Final Comments.**

In order to reduce risk and misstatements, I believe the proposed new rule will cause firms to create a compliance vetted script for new brokers to follow when soliciting clients from their old firm. The script will have answers to questions commonly asked by clients. To the extent the customer wants personalized representations relating to their own accounts, under my suggested proposal, those answers can be provided by the broker to the best of his or her ability and then confirmed in writing at a later date.

The proposed educational materials will make it easier for customers to begin a meaningful dialogue with their brokers and the broker's current firm. The transparency this creates will strengthen relationships and trust and will benefit the client, the broker and the firm involved. Everybody wins.

Very truly yours,

Brent A. Burns

# NYSE Informed Investor

## If Your Broker Changes Firms, What Do You Do?



It is not uncommon for brokers in the financial-services industry to change firms. When that happens, investors are presented with the dilemma of whether to move to the new firm with the broker who is changing jobs. Although a good relationship with a broker who understands your objectives and your investment experience is extremely valuable, you should protect your interests and be sure you are making a well-informed choice when your broker asks you to follow him or her to a new firm. You should especially be aware of any potential conflicts of interest, including those that may be related to the broker's compensation arrangements at the new firm.

As a general matter, you should ask, among other questions of interest to you, the following questions, which are discussed in more detail below:

- Why is the broker changing firms?
- How will the change affect your account?
- Will certain products or services that you like be available at the next firm?
- Can your existing investments be transferred to the new firm?
- How are fees different at the new firm?
- Will you have to pay any fees to the old or new firm to make the change?
- Are there any tax consequences if you are asked to sell any of your existing products?
- Are there elements of the broker's transition package that relate to the commissions, fees or costs associated with your account?

### Fees and Charges

Will you have to pay any fees to make the change? For example, fee-in-lieu-of-commission accounts may have termination fees if you leave before an anniversary of the account opening.

You should also ask if there are other factors that will directly bear upon your account. While commissions are negotiable, you should have a good understanding of the new commission schedule before moving. Fees for the maintenance of accounts differ from firm to firm and can add up if you have several different accounts, such as one or more IRAs, joint, individual, or custodial accounts. In addition, if your investment strategy employs margin, you should ask what the margin rates are at the new firm.

### Conflicts of Interest

If you are asked to move your account to a new firm, you should know whether your broker is being offered any inducement that might affect his or her recommendations as to the type or amount of products and services being offered to you. A broker changing firms may be receiving a substantial payment as an inducement to change firms. There is nothing wrong with a bonus of that type.

However, it could lead to situations in which the broker seeks to do more business in your account to justify the upfront payment, particularly if the bonus is based upon a percentage of newly generated commissions. Bear your broker's response in mind when deciding on future securities activities.

## Portability

Certain mutual funds and annuities may not be transferable or portable to a new firm. If you liquidate the product, it could lead to increased fees or tax consequences. Therefore, it may be in your best interest to have those types of securities remain at the existing firm if you decide to move with your broker. Inquire about the fees you may incur by your existing brokerage firm for maintaining this account.

In addition, investment vehicles such as negotiable certificates of deposit, market-linked certificates of deposit, some non-traded limited partnerships, certain mutual funds and other products may also not be transferable.

It is important to understand that you are not obligated to sell such securities when your broker moves to a new firm. You can open up a new account at the firm to which your broker is moving and choose which securities you wish to move. It is not an "all or nothing" scenario. You should question your broker if he or she has suggested that you liquidate non-portable securities when the broker moves to a new firm or anytime immediately prior to such a move. Make sure that the liquidation is in your best interests.

## Yields and Rates of Return

You should ask what investment vehicles, if any, are available for cash in your accounts. Also ask whether the new firm will automatically sweep your cash into money market funds or bank accounts, and if to bank accounts, is the bank affiliated or unaffiliated. If investments are made available for your cash, you should ask what the interest rates are. If you keep significant assets in cash, differing rates may significantly impact your returns. You also may wish to ascertain the availability of tax exempt money market funds if you are in a high tax bracket.

## Products and Services

What new products will be available, or conversely, what products that you have purchased in the past or might consider purchasing will be unavailable at the new firm? Naturally, different brokerage firms may offer different products. If there is a family of mutual funds that you have found useful in the past, you may wish to see if those funds are available at the new firm. If you invest in municipal bonds, you may wish to know whether the new firm is an underwriter or an active market maker in them. Where research on investment opportunities is important to you, you may wish to know the coverage and reputation of the new firm in this area. Whether the new firm conducts an investment banking business can be important if you seek access to initial public offerings. That fact is also important in weighing potential conflicts of interest.

As an educated customer, you can make an informed decision and better determine the mix of advantages when you know the questions to ask and ask them. After all, it's your money.