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FINRA Requests Comment on Proposed Rule Requiring Delivery of FINRA Disclosure Document to Customers of Transferring Representatives

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On May 27, 2015, FINRA solicited comment on a proposed rule (the “proposed rule”)¹ that would require a firm to which a representative has recently transferred to provide material prepared by FINRA (the “FINRA Disclosure Document”) to customers of the transferring representative in certain situations. The FINRA Disclosure Document highlights issues that FINRA believes retail customers should consider when determining whether to transfer assets to a representative’s new firm. The proposed rule would not apply to institutional customers.

Content of FINRA Disclosure Document

The FINRA Disclosure Document highlights potential implications of transferring assets to the representative’s new firm and encourages the retail customer to ask questions regarding those considerations to the new firm. The questions in the document include:

- whether the incentives in the representative’s Employment Compensation Package (“ECP”), may present a conflict of interest;
- whether the customer will incur costs to liquidate and move those assets that are not directly transferrable to the new firm;

¹ FINRA Regulatory Notice 15-19, *FINRA Requests Comment on a Proposed Rule to Require Delivery of an Educational Communication to Customers of a Transferring Representative*, available at <https://www.finra.org/industry/notices/15-19>.

- whether there will be inactivity fees to leave those non-transferrable assets with the current firm;
- whether there are other potential costs related to transferring assets to the recruiting firm, like differences in price structures and fees imposed between the current firm and the new firm; and
- the differences between the products and services of both firms.

Delivery of FINRA Disclosure Document

- Solicited transfers. The proposed rule would require the FINRA Disclosure Document to be provided on first contact with the customer regarding transferring of assets. The mode of communication used during the new firm's first contact with the customer will dictate the manner in which the document is to be presented to the retail customer.
 - Writing – If first contact is in writing, the FINRA Disclosure Document must accompany that correspondence.
 - Electronic – If electronic communication is used to make first contact, a hyperlink to the FINRA Disclosure Document must be included in the communication.
 - Verbal – If the first communication is oral, the firm must:
 - advise the customer that the FINRA Disclosure Document will be forthcoming; and
 - provide the customer with the FINRA Disclosure Document within three business days; or, if sooner,
 - provide the FINRA Disclosure Document with any other communication sent to the customer.

Per Supplementary Material .02 of the proposed rule, the requirement to provide the FINRA Disclosure Document does not apply if the customer who the member, directly or through that registered person, attempts to induce to transfer assets expressly states that he or she is not interested in transferring assets to the member. As discussed in "Applicable Period," if the former customer subsequently decides to transfer assets to the member without further individualized contact within the period of six months following the date the registered person begins employment or associates with the member, then the FINRA Disclosure Document must be delivered.

- Unsolicited transfer. In the event that a retail customer contacts the new firm on an unsolicited basis to transfer assets to an account assigned to the registered representative at the new firm, the FINRA Disclosure Document should accompany the account transfer approval documentation.

Applicable Period

- The requirements to deliver the FINRA Disclosure Document described above is applicable for six months following the date the representative is employed or associated with the new firm.
- If, within the six-month period, a retail customer who initially did not want to transfer assets to the new firm later decides to do so, the FINRA Disclosure Document should accompany the account transfer approval documentation.

Supervisory Procedures

FINRA noted that it expects firms to implement a system reasonably designed to achieve compliance with the delivery requirements for the FINRA Disclosure Document including but not limited to maintaining written policies and procedures and monitoring communications between transferring representatives or associates and former retail customers.

Changes from Original Proposal

In 2013, FINRA proposed ECP disclosure in an oral or written communication to a transferring representative's former customer.² That proposal, which elicited over 65 comment letters, was significantly different than the present proposal. Specifically, that proposal would have required disclosure of the transferring representative's specific ECP, while the current proposal requires only that the new firm provide the FINRA Disclosure Document, which refers to financial incentives the representative may have that constitute conflicts of interest.

Conclusion

If adopted, the proposed rule will impact the way in which retail customers of a transferring representative are solicited and the information that must be provided to them. Because FINRA only has jurisdiction over broker-dealers, the proposed rule would not apply to banks or investment advisers. The public comment period has concluded.

² See our client publication regarding Regulatory Notice 13-02, *FINRA Proposes Disclosure of Recruitment Practices*, SHEARMAN & STERLING LLP (Jan. 2013), available [here](#).

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This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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