



September 23, 2016

By Electronic Mail to pubcom@finra.org

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20549-1090

Re: FINRA Regulatory Notice 16-29: Proposal to Amend Gifts, Gratuities and Non-Cash Compensation Rules

Dear Ms. Asquith:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ appreciates the opportunity to respond to FINRA’s request for comment on Regulatory Notice 16-29 (“RN 16-29” or the “Proposal”),² which proposes amendments to FINRA’s gifts, gratuities and non-cash compensation rules. The Proposal would be adopted in the consolidated FINRA rulebook³ as amended FINRA Rule 3220 (Influencing or Rewarding Employees of Others) and new FINRA Rules 3221 (Restrictions on Non-Cash Compensation) and 3222 (Business Entertainment).

¹ SIFMA is the voice of the U.S. securities industry, representing the broker-dealers, banks and asset managers whose 889,000 employees provide access to the capital markets, raising over \$2.4 trillion for businesses and municipalities in the U.S., serving clients with over \$16 trillion in assets and managing more than \$62 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.

² Regulatory Notice 16-29 (Gifts, Gratuities and Non-Cash Compensation Rules) (August 2016), available at https://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-16-29.pdf (last visited September 20, 2016).

³ See generally, Information Notice 03-12-08 (Rulebook Consolidation Process) (March 12, 2008), available at <http://www.finra.org/sites/default/files/NoticeDocument/p038121.pdf> (last visited September 20, 2016).

I. Executive Summary of Comments

SIFMA applauds FINRA's retrospective rule review efforts. SIFMA believes this process should facilitate the identification of outdated and inefficient rules and interpretations while also recognizing and balancing investor protection concerns. In many respects the Proposal should update and refine FINRA's gifts, gratuities and non-cash compensation rules and interpretations. SIFMA believes the Proposal could be further refined by:

- **Gifts**: applying a principles-based approach to gifts or increasing the annual gift limit to \$250;
- **Gifts**: providing guidance on firms' tracking and recordkeeping requirements with respect to gifts of a *de minimis* value;
- **Gifts**: providing guidance on the difference in treatment between *de minimis* gifts, promotional items of nominal value, and commemorative items;
- **Gifts**: providing additional guidance on the scope of "personal gifts";
- **Non-cash compensation**: providing an exception for investor education programs and confirming the permissibility of prospecting trips;
- **Training & Education**: providing guidance on partial-day training events;
- **Training & Education**: providing guidance on the meaning of "vicinity";
- **Training & Education**: providing guidance on internal training and education meetings;
- **Business Entertainment**: defining business entertainment; and
- **Business Entertainment**: providing an exception for tracking business entertainment of a *de minimis* value.

SIFMA's comments are further discussed in the various sections of this comment letter.

II. Background on the Proposal

The Proposal is an outgrowth of FINRA's retrospective rule review process.⁴ In December 2014, FINRA published a report assessing its rules on gifts, gratuities and non-cash compensation.⁵ FINRA stated in the report that "the rules and FINRA's administration of them may benefit from some updating and recalibration to better align the investor protection benefits and economic impacts."⁶ To that end, the report included several recommendations to enhance the effectiveness and efficiency of the rules, such as updating the existing guidance, consolidating the rules into a single rule series, and increasing the annual gift limit.⁷

SIFMA applauds FINRA for its efforts in undertaking an extensive, multi-step assessment process in connection with the Proposal. We understand that FINRA met with and solicited feedback from a broad range of interested parties. The resulting report reflects a thorough and thoughtful data collection and analytic process. Further, the Proposal reflects careful consideration of the feedback and recommendations of interested parties, including SIFMA and its member firms. We encourage FINRA to expand its use of these assessment techniques beyond proposals related to the retrospective rule review process. We believe FINRA, member firms, and investors would benefit from FINRA applying a similar level of economic analysis, and transparency, to most if not all of its rule proposals.

SIFMA also commends FINRA for engaging in a retrospective rule review process. Both with respect to the current Proposal and FINRA's proposed amendments to the rules governing communications with the public,⁸ we believe the process will result in changes to existing rules that increase the rules' effectiveness and efficiency

⁴ See News Release: FINRA Launches Retrospective Rule Review (April 8, 2014), available at <https://www.finra.org/newsroom/2014/finra-launches-retrospective-rule-review> (last visited September 20, 2016). See also, FINRA Regulatory Notice 14-15 (Retrospective Rule Review) (April 2014), available at <https://www.finra.org/sites/default/files/NoticeDocument/p479811.pdf> (last visited September 20, 2016).

⁵ FINRA Retrospective Rule Review Report: Gifts, Gratuities and Non-Cash Compensation (December 2014) ("Gifts Report"), available at <https://www.finra.org/sites/default/files/p602010.pdf> (last visited September 20, 2016).

⁶ *Id.* at 9.

⁷ See *id.*

⁸ See FINRA Regulatory Notice 15-16 (Communications with the Public) (May 2015), available at http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory_Noteice_15-16.pdf (last visited September 20, 2016). See also Letter from Kevin Zambrowicz, Managing Director & Associate General Counsel, SIFMA and Stephen Vogt, Assistant Vice President and Assistant General Counsel, SIFMA to Marcia E. Asquith, Office of the Corporate Secretary, FINRA (July 2, 2015), available at <http://www.sifma.org/issues/item.aspx?id=8589955404> (last visited September 20, 2016).

without adversely impacting their investor protection goals. Outdated and inefficient rules and interpretations do not benefit anyone, particularly not investors, who ultimately may bear the burden of the increased costs and inefficiencies of these rules. We hope and expect that FINRA will continue and expand its retrospective rule review process, reevaluating rules and interpretations on an ongoing basis to ensure they are still relevant and meeting their underlying investor protection mandates in a cost effective and efficient manner.

As FINRA continues its retrospective rule review and rulebook consolidation processes, and in considering comments on the Proposal, SIFMA encourages FINRA to apply a principles-based approach to rulemaking rather than imposing rules with prescriptive requirements. A principles-based approach to rulemaking provides flexibility to account for the rapid pace of innovation in the financial services business while also establishing general principles of investor protection that will endure over time.

III. Overview of the Proposal

The Proposal arises from FINRA's assessment of its current gifts, gratuities and non-cash compensation rules and existing guidance in connection with the retrospective rule review. As a result of this analysis, FINRA concluded that the rules could benefit from certain changes to "better align the investor protection benefits and the economic impacts" of the rules.⁹ Specifically, in RN 16-29, FINRA proposes to make the following changes to its gifts, gratuities and non-cash compensation rules:

- consolidate the rules under a single rule series in the FINRA rulebook;
- increase the gift limit from \$100 to \$175 per person per year;
- include a *de minimis* threshold in the annual gift limit below which firms would not have to keep records of gifts given or received;
- amend the non-cash compensation rules to cover all securities products;
- prohibit product-specific internal sales contests; and
- add a new rule for business entertainment.

⁹ Gifts Report, *supra* note 5, at 9.

Subject to our comments below, SIFMA believes that these changes will improve the effectiveness and efficiency of the rules without compromising their underlying investor protection goals.

IV. Recommended Changes and Requests for Clarification and Guidance

SIFMA supports the investor protection objectives of the gifts, gratuities and non-cash compensation rules. SIFMA agrees that these rules have been largely effective in meeting their intended investor protection objectives, including limiting conflicts of interest. SIFMA also agrees with the notion that “there are certain areas where the investor protection benefits may not align with the associated economic costs” of the rules.¹⁰

As a general matter, SIFMA believes the proposed changes in RN 16-29 would better align the rules’ investor protection benefits and economic impacts. SIFMA respectfully suggests that FINRA consider the following changes to the Proposal which SIFMA believes should further balance the rules’ benefits and costs.

A. Gifts

1. FINRA Should Consider Applying a Principles-Based Approach to Gifts or Increase the Annual Gift Limit to \$250

SIFMA believes that FINRA should consider adopting a principles-based approach, rather than a specific dollar threshold, to gifts under FINRA Rule 3220. As we stated in our comments on Regulatory Notice 14-15, an approach based on the principles of reasonableness, propriety and avoiding conflicts would accomplish the rule’s investor protection goals. This approach should align the gifts and entertainment rules, which would resolve the existing supervisory challenges and difficult judgments associated with distinguishing between “gifts” and “entertainment” (or a mix of both).¹¹ Such an approach also should avoid some of the other shortcomings associated with the existing dollar-based annual gift limit, such as variances in buying power across geographies and time as well as the gift rule’s set of exceptions that, as a whole, are complex, costly, and inefficient to administer.

¹⁰ RN 16-29, *supra* note 2, at 9.

¹¹ SIFMA is concerned that the distinction between gifts and business entertainment creates unintended challenges for member firms. For example, a registered representative may, as permissible business entertainment, take a client and the client’s spouse to a professional sporting event. If the representative becomes ill or is delayed in traffic and cannot attend the event, however, the tickets may become an impermissible gift. Allowing for a principles-based approach to both gifts and entertainment would allow firms some flexibility in addressing such situations, while still fostering the rules’ investor protection goals.

In the alternative, if FINRA remains committed to a dollar-based threshold, then SIFMA believes that the annual gift limit should be increased to \$250. This higher amount is consistent with the median proposed gift limit observed in connection with FINRA's survey, is reasonable and is not so high that it would materially increase the potential for conflicts of interest and risk of abuse.¹² An annual gift limit of \$250 also would be consistent with the U.S. Department of Labor's ("DOL") standard for gifts and other consideration given by a service provider to a fiduciary of a plan subject to the Employee Retirement Income Security Act of 1974 as well as reporting and disclosure on DOL Form LM-10 under the Labor-Management Reporting and Disclosure Act of 1959.¹³

2. Guidance Regarding *De Minimis* Gifts

i. *Recordkeeping*

SIFMA requests that FINRA revise proposed Rule 3220's Supplementary Material .03 to exclude gifts of a *de minimis* value from the rule's aggregation requirement, consistent with the exclusion contained in Supplementary Material .07 for recordkeeping. Supplementary Material .07 provides that *de minimis* gifts consistent with Supplementary Material .06 are not subject to the recordkeeping requirements of paragraph (c) of Rule 3220. As currently drafted, however, Supplementary Material .03 requires that firms aggregate *all* gifts given by the firm and its associated persons to any particular recipient. If there is no express exclusion from the aggregation requirement for *de minimis* gifts, it could render relief from the rule's recordkeeping requirements of limited utility since records would need to be maintained in order to perform aggregation.

ii. *Distinctions between De Minimis Gifts and Promotional or Commemorative Items*

SIFMA requests that FINRA provide guidance to clarify the difference in treatment under proposed Rule 3220 between *de minimis* gifts, promotional items of nominal value, and commemorative items. Whereas Supplementary Material .06 appears to indicate that *de minimis* gifts and promotional items of nominal value need to be below \$50 to come within the exclusion from proposed Rule 3220(a), it appears that

¹² See Gifts Report, *supra* note 5, at 7. According to the report, retail-only firms and institutional-only firms on average proposed an annual gift limit of \$321 and \$370, respectively. *Id.*

¹³ See DOL's Employee Benefits Security Administration (EBSA) Enforcement Manual (August 2008), available at <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/enforcement/oe-manual/chapter-48> (last visited September 20, 2016) and DOL's Office of Labor-Management Standards (OLMS) Form LM-10 – Employer Reports Frequently Asked Questions (August 30, 2016), available at https://www.dol.gov/olms/regs/compliance/lm10_faq.htm (last visited September 20, 2016).

commemorative items do not need to be below \$50 – and could even exceed the proposed annual gift limit of \$175 – as long as such items are solely decorative. SIFMA requests that FINRA confirm this approach or otherwise clarify the intended application of the exclusions from the rule under Supplementary Material .06.

iii. *Personal Gifts*

SIFMA also requests that FINRA consider providing additional guidance on personal gifts. Supplementary Material .05 currently reads as if it is limited to “[g]ifts that are given for infrequent life events (*e.g.*, a wedding gift or a congratulatory gift for the birth of a child).” The guidance in Notice to Members 06-69 (“NTM 06-69”), however, was more broadly written, noting that “[t]he prohibitions in Rule 3060 generally do not apply to personal gifts such as a wedding gift or a congratulatory gift for the birth of a child, provided that these gifts are not ‘in relation to the business of the employer of the recipient.’”¹⁴ SIFMA believes that Supplementary Material .05 should be revised to align with NTM 06-69.

B. Non-Cash Compensation

1. FINRA Should Provide an Exception for Investor Education Programs and Confirm Permissibility of Prospecting Trips

Proposed Rule 3221 prohibits member firms and their associated persons from accepting or making payments or offers of payments of any non-cash compensation in connection with the sale of securities, except under certain enumerated circumstances. SIFMA recommends that FINRA include under proposed Rule 3221(b) an exception for investor education programs. Based on prior FINRA guidance,¹⁵ it has become standard industry practice for offerors to pay for, or reimburse member firms for, the costs associated with organizing and sponsoring customer and prospective customer seminars. Allowing offerors to pay for these kinds of investor education programs serves the industry well by helping to educate investors on the products and services that may best meet their needs.

¹⁴ NTM 06-69 (NASD Issues Additional Guidance on Rule 3060) (December 2006), at 2, available at <https://www.finra.org/sites/default/files/NoticeDocument/p018024.pdf> (last visited September 20, 2016).

¹⁵ See NASD Notice to Members 99-55 (Questions and Answers Relating to Non-Cash Compensation Rules) (July 1999) (“NTM 99-55”), Question 15, available at <http://www.finra.org/sites/default/files/NoticeDocument/p004217.pdf> (last visited September 20, 2016). See also, Letter from Joseph Furey, Assistant Chief Counsel, Division of Trading and Markets, U.S. Securities and Exchange Commission to Elliott R. Curzon, Esq., Dechert LLP (August 23, 2012) (“Charles Schwab No-Action Letter”), available at <https://www.sec.gov/divisions/marketreg/mr-noaction/2012/charlesschwab082312-11d.pdf> (last visited September 20, 2016).

In addition, SIFMA requests that FINRA confirm that, consistent with existing rules and interpretative guidance, prospecting trips continue to be permitted under proposed Rule 3221.¹⁶

2. Training & Education Meetings – Partial-Day Training Events

Proposed FINRA Rule 3221(b)(2) incorporates the same general requirements from the existing non-cash compensation rule for the exception on “Training or Education Meetings.” Proposed Supplementary Material .06 includes conditions that are currently covered by guidance found in various FINRA Notices to Members and Regulatory Notices that have been issued over the years. As addressed in previous FINRA guidance, Supplementary Material .06 provides that “any training must occupy substantially all of the work day.” This condition, without additional guidance or elaboration, could be interpreted as limiting the training exception only to meetings that cover a full day and not to shorter, partial-day training meetings where a meal is commonly provided.

SIFMA requests that FINRA remove the “substantially all of the work day” requirement of Supplementary Material .06 and that FINRA allow this exception to apply to full-day and partial-day training events. SIFMA understands that shorter training meetings with a meal are common in the industry, and that it has become a standard practice to cover partial-day meetings where meals are provided under the training exception of the current non-cash compensation rule. SIFMA also understands that firms may host two “back-to-back” partial-day training events and include one night of lodging to accommodate the participants’ other business obligations and travel time.

3. Training & Education Meetings – “Vicinity”

The Proposal would permit an offeror to make payments or reimbursements of associated persons’ expenses in connection with a training or education meeting held by an offeror or a member, provided that the meeting meets various conditions including that “the location is appropriate to the purpose of the meeting, which shall mean a United States office of the offeror or the member holding the meeting, or a facility located in the vicinity of such office”¹⁷ SIFMA requests that FINRA reconsider the need for the “vicinity” requirement. Some firms have indicated they would prefer to hold national meetings at desirable locations convenient for all participants, even in the absence of having firm offices at the location, and we question whether the vicinity conditions provide any meaningful investor protections in practice.

¹⁶ See NTM 99-55, *supra* note 15.

¹⁷ Proposed Rule 3221(b)(2)(B).

Additionally, SIFMA requests clarification regarding the meaning of “vicinity” in the rule text for offerors who are based offshore. In particular, would offshore locations be permitted if the offeror is based there?

4. Training & Education Meetings – Internal Training

In Regulatory Notice 16-29, FINRA states that the proposal “would permit a member to send its associated persons to an internal training meeting that is not tied to achievement of a sales target. The meeting would not have to meet the same requirements as a training or education meeting sponsored by a third-party offeror, but no unaffiliated entity could participate in the organization of these types of arrangements.”¹⁸ SIFMA requests that FINRA provide further clarification on what standards would apply to these internal training and education meetings. In addition, SIFMA requests that FINRA clarify what it means by the phrase: “no unaffiliated entity could participate in the organization of these types of arrangements.”

C. Business Entertainment

1. FINRA Should Consider Defining Business Entertainment

SIFMA requests that FINRA include a comprehensive definition of business entertainment in proposed Rule 3222’s text or supplementary material. Although the supplementary material provides that “[b]usiness entertainment includes, but is not limited to, an occasional meal, a ticket to an event (*e.g.*, sporting event) or the theater, and other comparable entertainment,”¹⁹ more is needed. The rule as currently drafted appears to apply to *all* business entertainment, without limitation. Therefore it is not clear whether proposed Rule 3222 is intended to apply to *all* customers, including both retail customers and customer representatives, or only to business entertainment provided to customer representatives, like proposed Rule 3220. Member firms would benefit from a definitive statement of the rule’s scope, especially in light of the difference in treatment between gifts and entertainment under the rules.

2. FINRA Should Provide an Exception for Tracking Business Entertainment of a *De Minimis* Value

SIFMA supports the principles-based approach to business entertainment under proposed Rule 3222. Notwithstanding our support for the rule’s non-prescriptive approach, SIFMA has concerns with the potential costs of the recordkeeping requirements under Rule 3222(b). This provision of the rule appears to require the

¹⁸ RN 16-29, *supra* note 2, at 6.

¹⁹ Proposed Rule 3222.02.

maintenance of detailed records of *all* expenses related to business entertainment. Requiring member firms and their employees to track and report every dollar of business entertainment (including, for example, a cup of coffee purchased by an offeror) would be administratively burdensome and of questionable value from a cost-benefit/economic analysis perspective.

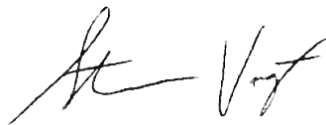
SIFMA suggests that FINRA incorporate into Rule 3222(b)'s reporting and recordkeeping requirement an exception for business entertainment of a *de minimis* value. Consistent with SIFMA's preference for principles-based standards, SIFMA believes that member firms should be given the flexibility to establish by policy a *de minimis* threshold for business entertainment. Alternatively, FINRA could apply a uniform value for *de minimis* business entertainment that aligns with the exception for *de minimis* gifts under proposed Rule 3220 (*i.e.*, below \$50 in value).

V. Conclusion

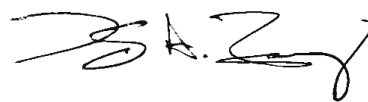
SIFMA appreciates the opportunity to comment on the Proposal. SIFMA commends FINRA for undertaking an evaluation of its gifts, gratuities and non-cash compensation rules in an effort to find ways to improve their effectiveness and efficiency. SIFMA believes the comments included in this letter should foster FINRA's efforts to update these rules and align the rules' costs and investor protection benefits. We look forward to a continuing dialogue with FINRA and working together on this important proposal.

If you have any questions or would like additional information, please contact Stephen Vogt, Assistant Vice President & Assistant General Counsel, SIFMA, at (202) 962-7393 (svogt@sifma.org), or Kevin Zambrowicz, Managing Director & Associate General Counsel, SIFMA, at (202) 962-7386 (kzambrowicz@sifma.org).

Very truly yours,



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cc: Evan Charkes, Co-Chair, SIFMA Compliance & Regulatory Policy Committee
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