October 27, 2021

VIA ELECTRONIC SUBMISSION

Vanessa A. Countryman, Secretary
Securities and Exchange Commission
100 F Street, NW
Washington, DC 20549-1090

Re: SR-FINRA-2021-024: Proposed Rule Change to Amend FINRA Rule 2231 (Customer Account Statements)

Dear Ms. Countryman:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to comment on the revised proposal to adopt consolidated Financial Industry Regulatory Authority ("FINRA") Rule 2231 ("Customer Account Statement Proposal" or the "Proposal").[2] As stated when our original comments were submitted in 2014 in response to Regulatory Notice 14-35, SIFMA understands and fully supports FINRA in its effort to protect sensitive customer information from unauthorized persons.[3] However, SIFMA continues to have significant concerns with the Proposal and requests sufficient time to implement a final rule.

1. Supplemental Material .02 (Transmission of Customer Account Statements to Other Persons or Entities)

Of greatest concern to SIFMA is Supplemental Material .02's proposed requirement to continue to send duplicate account statements to customers in contravention to their express wishes or the instructions of a person with appropriate legal authority over the customer's affairs, including an Agent or Attorney-in-Fact appointed under a valid Durable or Springing Power of Attorney ("POA"). SIFMA appreciates the change FINRA made that will allow a court-

[1] SIFMA is the leading trade association for broker-dealers, investment banks, and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly one million employees, we advocate for legislation, regulation, and business policy affecting retail and institutional investors, equity and fixed income markets, and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. With offices in New York and Washington, D.C., SIFMA is the U.S. regional member of the Global Financial Markets Association (GFMA).

[2] Proposed Rule Change to Amend FINRA Rule 2231 (Customer Account Statements), Rel. No. 34-93215, SR-FINRA-2021-024 (Sept. 30, 2021), 86 FR 55641 (Oct. 6, 2021).

[3] SIFMA Comment Letter on RN 14-35, dated Nov. 14, 2014, https://www.finra.org/sites/default/files/notice_comment_file_ref/sifma-1435_0.pdf

appointed fiduciary (e.g., Guardian or Conservator) to furnish the member firm with written instructions to cease sending account statements to a customer, but this change did not go far enough to address the concerns raised in our 2014 comment letter. Not allowing an exception for Agents or Attorneys-in-Fact appointed under valid POAs to provide written instructions to cease sending statements to customers, including those who are or become vulnerable or disabled, may result in an increased risk of customers' privacy being violated, account compromises, and/or identity theft. The exception to the continuous delivery requirement should be expanded to include an Agent or Attorney-in-Fact appointed under a valid Durable or Springing POA.

As stated in our 2014 comment letter, the POA relationship is a powerful one, in which a formal legal document drafted and effected pursuant to state law outlines the scope and limits of an agent's power under the POA. In not allowing the Agent or Attorney-in-Fact to act in the legal capacity specifically granted to them by the customer, the Proposal erodes the legal authority of an Agent or Attorney-in-Fact in a manner that may be inconsistent with applicable state laws. Further, the Proposal impedes and potentially harms customers for whom the POA is a crucial legal structure for protecting his or her legal rights and finances.

SIFMA believes the requirements of the Proposed Rule undermine and erode the ability of Agents and Attorneys-in-Fact to properly exercise their fiduciary responsibilities and are inconsistent with the power given Agents or Attorneys-in-Fact under state law. The Proposal's requirements will negatively impact customer plans to address a future where they may require assistance in managing their legal and financial affairs. Durable POAs are an integral part of modern estate plans and provide the benefit of not having to go to court to have a fiduciary appointed, which is costly, time-consuming, and public. Member firms have confirmed that they are presented with many more POAs than court-appointed Guardianships or Conservatorships. Also, it is very common that an Agent or Attorney-in-Fact appointed under a valid POA does not contact a member firm until their customer is incapacitated, an unfortunate situation occurring with increasing frequency.[4] At that time, the customer can no longer provide the consent required under the standards established by the Securities and Exchange Commission on the use of electronic media for delivery purposes, conduct a meaningful review of their statements, or keep the information contained therein safe. Respectfully, FINRA's proposal to use electronic delivery to satisfy account statement delivery obligations and to ensure customer monitoring of investment/account activities is not feasible in these situations.

We understand that FINRA is concerned with fraud or misconduct by Agents or Attorneys-in-Fact appointed under POAs and that, in FINRA's opinion, court-appointed Guardians or Conservators do not raise the same level of investor protection concerns.[5] However, the inability to stop delivery of account statements to incapacitated or vulnerable customers, particularly those living in assisted-living facilities, nursing homes, or at home where

[4] For example, by mid-century, the rapidly increasing number of adults 65 and older who will develop Alzheimer's dementia will swell to 13.8 million. Alzheimer's Association, *2020 Alzheimer's Disease Facts and Figures* (Mar. 10, 2020), https://alz-journals.onlinelibrary.wiley.com/doi/10.1002/alz.12068 (last accessed Oct. 21, 2021). As Americans age and experience cognitive decline, either slowly or rapidly, the number of incidents where they do not notify the firm will become ever more common.

[5] *Supra* note 2 at 86 FR 55648, 55654.

non-family, paid caregivers regularly have access to sensitive customer information and are as likely perpetuate fraud against the customer should be just as concerning.[6]

Notably, this continuous delivery requirement stands in stark contrast to FINRA's more recent efforts to address the financial exploitation of senior and vulnerable adult investors by providing tools to firms to address fraud, not to mention the FINRA Foundation's excellent work. For instance, FINRA states in the Proposal, for another purpose (Validation of Customer Instructions), the following:

> FINRA believes that a firm's obligation to conduct the requisite validation pertaining to servicing a customer's account are addressed under Rule 2090 (Know Your Customer). Rule 2090 requires a firm to use reasonable diligence in regard to the opening and maintenance of every account, to know the essential facts concerning every customer and concerning the authority of each person acting on behalf of such customer. The "essential facts" to "knowing the customer" include, among other things, those facts required to act in accordance with any special handling instructions for the account and understand the authority of each person acting on behalf of the customer.[7]

This same rationale should be applied to firms when deciding to allow Agents or Attorneys-in-Fact to act over customers' account. Where facts and circumstances warrant it, firms will continue to send account statements to customers and notify authorities if they have reason to be believe financial exploitation is or may be occurring, but they should be allowed to stop delivery of account statements when necessary.

In addition, FINRA Rule 4512 (Customer Account Information) and Rule 2165 (Financial Exploitation of Specified Adults), both post-dating the 2014 proposal, provide members with a way to respond to situations where they have a reasonable basis to believe that financial exploitation has occurred, is occurring, has been attempted or will be attempted. Members can better protect their customers from financial exploitation with their ability to contact a customer's designated trusted contact person and, where determined to be necessary, place a temporary hold on disbursements from a customer's account. It should be noted that the trusted contact person is often the same person who is appointed as Agent or Attorney-in Fact under the client's Durable or Springing POA.

Given the likely harm customers will be exposed to, we would appreciate a reconsideration of the exception to the continuous delivery requirement to include an Agent or Attorney-in-Fact appointed under a valid Durable or Springing POA. This would respect a customer's wishes and protect them from financial exploitation.

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[6] The CFPB Office for Older Americans, the only federal agency dedicated to the financial health of Americans over 62 years old, acknowledges the threat can come from caregivers in their guide, *Protecting Residents From Financial Exploitation*, https://files.consumerfinance.gov/f/201406_cfpb_guide_protecting-residents-from-financial-exploitation.pdf; s*ee also*, CFPB study, *Suspicious Activity Reports on Elder Financial Exploitation: Issues and Trends* (Feb. 2019), https://files.consumerfinance.gov/f/documents/cfpb_suspicious-activity-reports-elder-financial-exploitation_report.pdf (both last accessed on Oct. 11, 2021).

[7] *Supra* note 2 at 86 FR 55652.

2. Supplemental Material .08 (Use of Summary Statements)

In adopting the requirements of NYSE Rule Interpretation 409T(a)/06, FINRA made a revision that we believe requires clarification. The Federal Register notice, which does not include text of the proposed rule change, says there should be a *written agreement*:

> between the *parties* jointly formulating or distributing combined statements with the summary attesting that each entity has developed procedures and controls for testing the accuracy of its own information included on the statements….[8] (emphasis added.)

However, the rule text refers to "a *written agreement* between the *clearing firm* and each other person jointly providing its respective customer account statements…"[9] (emphasis added.) This wording difference creates an odd requirement that does not make sense in certain situations. For example, some of our members prepare their own statements under permission from their clearing firms. The Proposal would require a tri-party agreement between the clearing firm, the broker-dealer, *and* a registered investment advisory affiliate, an unusual situation. We request that FINRA clarify in the final rule that written agreements can be required between affiliates for jointly prepared statements, but not between the clearing firm and an affiliate that is not a broker-dealer.

3. Implementation Timeframe

As written, this Proposal will require significant cost and time to operationalize a final rule, and we request an effective date no earlier than June 1, 2023. When our members budgeted their technological and operational expenses for calendar year 2022, they had no indication that a significant rulemaking nearly 12 years[10] in the making would be finalized this year. As such, they budgeted for and have been dutifully implementing other rules, including residual Regulation Best Interest elements, the Department of Labor's fiduciary advice exemption, PTE 2020-02, and the upcoming SEC Marketing Rule. Not to mention the continuous technological enhancements members have made during the pandemic to allow their financial advisors and staff to work remotely and supervise them appropriately. All this work will continue throughout 2022 and work on this rule could not start until the beginning of 2023. The build out and testing will take approximately 6-8 months according to our members; hence, the need for an effective date of no earlier than June 1, 2023.

This is no small undertaking. FINRA notes that some firms currently provide continuous delivery of account statements to customers, but most do not.[11] We respectfully request that should a rule be finalized this year or early next, FINRA sets an effective date of June 1, 2023, which will allow our members to budget for, build out, and test their systems to comply with a final rule.

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[8] *Id.* at 55646.

[9] SR-FINRA-2021-024, *supra* note 2, at 343-44.

[10] *See* Proposed Rule Change to Adopt FINRA Rule 2231 in the Consolidated FINRA Rulebook, Release No. 34-59921 (May 14, 2009), 74 FR 23912 (May 21, 2009).

[11] *Supra* note 2 at 86 FR 55648.

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Thank you for considering our comments. If you have any questions regarding them or require additional information, please do not hesitate to contact me at (202) 962-7300.

Respectfully submitted,

Bernard V. Canepa

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