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August 22, 2011

VIA ELECTRONIC DELIVERY

Elizabeth M. Murphy, Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: SR-FINRA-2009-028; Amendment No. 1 to Proposed Rule Change to Adopt FINRA Rule 2231 (Customer Account Statements) in the Consolidated FINRA Rulebook

Dear Ms. Murphy:

TIAA-CREF Individual & Institutional Services, LLC ("TC Services")[1] writes in further support of its prior requests that FINRA wholly exclude all transactions within employer sponsored retirement plans ("retirement plans") from the monthly customer account statement requirement within proposed FINRA Rule 2231 ("Proposed Rule").[2] Our earlier comments[3] demonstrate how monthly statements are not necessary in this limited context to satisfy FINRA's stated goals of providing retail investors with the opportunity to review their accounts in a timely manner for errors or possible identity theft.

There exist today other already required client statements and other access points that provide more timely notice to participants of account activity in both a more efficient and less expensive manner. Moreover, we have established that the incremental benefit, if indeed any, associated with monthly statements within retirement plans is far outweighed by the

[1] TC Services is registered with the Securities and Exchange Commission ("SEC") as a broker-dealer and is a member of FINRA. TC Services is wholly owned by Teachers Insurance and Annuity Association of America ("TIAA"), and both TC Services and TIAA are members of the TIAA-CREF group of companies, which comprise one of the world's largest private retirement plan systems. For over 90 years, TIAA-CREF has helped people in the academic, research, medical and cultural fields plan for and live through retirement.

[2] Notice of Filing of Proposed Rule Change and Amendment No. 1 to Adopt FINRA Rule 2231 (Customer Account Statements) in the Consolidated FINRA Rulebook, Exch. Act Rel. No. 34-64969 (July 26, 2011), 76 Fed. Reg. 46,340 (August 2., 2011) (the "Amended Proposed Rule Notice").

[3] The Commission sought and received comments on a prior version of proposed FINRA Rule 2231 in May 2009 (*See* Exch. Act. Rel. No. 59,921 (May 14, 2009), 74 Fed. Reg. 23912 (May 21, 2009) ("Prior Proposed Rule Notice"). TC Services submitted comment letters on the Prior Proposed Rule Notice dated June 11, 2009 and July 13, 2009.

proposal's costs. Were FINRA to decline to further modify the proposal in a manner that wholly excludes transactions within retirement plans from the monthly statement requirement, the proposal will not meet the standards for rulemaking applicable to FINRA[4], would not meet the type of fulsome cost and benefits analysis suggested by a recent judicial decision[5] and would run afoul of recent executive orders.[6]

In responding to our earlier comments, FINRA re-proposed the Rule to exclude certain retirement plan transactions—namely, recurring transactions consistent with the requirements of Rule 10b-10 or related no-action, interpretive or exemptive relief issued by the SEC. We are cognizant of the challenge FINRA faces in rulemaking—crafting meaningful exemptions from a proposal that are not so unnecessarily broad as to eviscerate the intent of the proposal. In this matter, we believe after reviewing FINRA's analysis in re-proposing the rule that FINRA did grasp the justification in exempting retirement plan transactions, tried to accommodate this stance in the re-proposal, but inadvertently did so in a manner that effectively provides no relief whatsoever for retirement plans.

The re-proposal would still require monthly statements within employer sponsored retirement plans for non-recurring transactions such as occasional participant re-allocations. This will result in retirement plan participants receiving more statements than they currently do. Under the proposal they will now receive three—an immediate confirmation statement and monthly statement for non recurring transactions, and the quarterly statement reflecting transactions made under a periodic or investment company plan. As TIAA set forth in an earlier comment letter, and independently supported by other peer firms[7], requiring monthly statements within retirement plans is a fix costing in the millions of dollars for firms.

We are nonetheless hopeful we have found a mutually agreeable resolution. And after recapping why the monthly statement portion of the proposal is not justifiable for retirement plan transactions—recurring or not—we provide sample language FINRA can adopt to amend the proposal to exempt retirement plans.

A. FINRA's Discussion of the Benefits and the Corresponding Burdens on Competition is Cursory and Does Not Meet its Regulatory Requirements.

Exchange Act Rules 15A(b)(6) and (9) require FINRA rulemaking initiatives be designed to prevent fraudulent and manipulative acts and not impose any burden on competition not necessary or appropriate. Similarly, the instructions to Form 19b-4 require FINRA explain in detail why the proposed rule change does not unduly burden competition or efficiency. Form 19b-4 further cautions that "a mere assertion that the proposed rule change is consistent with those requirements is not sufficient."

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[4] As noted in TC Services' prior comment letter of July 13, 2009, we believe the Proposed Rule is inconsistent with the requirements of Section 15A of the Exchange Act and thus should not be approved by the Commission pursuant to Section 19 of the Exchange Act.

[5] *See* Business Roundtable v. S.E.C., 2011 WL 2936808 (C.A.D.C.,2011).

[6] *See* Executive Order 13563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821 (Jan. 21, 2011) ("Order 13563") and Executive Order 13579, Regulation and Independent Regulatory Agencies, 76 Fed. Reg. 41,587 (July 14, 2011) ("Order 13579").

[7] *See* Amended Proposed Rule Notice at 46,342.

This required level of analysis and detail is noticeably absent from the proposal when viewed in the context of employer sponsored retirement plans. By way of example, and perhaps most glaringly, FINRA's entire justification of the burden on competition consists of the following: "FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act."[8]

As to providing detail as to the need for monthly statements within retirement plans, FINRA goes no further than to conclude, "[we] believe that the proposed rule change will provide customers with critical information regarding their accounts and will allow them to review their statements in a timely manner…"[9] FINRA cites no studies, empirical data, or specific instances of past harm in support thereof. Moreover, this allegation ignores that customer statements currently provided to customers already serve the same purpose of customer protection—specifically immediate confirmation statements and quarterly account statements. This allegation also ignores that were FINRA to find those two existing customer reports somehow insufficient—to which they have offered no evidence—less expensive and more timely alternatives exist. Customers can obtain account information almost immediately through web access or by phoning national call centers to speak with a financial associate or access automated self-help phone systems.

T-C Services estimates the costs of developing the capability to provide monthly statements for just non recurring transactions will exceed one million dollars. Given that many TIAA-CREF investment products are managed on an at cost basis, additional expense flows through to participants. Besides hard costs, the proposal's toll on environmental resources is significant. We estimate providing monthly statements for the nonrecurring transactions will require millions of additional pages of paper annually. While FINRA did acknowledge our earlier environmental estimates with regards to requiring monthly statements for all transactions, it seemingly dismissed them without meaningful consideration.

Given the scant record provided by FINRA, we believe the SEC cannot conclude that the proposal should be approved as consistent with applicable statutory requirements with specific regards to requiring monthly statements for any transactions within retirement plans. TC Services and other commenters have simply provided too much evidence that FINRA's goals are either already met through existing client statements or that there are more effective and less expensive alternatives.

B. In Reviewing this FINRA Proposal, the SEC Should Consider by Way of Analogy What Courts Find as Adequate Consideration of the Costs and Burdens of Regulatory Rulemaking.

We believe the failure to adequately address the economic burdens particularly damaging in light of a recent Court of Appeals decision involving Exchange Act Rule 14a-11, the Business Roundtable case.[10] While this case involved the review of the

[8] *See* Amended Proposed Rule Notice Section No. 4, Self-Regulatory Organization's Statement on Burden on Competition at 46,343.

[9] *Id.*

[10] *See* Supra Note 5.

Commission's rulemaking under a somewhat different regulatory standard, we nonetheless find instructive the Court's views on what constitutes a fulsome consideration of the costs and burdens of a regulatory rule proposal.

By way of example, the Court will scrutinize a proposal that opportunistically frames the benefits of a proposal or fails to respond to substantial problems raised by commenters.[11] The Court will discount support in the form of intangible or less readily quantifiable benefits.[12] The Court warns that regulators should be hesitant to rely upon insufficient empirical data when concluding the worth of a proposal's benefit.[13] Regulatory statements should address the probability the rule will be of no net benefit.[14] Contrast this required analysis with comments FINRA acknowledges receiving:

- "Several commenter expressed concern that customer account statements are less effective at helping customers spot errors, identify theft or other potential problems than …more timely alternatives."[15] FINRA's response was a simple "we disagree" without supporting detail.[16]

- "The commenters state that [requiring monthly statements for retirement plans] would add confusion and place broker-dealers at a competitive disadvantage with few if any benefits."[17] FINRA did not address this directly.

- "Commenters state that the practical benefits received by investors from monthly statements versus quarterly statements are substantially disproportionate to the inherent cost under a cost benefit analysis."[18] FINRA responded in cursory fashion with the cost benefits conclusion noted above in Section A.

C. Extending the Proposal's Coverage to Retirement Plan Transactions is at Odds with President Obama's Executive Orders 13563 and 13579.

The application of the monthly statement requirement against retirement plans would also run afoul of President Barack Obama's recent series of executive orders asking federal agencies, including independent agencies, to find ways to improve and streamline their regulations.[19] And while perhaps not directly governing the rulemaking of FINRA, we nonetheless find the Order's guidelines instructive. These Orders collectively ask independent federal agencies review regulations with the following goals in mind.

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[11] Business Roundtable v. S.E.C., 2011 WL 2936808, at 5.

[12] *Id.*, at 6.

[13] *Id.*

[14] *Id.*, at 11.

[15] *See* Amended Proposed Rule Notice at 46,342.

[16] *Id.*

[17] *Id.* at 46,343.

[18] *Id.* at 46,342.

[19] *See* supra note 6.

- "identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends. [Our regulatory system] must take into account benefits and costs…"

- "propose or adopt a regulation only upon a reasoned determination that is benefits justify its costs…"

- "tailor its regulations to impose the least burden on society…"

- "select in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental [benefits]…" [emphasis added][20]

Allowing retirement plans to continue to rely upon the current construct of immediate confirmation statements for non-recurring transactions and quarterly statements for both non and recurring transactions is consistent with the Orders. The requested exemptive carve out would address FINRA's stated goals in a manner that is less burdensome, more cost effective and levies a lesser toll on the environment.

D. Proposed Language For an Employer Sponsored Retirement Plan Carve-Out.

To best address the above concerns, we propose that a new carve-out be added to Section (c)(2) of proposed FINRA Rule 2231. This could be accomplished by adding a new paragraph (f) which specifically excludes "transactions made within employer-sponsored retirement plans." Furthermore, we suggest that additional Supplementary Materials be added to the Proposed Rule to clarify what is meant by an "employer-sponsored retirement plan" and to specifically exclude brokerage window accounts. We suggest the following:

> The term "employer-sponsored retirement plan" means employee pension plans covered by the Employee Retirement Income Securities Act of 1974, as amended, plans described in Internal Revenue Code ("IRC") sections 401(a), 401(k), 403(b), 408(k), 408(p), 415(m) or 457(b), government and church plans defined in IRC section 414, deferred compensation plans of state and local governments and tax-exempt organizations under IRC section 457(f) and nonqualified deferred compensation arrangements established or maintained by employers or plan sponsors, as well as any investment alternatives designated by such plans into which participant and beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts (but excludes "brokerage windows," "self-directed brokerage accounts," or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan).[21]

[20] Order 13563, 76 Fed. Reg. at 3821.

[21] We have largely modeled this provision using the concept of a designated investment alternative that is set forth in the recent Department of Labor ("DOL") regulation governing participant disclosures. Under this regulation, a "designated investment alternative" is defined as "any investment alternative designated by the plan into which participants and beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts. The term 'designated investment alternative' shall not include 'brokerage windows,' 'self directed brokerage accounts,' or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan. (*See* DOL Regulation § 2550.404-a-5(h)(4)). This concept is equally

We acknowledge that, in some cases, a Plan may make a brokerage window (or self-directed brokerage account) available as an investment option to its Plan participants. The brokerage window allows the Plan participant to invest in a wide variety of investments that are not typically pre-screened on behalf of the Plan. For this reason, we believe that brokerage window accounts should be subject to the monthly statement requirement unless one of the Proposed Carve-Outs otherwise apply and should not fall under the more general employer-sponsored retirement plan carve out that we request.

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We would welcome the opportunity to discuss this matter further. If you have any questions regarding this comment letter, please contact me at 303.626.4229.

Very truly yours,

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TIAA-CREF Individual & Institutional Services, LLC

cc: Chairman Mary L. Schapiro
Commissioner Kathleen L. Casey
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applicable to Plans not subject to ERISA and, therefore, we have tailored our proposed Supplementary Material definition of “employer sponsored retirement plan” accordingly.