Carl B. Wilkerson
Vice President & Chief Counsel
Securities & Litigation
(202) 624-2118 t (866) 953-4096 f
carlwilkerson@acli.com

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Kevin M. O'Neill, Deputy Secretary
Securities and Exchange Commission
100 F Street
Washington, DC 20549

Re: Request for an Extended Comment Period on Proposed FINRA Rule 2243

Dear Mr. O'Neill:

The American Council of Life Insurers ("ACLI") is a national trade association with 300 members that represent more than 90 percent of the assets and premiums of the life insurance and annuity industry. The SEC recently invited comment on Proposed FINRA Rule 2243 concerning disclosure and reporting associated with broker-dealer recruiting practices. The initiative appeared in the Federal Register on March 28, 2014[1], and established a comment deadline expiring on April 18, 2014. The proposed rule will have a broad impact on broker-dealers and life insurers. This detailed initiative merits careful analysis that will be challenging to fully execute within the 22 day comment period, containing 16 business days. An extended comment period will generate more valuable and informed input.

Background

Life insurers have actively participated in SEC and SRO rulemaking over many years. ACLI promptly circulated FINRA's rule proposal to its Committee on Securities Regulation for input and guidance. This process ensures broad, consensus-based policy development and provides valuable substantive feedback. It is, however, meticulous and time consuming.

The important task of identifying and thoroughly analyzing the full implications of the initiative requires concentrated analytical resources. We will continue to evaluate the regulatory, structural and financial implications of FINRA's proposal for life insurers. Moreover, each of these considerations must be analyzed against unique fact patterns, business models, and organizational structures.

Industry groups like our trade association circulate regulatory proposals, elicit membership input, develop a consensus, and circulate draft letters of comment before submission. This worthwhile,

[1] 79 Fed. Reg. 60 at 17529 (Mar. 28, 2014) [http://www.gpo.gov/fdsys/pkg/FR-2014-03-28/pdf/2014-06895.pdf]

but time intensive, process is difficult to execute in a 22 day comment period, particularly given the proposals' significance and complexity.

Need for an Extended Comment Period

Unlike some other commentators, ACLI's submission will reflect the views of over 300 life insurance companies representing 90% of the life insurance and annuities business. Our consensus-based position, therefore, will provide substantial, broad input for the SEC on this initiative. By the same token, however, the process of achieving consensus is more time consuming for a large organization representing diverse interests.[2]

The proposal appeared in the Federal Register on March 28, 2014 and provided a 22-day comment that contained 16 business days. The initiative is detailed, and merits thorough analysis and constructive input. We would appreciate the reasonable opportunity to review and respond to the substance and practical realities of the FINRA proposal. Moreover, an aspect of the proposal directly addressing life insurance companies did not appear in FINRA's proposal circulated to its membership. This feature simply appeared in FINRA's submission to the SEC for the first time, without any explanation. An extended comment period would enable scrutiny and input in response to these matters.

In addition to evaluating the initiative's substance, several other statutory, procedural and cost considerations merit careful analysis, such as the proposal's cost-benefit analysis and its effects on competition, efficiency and capital formation

The release and FINRA's application for SEC approval simply state that "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." FINRA's proposal, however, contains no economic impact statement, and does not quantify the competitive burdens on broker-dealers. The SEC cannot create this analysis on its own initiative. It is incumbent on the SRO to fully develop and deliver this information, as explained below.

When it amended the Exchange Act in 1975, Congress specifically charged the SEC with the responsibility to evaluate competitive burdens of SRO rules and rule changes. The Senate report on the legislation stated that:

> Sections 6(b)(8), 19(b) and 19(c) of the Exchange Act would *obligate* the Commission to review existing and proposed rules of the self-regulatory organizations and to abrogate any present rule, or to disapprove any proposed rule, having the effect of a competitive restraint it finds to be neither necessary nor appropriate in furtherance of a legitimate regulatory objective.[3]

Section 23(a) of the Exchange Act was also added in 1975, and requires the SEC to consider the anti-competitive effects of rule changes, and to balance any impact against the regulatory benefit to

[2] This sentiment is drawn directly from the Guide text cited in footnote 3 *supra*.
[3] S. Rep. 94, 94th Cong., 1st Sess. (April 14, 1975) at 12.

be obtained.[4] Similarly, Sections 15A(b)(6) and (9) of the 1934 Act require the SEC to evaluate carefully the competitive impact of proposed SRO rules and amendments.

The Securities Act Amendments of 1975 significantly expanded the SEC's oversight and regulatory powers concerning SRO rules, and specifically directed the SEC to carefully evaluate competitive factors in exercising its SRO oversight. Importantly, Congress did not intend to confer general antitrust immunity on SRO rulemaking that was subject to the SEC's oversight review.[5]

The antitrust immunity created by Congress contemplates active oversight by the SEC in executing its responsibilities to ensure consistency with the securities laws, and to blunt the anticompetitive behavior inherent in self-regulatory conduct. Otherwise, a Congressional grant of substantial regulatory authority to private organizations without federal regulatory oversight would violate the constitutional prohibition against the delegation of legislative powers.

The antitrust threshold in the 1934 Act is not an optional procedure. The legislative history unequivocally highlighted that thorough review of competitive burdens is mandatory in SRO rulemaking:

> This *explicit obligation* to balance, against other regulatory criteria and considerations, the competitive implications of self-regulatory [actions]…. The Commission's obligation is to weigh competitive impact in reaching regulatory conclusions…. [and] disapprove any proposed rule, having the effect of a competitive restraint if finds to be neither necessary nor appropriate in furtherance of a legitimate regulatory objective.[6]

In order for SEC review to provide immunity for self-regulatory conduct, the review must be active, and must result in a ruling by the SEC that is judicially reviewable.[7] Section 25 of the 1934 Act states that the SEC's actual findings are conclusive if supported by substantial *evidence*, and that its decisions should be overturned only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, the excess of statutory jurisdiction, authority, or limitations, or short of statutory right, or without observance of procedures required by law." The proposed rule amendments fail the statutory safeguards to competition set forth above.

The SEC Chairman and several SEC Commissioners have reemphasized the critical importance of

[4] *Id*. at 12.

[5] *See*, Smythe, *Government Supervised Self-Regulation in the Securities Industry and the Antitrust Laws: Suggestions for an Accommodation*, 62 N.C. L. Rev. 475 (1984) at 504 [the SEC has an obligation in reviewing SRO conduct to "weigh the competitive impact in reaching regulatory conclusions"]. *See also* Linden, *A Reconciliation of Antiturst Law with Securities Regulation: the Judicial Approach*, 45 GEO. Wash. L. Rev (1977); Johnson, Application of Antitrust Laws to the Securities Industry, 20 SW. L.J. (1966); Note, The Application of Antitrust Laws to the Securities Industry, 10 WM. & Mary L. Rev. (1968).

[6] S. Rep. 94, 94th Cong., 1st Sess. (April 14, 1975) at 13 [emphasis added]. Congress noted that SROs are "quasi-public organizations, not private clubs." *Id* at 29. Accord, 121 Cong. Rec. 10728, 10756 (Apr. 17, 1975)

[7] *See* note 4 *supra.*

identifying and addressing the costs and benefits of rulemaking.[8] The SEC Chairman has directed the SEC's "General Counsel's Office to carry out a 'top-to-bottom' review of our process for assessing the economic ramifications of our rulemakings."[9] FINRA should strive for nothing less.

In a different context, former SEC Chairman Levitt emphasized the importance of reviewing the impact of rulemaking on competition when he stated:

> In response to the National Securities Markets Improvement Act of 1996 (NSMIA), the Commission has rededicated itself to considering how rules affect competition, efficiency, and capital formation as part of its public interest determination. Accordingly, the Commission intends to focus increased attention on these issues when it considers rulemaking initiatives. In addition, the Commission measures the benefits of proposed rules against possible anti-competitive effects, as *required* by the Exchange Act.[10]

In light of this unequivocal requirement for SRO analysis about the competitive and economic analysis of proposed rules, it would be quite appropriate to extend the comment period to allow FINRA to demonstrate through analysis and quantification that "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." This approach fully comports with FINRA's statement in September 2013 that it would conduct a more thorough economic impact assessment about new rule proposals.[11]

Conclusion

Neither the APA[12] nor the SEC's rules of practice establish a "standard" period of comment on SEC or SRO rulemakings. Rather, the goal of robust public comment on administrative rulemakings is best served by selecting a time period based on the unique factors and complexity of the individual initiative, and not "routine" practices. Some proposals should properly have longer comment periods than others.

In this instance, an extended comment period of 45-60 days will promote the most informed feedback given the size and diversity of ACLI's membership, as well as the importance of the issues under examination. The depth and quality of comment are higher priorities than the speed of completing the project. As a matter of comparison, FINRA spent over one year between publishing the proposed rule to its membership for comment and its submission to the SEC for approval.

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[8] *See* speeches by SEC Chairman Cox and Commissioners Atkins, Casey, and Nazareth at the PLI SEC Speaks Conference (Feb. 9, 2007) that can be found, respectively at http://www.sec.gov/news/speech/2007/spch020907cc.htm, http://www.sec.gov/news/speech/2007/spch020907psa.htm, http://www.sec.gov/news/speech/2007/spch020907klc.htm, and http://www.sec.gov/news/speech/2007/spch020907aln.htm .

[9] *See* comments of Commissioner Atkins at http://www.sec.gov/news/speech/2007/spch020907psa.htm .

[10] *See* testimony of Arthur Levitt, SEC Chairman , concerning appropriations for fiscal year 1998 before the Subcommitte on Commerce, Justice, and State, the Judiciary, and Related Agencies of the House Committee on Appropriations (Mar 14, 1997), which appears at http://www.sec.gov/news/testimony/testarchive/1997/tsty0497.txt

[11] *See* http://www.finra.org/web/groups/industry/documents/industry/p346389.pdf

[12] *See* Guide at 196.

ACLI has actively and constructively participated in numerous SEC and SRO rulemaking initiatives over many years. We devote resources and time in developing policy positions and providing useful feedback. Our consensus-based process is neither dilatory nor obstructionist. Our request for a comment extension will allow the most useful feedback on this FINRA initiative.

Please let me know if we can provide any additional background, or answer any questions that may develop.

Sincerely,

Carl B. Wilkerson