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April 18, 2014

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

Re: Submission on Proposed FINRA Rule 2243; [SR–FINRA–2014–010]

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, that represented a 22 day comment period with 16 business days.

The proposed rule will have a broad impact on broker-dealers and life insurers. This detailed initiative merits careful analysis.

Summary of the Proposed Rule

According to FINRA's explanation in the release:

> FINRA members dedicate substantial resources each year to recruit registered persons (''representatives'') to their firms. Implicit in these recruitment efforts is an expectation that many of the representative's former customers will transfer assets to the member recruiting the representative (''recruiting firm'') based on the relationship that the representative has developed with those customers. To induce representatives to leave their current firm, recruiting firms often offer inducements to the representatives in the form of recruitment compensation packages. Recruitment compensation packages provide a significant layer of compensation in addition to the commission payout grid or other compensation that a representative receives based on production at a new firm. Recruitment compensation typically takes the form of some combination of upfront payments, such as cash bonuses or forgivable loans, and potential future payments, such as performance-based bonuses or

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

> special commission schedules that are not provided to similarly situated representatives. FINRA understands that representatives who contact former customers to join them at their new firm often emphasize the benefits the former customers would experience by transferring their assets to the firm, such as superior products, platforms and service. However, while the recruiting firm and the representative understand the financial incentives at stake in a transfer, the representative's former customers who are contacted or notified about moving assets to the recruiting firm generally are not informed that their representative is receiving a recruitment compensation package to transfer firms, or the potential magnitude of such packages.
>
> The proposed rule change aims to provide former customers of a representative with a more complete picture of the factors involved in a decision to transfer assets to a recruiting firm. FINRA believes that former customers would benefit from information regarding recruitment compensation packages and such other considerations as costs, fees and portability issues that may impact their assets before they make a decision to transfer assets to a recruiting firm.

The proposed rule seeks to fulfill these objectives by requiring disclosure to former customers with detailed information about compensation from the recruiting broker-dealer.

Statement of Position

We have several concerns that reflect our brief preliminary views in light of the very short comment period. The FINRA prepared release states that "FINRA understands that members sometimes partner with another financial services entity, such as an investment adviser or insurance company, as part of the recruitment arrangement, to recruit a representative. In those circumstances, both upfront payments and potential future payments would include payments by the third party."

Contrary to FINRA's "understanding," FINRA has no jurisdiction or authority over insurance companies or the sale of life insurance or annuities not required to be registered under the federal securities laws. FINRA has appropriate authority over broker-dealer recruitment practices, but has none with respect to recruitment by life insurers or their agencies. We are profoundly troubled by this potential jurisdictional enlargement and the complete absence of any nexus between insurance company recruitment and the purpose articulated in FINRA's release. FINRA's understanding (quoted above) appeared for the first time in the Federal Register publication on March 28, 2014. Nothing in FINRA's proposal circulated to its members contained this position. There is no explanation in the Federal Register release about FINRA's reasoning or any commentator's suggestion on this point, just an assertion by "understanding."

It defies balanced administrative process to slip FINRA's "understanding" into a release explaining the rule at the last juncture during a 22 day comment period with 16 business days for analysis. Further, the text of the rule has no statement or language about FINRA's "understanding." .All applications of any rule should appear in the four corners of the rule, and not tucked into an accompanying release with ambiguous language at the last minute and little opportunity for meaningful scrutiny. The SEC has been asked to approve the text of proposed FINRA Rule 2243. The ambiguous, unsubstantiated gloss concerning insurance companies in FINRA's prepared release precludes the rule's viability. The SEC should affirmatively reject FINRA's request for approval until this aspect is eliminated. Moreover, the jurisdictional enlargement through FINRA's unwarranted and unsupported statement about insurance companies should be affirmatively thwarted by the SEC. The request for SEC approval of Rule 2243 is an inappropriate forum to

achieve unauthorized authority over insurance companies. The indirect manner of the "understanding" in the release and its absence of administrative process are fundamentally wrong. The nearly anecdotal "understanding" in the release from FINRA unacceptably muddies clear application and interpretation of Rule 2243.

The release indicates that the proposal will become effective within 45 days after the date of publication in the Federal Register or within a longer period as the Commission may designate up to 90 days. A 45 day review period of SEC review is inadequate to fairly consider and address public comment on this detailed initiative. We urge the SEC to postpone the effectiveness day as long as necessary to address properly significant issues of competition, FINRA rulemaking process, and the fulfillment of statutory requirements for SEC approval of SRO rulemaking. An extended comment period will also generate more valuable and informed input. We are concerned that other interested parties may have opted out of the comment process due to its extremely short duration.

While FINRA casts the rule as a means to provide former customers of a representative with a more complete picture of the factors involved in a decision to transfer assets to a recruiting firm, it could equally be viewed as a means to erect anticompetitive barriers to slow the recruitment of agents from a broker-dealer that had invested in the agent's training and that have a continuing financial interest in retaining assets under management. The release has a dearth of analysis on competition. Explanation of Rule 2243's impact on competition is integral to the SEC's review and approval.

Competitive and Economic Impact of Proposed Rule 2243

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 type of 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.[2]

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 be obtained.[3] 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.

[2] S. Rep. 94, 94th Cong., 1st Sess. (April 14, 1975) at 12.

[3] *Id*. at 12.

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.[4]

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.[5]

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.[6] 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.

A former SEC Chairman and several former SEC Commissioners have reemphasized the critical importance of identifying and addressing the costs and benefits of rulemaking.[7] Former SEC

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[4] *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 Antitrust 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).

[5] 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)

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

[7] *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 .

Chairman Levitt 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." The Dodd-Frank also emphasized the importance of cost-benefit analysis, including competitive and economic impact, in federal securities rulemaking. FINRA should strive for nothing less.

In a different but related 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.[8]

In light of this unequivocal requirement for SRO analysis about the competitive and economic impact of proposed rules, it would be quite appropriate to extend the comment period and the effectiveness date to the greatest extent so that FINRA can substantiate through quantification and thorough explanation why it "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 commendable statement in September 2013 that it would conduct a more thorough economic impact assessment about new rule proposals through its Office of Chief Economist.[9]

Conclusion

FINRA's proposed Rule 2243 is detailed and complex, and warrants careful review by the SEC for compliance with its authority over SRO rulemaking. The rule and the impact of FINRA's "understanding" about insurance companies raises troubling issues of process, clear rulemaking, and appropriate FINRA authority. We have offered our preliminary comments in light of the very short 22 day comment period with 16 business days.

In sum, the SEC should withhold approval of Rule 2243 until the impact of the rule is confined to the four corners of the text without the interpretive confusion appearing in the accompanying FINRA "understanding" at the eleventh hour. Additionally, the SEC should withhold approval of the rule until the potential enlargement of FINRA's authority over insurance companies is fully eliminated. The SEC must require FINRA to conduct a meaningful analysis and explanation of the Rule's competitive and economic impact as required under the 1934 Act.

As noted in our separate request for a comment period extension, ACLI and its member life insurers have actively and constructively 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

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[8] *See* testimony of Arthur Levitt, SEC Chairman , concerning appropriations for fiscal year 1998 before the Subcommittee 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

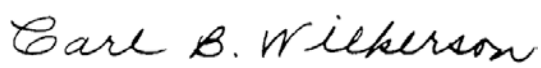
[9] *See* http://www.finra.org/web/groups/industry/documents/industry/p346389.pdf

valuable substantive feedback. It is, however, meticulous and time consuming. At this juncture, therefore, we offer brief preliminary views on our principal concerns with proposed Rule 2243.

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, provides 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.[10] For this reason, we again request an extension of the comment period on Rule 2243.

Thank you for your attention to our views. Please let me know if we can provide any additional background, or answer any questions that may develop.

Sincerely,



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[10] This sentiment is drawn directly from the Guide to Federal Agency Rulemaking.