National Association of Insurance and Financial Advisors

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VIA ELECTRONIC FILING

Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change To Adopt FINRA Rule 2030 and FINRA Rule 4580 To Establish "Pay-To-Play" and Related Rules (Release No. 34-76767; File No. SR-FINRA-2015-056)

Ladies and Gentlemen:

The National Association of Insurance and Financial Advisors ("NAIFA") welcomes the opportunity to comment on the proposed rulemaking by the Financial Industry Regulatory Authority, Inc. ("FINRA"), which was filed on December 16, 2015 with the Securities and Exchange Commission (the "Commission").[1] Specifically, the proposal would create a new FINRA Rule 2030 (Engaging in Distribution and Solicitation Activities with Government Entities) and FINRA Rule 4580 (Books and Records), both of which seek to address "pay-to-play" practices of member firms (taken together, "Proposed Rule").[2]

Founded in 1890 as The National Association of Life Underwriters (NALU), NAIFA is one of the nation's oldest and largest associations representing the interests of insurance professionals from every Congressional district in the United States. NAIFA members assist consumers by focusing their practices on one or more of the following: life insurance and annuities, health insurance and employee benefits, multiline, and financial advising and investments. NAIFA's mission is to advocate for a positive legislative and regulatory environment, enhance business and professional skills, and promote the ethical conduct of its members. NAIFA's membership includes individuals who would potentially be subject to the pay-to-play rules described below.

[1] Release No. 34-76767, 80 FR 81650 (Dec. 30, 2015)(Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change To Adopt FINRA Rule 2030 and FINRA Rule 4580 To Establish "Pay-To-Play" and Related Rules)("Proposed Rule Release").

[2] In November of 2014, FINRA proposed its pay-to-play rule in Regulatory Notice 14-50 ("original proposal"). Originally, the proposal was to create a FINRA Rule 2390. That was since revised to create both Proposed FINRA Rule 2030 and Proposed FINRA Rule 4580.

While NAIFA appreciates the changes made to the Proposed Rule from the original proposal, there are several clarifications that FINRA – along with the Commission – could make to further effective compliance. These clarifications could then be applied to the Commission's interpretation of the Commission's existing pay-to-play rule for investment advisers ("Investment Adviser Pay-to-Play Rule" or "Rule 206(4)-5"),[3] which suffers from similar clarity issues. Specifically, the Proposed Rule should clarify terms in the following three general areas:

- Definition of "covered associate";
- Definition of a covered "official"; and
- Treatment of political committee ("PAC") contributions.

While NAIFA is well aware that the Commission has previously declined to provide more specific clarifications on these topics, we hope that the Commission can take this opportunity to work with FINRA to create greater clarity with respect to the application of these rules as well as ensure consistency across the various pay-to-play regimes.

As a direct result of this lack of clarity, many investment advisers and broker dealers have taken overly broad and/or differing – and sometimes contradictory – approaches to the Investment Adviser Pay-to-Play Rule which have had the effect of limiting the legitimate political contributions and other political activity of NAIFA members in a way not required or anticipated by the Investment Adviser Pay-to-Play Rule. We are concerned that individual NAIFA members who may be improperly classified as a "covered associate" under the Proposed Rule will be impacted in a similar manner due to the lack of clear guidance. Therefore we respectfully request that the Commission address the following, as outline below.

Clarify the definition of a "covered associate".

NAIFA is pleased that FINRA sought to align the definition of "covered associate" in the Proposed Rule with the definition of "covered associate" in the Investment Adviser Pay-to-Play Rule.[4] A "covered associate", as defined in the Rule, means:

"*(A) Any general partner, managing member or executive officer of a covered member, or other individual with a similar status or function;*

(B) Any associate person of a covered member who engages in distribution or solicitation activities with a government entity for such covered member;

(C) Any associated person of a covered member who supervises, directly or indirectly, the government entity distribution or solicitation activities of a person in subparagraph (B) above; and

(D) Any political action committee controlled by a covered member or a covered associate."[5]

[3] *See* 17 C.F.R. § 275.206(4)-5; *see also* "Political Contributions by Certain Investment Advisers," Advisers Act Release No. 3043 (July 1, 2010), 75 FR 41018 ("Investment Adviser Pay-to-Play Rule Adopting Release").
[4] *See* Proposed FINRA Rule 2030(g) (2); *see also* Rule 206(4)-5(f) (2).
[5] *See* Proposed FINRA Rule 2030(g) (2).

The definition is problematic, however, in the same manner as the definition of "covered associate" in the Investment Adviser Pay-to-Play Rule, which included "any employee who solicits a government entity for the investment adviser and any person who supervises, directly or indirectly, such employee" as part of the definition of "covered associate of an investment adviser."[6] In response to the Investment Adviser Pay-to-Play Rule, many investment advisers and broker dealers have classified all of their representatives as covered associates regardless of whether they actually engage in the solicitation activity specified in the definition. We fear that a similar overly restrictive approach will occur, in practice, as a result of the Proposed Rule. Such action will increase the compliance costs and burdens placed on member firms as well as serve to limit the legitimate political activity of individuals when, technically, it is not necessary or required. Additional clarification on when associated persons of a covered member would (or would not) qualify as a "covered associate" would not only ease these compliance burdens and curtail overly broad limits on legitimate political activity, but also increase the consistency of procedures amongst member firms who seek to comply with both the letter and the spirit of the Proposed Rule.

Clarify and delineate the positions that would qualify as a covered "official".

In Proposed Rule 2030, "official" is defined as it is in the Investment Adviser Pay-to-Play Rule, yet that definition has, and will continue, to spark confusion over exactly what offices subject the holder to be classified as an "official". The Proposed Rule states:

> *"(8) "Official" means any person (including any election committee for the person) who was, at the time of the contribution, an incumbent, candidate or successful candidate for elective office of a government entity, if the office:*
>
> *(A) Is directly or indirectly responsible for, or can influence the outcome of, the hiring of an investment adviser by a government entity; or*
>
> *(B) Has authority to appoint any person who is directly or indirectly responsible for, or can influence the outcome of, the hiring of an investment adviser by a government entity."*[7]

The Commission's not having provided any additional details or guidance with respect to this definition has led to significant ambiguity with respect to the application of the Investment Adviser Pay-to-Play Rule, and unless additional guidance is provided, the Proposed Rule will further that ambiguity. As a result, inconsistent positions will continue to be taken across the industry and the lack of clarity could lead to innocent misunderstandings that would place member firms at significant risk and improperly limit an individual's political activity.[8]

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[6] *See* Rule 206(4)-5(f) (2) (ii).

[7] Proposed FINRA Rule 2030(g) (8). This definition mirrors the definition of "official" in the Investment Adviser Pay-to-Play Rule. *See* Rule 206(4)-5(f) (6).

[8] In its briefing papers defending a lawsuit against the Investment Adviser Pay-to-Play Rule, the SEC provided some additional analysis of the term "official", stating that a legislator who casts a vote for a state treasurer, and the treasurer is then "is responsible for or can influence the outcome of the investment adviser selection process," is not considered a covered "official" under Rule 206(4)-5. *See* "Securities and Exchange Commission's Response to Plaintiff's Motion for Leave to File Tracy Declaration," *New York Republican State Committee v. SEC*, No. 1:14-CV-01345 (BAH) *at* 8; *see also* "Securities and Exchange Commission's Response in Opposition to Plaintiff's Motion for Preliminary Injunction," *New York Republican State Committee v. SEC*, No. 1:14-CV-01345 (BAH) *at*

Outline the factors by which contributions to PACs would not trigger the anti-circumvention provision of the proposed rule.

Similar to the Investment Adviser Pay-to-Play Rule, the Proposed Rule contains an anti-circumvention provision, stating that "It shall be a violation of the Rule for any covered member or any of its covered associates to do anything indirectly, that, if done directly, would result in a violation of this Rule."[9] Both the Proposed Rule Release and the Investment Adviser Pay-to-Play Rule Release discuss these "indirect contributions"[10] and the Proposed Rule Release states that "FINRA notes that a direct contribution to a political party by a covered member or its covered associates would not violate the proposed rule unless the contribution was a means for the covered member to do indirectly what the rule would prohibit directly (for example, if the contribution was earmarked or known to be provided for the benefit of a particular government official)."[11] Further, the Proposed Rule Release states that "FINRA has clarified that it would require a *showing of intent* to circumvent the rule for a covered member or its covered associates funneling payments through a third party to trigger the two-year time out."[12]

These statements, combined with a Commission statement in official guidance that "a chain of contributions through PACs made for the purpose of avoiding the pay to play rule, would violate the rule's and section 208(d) of the Advisers Act's, general prohibitions against doing anything indirectly which would be prohibited if done directly,"[13] have the ability to continue the chill on contributions to various PACs. Prospective contributors who simply want to donate to a PAC have been hesitant to or restricted from doing so out of fear that they may be making an indirect contribution in violation of the Investment Adviser Pay-to-Play Rule.

While we appreciate FINRA making it clear that an intent to circumvent is required, we have discovered that many of those subject to Rule 206(4)-5 do not want to be put in a situation of demonstrating a lack of intent, and therefore are choosing not to contribute, or as a compliance matter, are being prohibited from doing so. Representation letters from PACs are helpful, but without further guidance from the Commission on what process a covered associate should undertake to eliminate risk under the Proposed Rule, we would expect that individuals subject to the Proposed Rule will continue to avoid contributing to (or will not be permitted to contribute to) PACs. Such action (or lack of action) can have a ripple effect through the political process, damaging both trade association and other PACs, and also distorting the voice of those in the financial services industry.

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25. The fact that this information needs to be provided in defense of a lawsuit demonstrates the need for clear guidance and language within the Proposed Rule and also within Rule 206(4)-5.

[9] Proposed FINRA Rule 2030(e); *see also* Rule 206(4)-5(d).

[10] *See* 80 FR 81650, 81654; 75 FR 41018, 41044.

[11] 80 FR 81650, 81662 (citing 75 FR 41018, 41044 n.337).

[12] 80 FR 81650, 81663 (citing 75 FR 41018, 41044 n.340).

[13] Question II.5 Chain of Contributions through PACs, "Staff Responses to Questions About the Pay to Play Rule," (posted March 22, 2011).

Thank you for the opportunity to comment on the Proposed Rule. We look forward to working with FINRA and the Commission in the future. Please contact the undersigned if you have any questions or would like to discuss our comments in greater detail.

Respectfully,

Gary A Sanders
Counsel and Vice President, Government Relations
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