

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-93215; File No. SR-FINRA-2021-024)

September 30, 2021

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change to Amend FINRA Rule 2231 (Customer Account Statements)

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on September 29, 2021, the Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to: (1) amend Rule 2231 (Customer Account Statements) to (a) add new supplementary materials pertaining to compliance with Rule 4311 (Carrying Agreements), the transmission of customer account statements to other persons or entities, the use of electronic media to satisfy delivery obligations, and compliance with Rule 3150 (Holding of Customer Mail); and (b) incorporate without substantive change specified provisions derived from Temporary Dual FINRA-NYSE Rule Interpretation 409T (Statements of Accounts to Customers) pertaining to information disclosed on customer account statements, externally held assets, use of logos and trademarks, and use of summary statements; (2) delete Temporary Dual FINRA-NYSE Rule 409T (Statements of Accounts to Customers)

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

and Temporary Dual FINRA-NYSE Rule Interpretation 409T;<sup>3</sup> and (3) make other non-substantive and technical changes in Rule 2231 and to other FINRA rules due to this proposed rule change.

The text of the proposed rule change is available on FINRA's website at <http://www.finra.org>, at the principal office of FINRA and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV

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<sup>3</sup> As part of the process of completing a consolidated FINRA rulebook, FINRA adopted, without substantive changes, the remaining legacy NASD rules as FINRA rules in the consolidated FINRA rulebook and the remaining Incorporated NYSE Rules and Incorporated NYSE Rule Interpretations in the consolidated FINRA rulebook as a separate Temporary Dual FINRA-NYSE Member Rules Series. These NYSE rules and their corresponding interpretations now bear a "T" modifier after the rule and interpretation number to denote their placement in the Temporary Dual FINRA-NYSE Member Rules Series. The Temporary Dual FINRA-NYSE Member Rules Series apply only to those members of FINRA that are also members of the NYSE ("dual members"). The FINRA rules apply to all FINRA members, unless such rules have a more limited application by their terms. Among the remaining NASD rules was NASD Rule 2340 (Customer Account Statements), which was adopted, without substantive changes, as FINRA Rule 2231. Incorporated NYSE Rule 409 (Statements of Accounts to Customers) and Incorporated NYSE Rule Interpretation 409 (Statements of Accounts to Customers) were adopted, without substantive changes, under the Temporary Dual FINRA-NYSE Rules Series as Rule 409T and Interpretation 409T, respectively. See Securities Exchange Act Release No. 85589 (April 10, 2019), 84 FR 15646 (April 16, 2019) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2019-009). For convenience, the rules and interpretations under the Temporary Dual FINRA-NYSE Member Rules Series are referred to as "NYSE Rule" and "NYSE Rule Interpretation," as appropriate.

below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Background

Rule 2231 and NYSE Rule 409T govern the obligation of members to deliver customer account statements to customers. Specifically, Rule 2231 and NYSE Rule 409T require each “general securities member”<sup>4</sup> and each member organization carrying customer accounts, respectively, to send account statements to customers at least quarterly showing security and money positions or account activity during the preceding quarter, except if carried on a Delivery versus Payment/Receive versus Payment (“DVP/RVP”) basis.

At the time FINRA adopted Rule 2231, along with NYSE Rule 409T and NYSE Rule Interpretation 409T (together, “NYSE provisions”), among others, into the consolidated FINRA rulebook, FINRA noted that it would continue to review the substance of such rules and expected to propose substantive changes to some or all of the rules as part of future rulemakings.<sup>5</sup> As part of that effort and as described further below, FINRA is now proposing to amend Rule 2231 that would incorporate several existing provisions from the NYSE provisions. As a result of this proposed harmonization, the NYSE provisions would be deleted in their entirety.

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<sup>4</sup> Rule 2231(d) defines the term “general securities member” to mean “any member that conducts a general securities business and is required to calculate its net capital pursuant to the provisions of SEA Rule 15c3-1(a). Notwithstanding the foregoing definition, a member that does not carry customer accounts and does not hold customer funds or securities is exempt from the provisions of this section.”

<sup>5</sup> See supra note 3.

Rule 2231 differs from the NYSE provisions in several ways. First, Rule 2231(c) sets forth requirements for disclosure of values for unlisted or illiquid direct participation programs or real estate investment trust securities. Neither NYSE Rule 409T nor NYSE Rule Interpretation 409T have a corresponding provision. Second, the NYSE provisions address the delivery of confirmations, account statements or other communications to third parties subject to specified conditions and exceptions. In addition, NYSE Rule 409T(g) provides that members carrying margin accounts for customers should send duplicate copies of monthly statements of guaranteed accounts to the respective guarantors unless such guarantors have specifically provided in writing that they do not want such statements sent to them. Rule 2231 does not have similar provisions. Third, Rule 2231(d) expressly defines several terms (e.g., “account activity,” “DVP/RVP account,” “general securities member”) and Rule 2231(e) provides for exemptive relief from the rule. NYSE Rule 409T expressly defines only one term, “DVP/RVP account,” and does not provide for exemptive relief from the rule. Finally, unlike Rule 2231, NYSE Rule Interpretation 409T dictates the disclosures that must be made in a customer account statement, including for externally held assets, and requirements for use of third party agents, logos and trademarks, summary statements, and sets forth the standards for holding mail for a customer.

In light of these differences, FINRA is specifically proposing to: (a) add as new Supplementary Materials .01 (Compliance with Rule 4311 (Carrying Agreements)), .02 (Transmission of Customer Account Statements to Other Persons or Entities), .03 (Use of Electronic Media to Satisfy Delivery Obligations), and .04 (Compliance with Rule 3150 (Holding of Customer Mail)); and (b) incorporate provisions derived from NYSE Rule Interpretation 409T, without substantive change, as Supplementary Materials .05 (Information to

be Disclosed on Statement), .06 (Assets Externally Held), .07 (Use of Logos, Trademarks, etc.), and .08 (Use of Summary Statements).

### Rule Filing History

In 2009, FINRA had filed with the SEC a proposed rule change to adopt then NASD Rule 2340 and legacy NYSE Rule 409, including its related interpretations, as Rule 2231 into the consolidated FINRA rulebook (“Initial Rule Filing”) as part of the process of developing the consolidated FINRA rulebook.<sup>6</sup> Among other things, the Initial Rule Filing had set forth a number of proposed supplementary materials, most of which were derived largely from then NYSE Rule Interpretation 409 to address customer account disclosures, including for externally held assets, and requirements for use of third party agents, logos and trademarks, summary statements, and holding customer mail.<sup>7</sup>

Among these proposed supplementary materials was one, based in part on legacy NYSE Rule 409(b), which would have required written instructions from the customer to address or send customer statements, confirmations or other communications relating to the customer’s account to other persons or entities. However, unlike legacy NYSE Rule 409(b), the proposed supplementary material was silent on whether a firm would have to continue sending account statements to the customer. Commenters to the Initial Rule Filing expressed concerns relating to the need for written customer consent to transmit customer account statements to third parties

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<sup>6</sup> See Securities Exchange Act Release No. 59921 (May 14, 2009), 74 FR 23912 (May 21, 2009) (Notice of Filing of File No. SR-FINRA-2009-028).

<sup>7</sup> FINRA had also proposed amending then NASD Rule 2340 to change the frequency of the delivery of account statements to a customer from quarterly to monthly where the customer had account activity during the preceding month, and with a frequency of not less than once every calendar quarter to each customer whose account had a security position or money balance during the period since the last such statement was sent to the customer.

and sought clarification on whether firms would be required to obtain written consent when complying with then NASD Rule 3050 (Transactions for or by Associated Persons) and then NYSE Rule 407 (Transactions—Employees of Members, Member Organizations and the Exchange).<sup>8</sup> In response to these comments, among others, FINRA amended the Initial Rule Filing in 2011 (“Amended Rule Filing”).<sup>9</sup> With respect to the transmission of customer account statements to third parties, FINRA had proposed clarifying that member firms would not be required to obtain prior written consent from their associated persons to send duplicate account statements or other communications with respect to such associated persons’ accounts that were subject to then NASD Rule 3050 and NYSE Rule 407. To address concerns regarding potential fraud, especially with senior investors, where a third party receives the account statements in lieu of such customer, FINRA had also proposed clarifying that firms would have to continue to deliver account statements to customers, either in paper format or electronically, even when directed by the customer, in writing, to send statements to a third party. FINRA made this clarification in an effort to remain consistent with any SEC release, interpretation, “no-action” position or exemption issued by the SEC or its staff in the context of SEA Rule 10b-10

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<sup>8</sup> NASD Rule 3050 and NYSE Rule 407 are the predecessor rules to Rule 3210 (Accounts at Other Broker-Dealers and Financial Institutions). In 2015, FINRA adopted Rule 3210 in the consolidated FINRA rulebook to replace NASD Rule 3050, NYSE Rules 407 and 407A (Disclosure of All Member Accounts) and the corresponding NYSE interpretations. See Securities Exchange Act Release No. 75655 (August 10, 2015), 80 FR 48941 (August 14, 2015) (Notice of Filing of File No. SR-FINRA-2015-029). Rule 3210 governs accounts that associated persons open or establish at firms other than their employer and in which they have a beneficial interest. In general, the rule requires that the associated person must obtain the prior written consent of his or her employer to open or establish the account, and provides that the member firm where the account is held must transmit duplicate copies of confirmations and statements to the employer upon the employer’s request.

<sup>9</sup> See Securities Exchange Act Release No. 64969 (July 26, 2011), 76 FR 46340 (August 2, 2011) (Notice of Filing of Amendment No. 1 to File No. SR-FINRA-2009-028).

(Confirmation of transactions) that have established the policy that customers should continue to receive periodic account statements when not receiving immediate trade confirmations under SEA Rule 10b-10.<sup>10</sup> Further comments were received in response to the Amended Rule Filing. Commenters objected to the proposed requirement to deliver account statements to customers even when directed by customers, in writing, to send the statements to third parties. Some commenters believed that members should not be required to continue delivering account statements to customers, particularly where there was a power of attorney (“POA”) or incapacity. FINRA withdrew the filing to further consider the comments.<sup>11</sup>

To address the concerns raised in the prior filing, FINRA published Regulatory Notice 14-35 (September 2014) (“Notice” or “Notice 14-35 Proposal”), seeking comment on a revised proposal to transfer then NASD Rule 2340 and Incorporated NYSE Rule 409 and its related interpretations, largely unchanged, into the consolidated FINRA rulebook as Rule 2231. With respect to the proposed supplementary material pertaining to the transmission of customer account statements to other persons or entities, the Notice 14-35 Proposal set forth changes to that provision that aligned more closely with then NYSE Rule 409(b) and were intended to help ensure that a customer continues to receive the account statement even when such customer directs the firm to send the statement to a third party. As described further below, the proposed rule change differs in some respects from the terms set forth in the Notice 14-35 Proposal as to proposed Supplementary Material .02. In all other respects, subject to some technical changes,

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<sup>10</sup> 17 CFR 240.10b-10. See also note 9, supra.

<sup>11</sup> See Securities Exchange Act Release No. 67588 (August 2, 2012), 77 FR 47470 (August 8, 2012) (Notice of Withdrawal of File No. SR-FINRA-2009-028).

the proposed amendments to Rule 2231 remain substantively unchanged from the Notice 14-35 Proposal.

#### Proposed Amendments to Rule 2231

In 2019, after the publication of the Notice, FINRA adopted the remaining legacy NASD rules as FINRA rules in the consolidated FINRA rulebook and the remaining Incorporated NYSE Rules and Incorporated NYSE Rule Interpretations in the consolidated FINRA rulebook as a separate Temporary Dual FINRA-NYSE Member Rules Series.<sup>12</sup> No substantive changes to these rules were made in connection with the move into the consolidated FINRA rulebook. NASD Rule 2340 was renumbered as Rule 2231 and Incorporated NYSE Rule 409 and Incorporated NYSE Rule Interpretation 409 were renumbered as NYSE Rule 409T and NYSE Rule Interpretation 409T, respectively.

#### A. Paragraphs (a) through (e) Under Rule 2231 to Remain Substantively Unchanged

In general, paragraph (a) (General) under Rule 2231 addresses the frequency of the delivery of customer account statements, and the requirement for account statements to include a statement advising customers to report to the firm (introducing firm and clearing firm, if different) inaccuracies in their accounts in writing. Paragraph (b) (Delivery Versus Payment/Receive Versus Payment (DVP/RVP) Accounts) addresses account statement delivery requirements for DVP/RVP arrangements. Paragraph (c) (DPP and Unlisted REIT Securities) requires, among other things, general securities members to include in customer account statements a per share estimated value for a direct participation program (“DPP”) or real estate investment trust (“REIT”) security developed in a manner reasonably designed to ensure that the per share estimated value is reliable. In addition, paragraph (c) provides two methodologies for

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<sup>12</sup> See supra note 3.



calculating the per share estimated value for a DPP or REIT security that is deemed to have been developed in a manner reasonably designed to ensure that it is reliable: the net investment methodology and the appraised value methodology. Paragraph (d) (Definitions) sets forth several definitions and finally, paragraph (e) (Exemptions) permits FINRA to exempt any member firm from the rule upon a showing of good cause. Consistent with the Notice 14-35 Proposal, FINRA is proposing to retain, without substantive changes, the existing requirements set forth in paragraphs (a) through (e) under Rule 2231.

B. Proposed Supplementary Materials to Rule 2231

In an effort to harmonize the NYSE provisions with Rule 2231, FINRA is proposing to add new supplementary materials relating to compliance with Rule 4311, the transmission of customer account statements to other persons or entities, the use of electronic media, and compliance with Rule 3150. In addition, the proposed change would transfer, with clarifying and technical changes, the existing requirements in NYSE Rule Interpretation 409T relating to the information to be disclosed on statements,<sup>13</sup> assets externally held and included on statements solely as a service to customers,<sup>14</sup> the use of logos and trademarks, etc.,<sup>15</sup> and the use of summary statements.<sup>16</sup> As a result of this harmonization, some provisions would be new for FINRA members that are not also members of the NYSE (or “non-NYSE members”) and for dual

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<sup>13</sup> See NYSE Rule Interpretation 409T(a)/02 (Information to be Disclosed).

<sup>14</sup> See NYSE Rule Interpretation 409T(a)/04 (Assets Externally Held and Included in Statements Solely as a Service to Customers).

<sup>15</sup> See NYSE Rule Interpretation 409T(a)/05 (Use of Logos, Trademarks, etc.).

<sup>16</sup> See NYSE Rule Interpretation 409T(a)/06 (Use of Summary Statements).

members. FINRA believes that harmonizing the NYSE provisions into Rule 2231 would provide greater clarity and regulatory efficiency to all FINRA member firms.

1. Compliance with Rule 4311 (Carrying Agreements) (Proposed Supplementary Material .01)

FINRA is proposing to add new Supplementary Material .01 to Rule 2231 that would remind firms of their obligations under Rule 4311, including specifically the rights and obligations of the carrying firm under Rule 4311(c)(2). Rule 4311 generally governs the requirements applicable to member firms when entering into agreements for the carrying of any customer accounts in which securities transactions can be effected. In general, Rule 4311(c) requires that each carrying agreement in which accounts are to be carried on a fully disclosed basis must specify the responsibilities of each party to the agreement, setting forth the minimum responsibilities that the agreement must allocate. Among those responsibilities, outlined in Rule 4311(c)(2), is to require each carrying agreement in which accounts are carried on a fully disclosed basis to expressly allocate to the carrying firm the responsibility for the safeguarding of funds and securities for the purposes of SEA Rule 15c3-3 (Customer protection – reserves and custody of securities.) and for preparing and transmitting statements of account to customers.<sup>17</sup> To emphasize the importance of ensuring the accuracy and integrity of customer account statements, proposed Supplementary Material .01 would remind firms of their obligations under Rule 4311, including paragraph (c)(2).

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<sup>17</sup> 17 CFR 240.15c3-3. Rule 4311(c)(2) also provides that the carrying firm may authorize the introducing firm to prepare and/or transmit statements of account to customers on the carrying firm's behalf with the prior written approval of FINRA.

2. Transmission of Customer Account Statements to Other Persons or Entities (Proposed Supplementary Material .02)

Unlike NYSE Rule 409T, Rule 2231 does not address the transmission of customer account statements to third parties. To harmonize NYSE Rule 409T with Rule 2231, FINRA is proposing to add new Supplementary Material .02 to Rule 2231 to address the transmission of customer account statements to other persons or entities in similar fashion as NYSE Rule 409T. In general, NYSE Rule 409T(b) prohibits, without the NYSE's consent, the delivery of statements, confirmations or other communications to a nonmember customer: (1) in care of a person holding POA over the customer's account unless either (A) the customer has provided written instructions to the member organization to send such confirmations, statements or communications in care of such person, or (B) duplicate copies are sent to the customer at some other address designated in writing by the customer; or (2) at the address of any member, member organization, or in care of a partner, stockholder who is actively engaged in the member corporation's business or employee of any member organization.<sup>18</sup>

In the Notice, FINRA had proposed that, except as required to comply with Rule 3210 (the successor rule to NASD Rule 3050 and NYSE Rule 407), a member may not address or send account statements or other communications relating to a customer's account to other persons or entities or in care of a person holding POA over the customer's account unless (1) the customer provided written instructions to the firm to send such statements or other communications to such person or entity or in care of a person holding POA over the customer's account; and (2) the firm sent duplicates of such statements or other communications, in accordance with Rule 2231,

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<sup>18</sup> NYSE Rule 409T(b) also provides that NYSE may, upon written request, waive the requirements therein. NYSE Rule 409T(b)(2) waivers are addressed in NYSE Rule Interpretation 409T(b)/01 (Standards for Holding Mail for Foreign Customers – Rule 409T(b)(2) Waivers), discussed below.

directly to the customer either in paper format or electronically as provided in proposed Supplementary Material .03. FINRA notes that unlike NYSE Rule 409T(b), which provides a firm the option (using the disjunctive “or”) to continue delivering account statements to the customer that has an arrangement with the firm to deliver account statements to a third party, proposed Supplementary Material .02 as described in the Notice 14-35 Proposal did not. Omitting this option limited a customer’s ability to decline receiving statements.

Commenters to the Notice 14-35 Proposal expressed concerns with this limitation, particularly where the customer’s health or capacity was in question. In consideration of comments received to that proposal, FINRA is proposing to adjust the proposed supplementary material in several ways. The term “or other communications” would be deleted from the proposed rule text to clarify that proposed Supplementary Material .02 would be confined to only customer account statements. The specific reference to “or in care of a person holding power of attorney over the customer’s account” would also be deleted from the proposed rule text, leaving the general reference to “other persons or entities” that could include any third party the customer may designate to receive the account statements.

In addition, while proposed Supplementary Material .02 would retain the continuous statement delivery requirement to the customer as described in the Notice 14-35 Proposal, the proposed supplementary material would be adjusted to create a limited exception to the general requirement to continue to deliver account statements to a customer in cases where there is a court-appointed fiduciary. Specifically, proposed Supplementary Material .02(b) would provide that where a court of competent jurisdiction has appointed a guardian, conservator, trustee, personal representative or other person with legal authority to act on behalf of a customer, a member may cease sending account statements to the customer upon written instructions from

such court-appointed fiduciary provided that the court-appointed fiduciary furnishes to the member an official copy of the court appointment that establishes authority over the customer's account(s). As adjusted, proposed Supplementary Material .02(a) would state that, except as provided for in proposed paragraph (b) relating to the existence of a court-appointed fiduciary, a member may not send account statements relating to a customer's account(s) to other persons or entities unless: (1) the customer has provided written instructions to the member to send the statements to such person or entity; and (2) the member continues to send accounts statements directly to the customer either in paper format or electronically as provided in Supplementary Material. 03 (Use of Electronic Media to Satisfy Delivery Obligations) of Rule 2231.

Finally, proposed Supplementary Material .02(c) would maintain, in similar fashion to the Notice 14-35 Proposal, that notwithstanding proposed Supplementary Material .02(a), a member may provide duplicate customer account statements under Rule 2070 (Transactions Involving FINRA Employees), Rule 3210, or other similar applicable federal securities laws, rules, and regulations in accordance with the requirements of such rule.<sup>19</sup>

FINRA believes that the proposed supplementary material, as adjusted herein, achieves the appropriate balance between ensuring that customers continue to receive their account statements in accordance with Rule 2231(a) to retain the ability to readily monitor their account activity while recognizing that there are special circumstances where a firm may stop the delivery of account statements to customers.

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<sup>19</sup> See supra note 8.

3. Use of Electronic Media to Satisfy Delivery Obligations (Proposed Supplementary Material .03)

FINRA is proposing to add new Supplementary Material .03 to Rule 2231 that would expressly allow a member firm to satisfy its delivery obligations under the rule by using electronic media, subject to compliance with standards established by the SEC on the use of electronic media for delivery purposes.<sup>20</sup> This provision would be consistent with prior guidance FINRA has issued on the use of electronic media to satisfy delivery obligations.<sup>21</sup>

4. Compliance with Rule 3150 (Holding of Customer Mail) (Proposed Supplementary Material .04)

In general, Rule 3150 allows a firm to hold a customer's mail for a specific time period in accordance with the customer's written instructions if the firm meets specified conditions. FINRA is proposing to add new Supplementary Material .04 to Rule 2231 that would permit member firms to hold customer mail, including customer account statements, subject to the requirements of Rule 3150.

5. Information to be Disclosed on Statement (Proposed Supplementary Material .05)

NYSE Rule Interpretation 409T(a)/02 describes the information that must be disclosed on the front of a customer account statement: the identity of the introducing and carrying organizations, and their respective phone numbers for service; that the carrying organization is a

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<sup>20</sup> SEC guidance to date on the use of electronic media generally requires the affirmative consent of the investor or customer. See Securities Act Release No. 7233 (October 6, 1995); 60 FR 53458 (October 13, 1995); Securities Act Release No. 7288 (May 9, 1996); 61 FR 24644 (May 15, 1996); and Securities Act Release No. 7856 (April 28, 2000); 65 FR 25843, 25854 (May 4, 2000).

<sup>21</sup> See Notice to Members 98-3 (January 1998) (stating in part that members are permitted to electronically transmit documents that they are required or permitted to furnish to customers under FINRA rules, provided they comply with all aspects of the SEC's electronic delivery requirements).

member of Securities Investor Protection Corporation (“SIPC”); and the opening and closing account balances. Note 1 to NYSE Rule Interpretation 409T(a)/02 provides that “[t]he SEC has stated that under the SEA Rule 15c3-1(a)(2)(iv), certain carrying firms must issue customer account statements, and the account statements must contain the name and telephone number of a person at the carrying firm who the customer can contact with inquiries regarding the account (See SEA Release No. 34-31511, dated November 24, 1992). The phone number of the carrying organization may appear on the back of the statement. If it does, it must be in ‘bold’ or ‘highlighted’ letters.” Unlike NYSE Rule Interpretation 409T(a)/02, Rule 2231 does not detail the information that must be clearly and prominently disclosed on the front of an account statement. FINRA is proposing to transfer NYSE Rule Interpretation 409T(a)/02, inclusive of note 1, without substantive changes, as Supplementary Material .05 to Rule 2231. Proposed Supplementary Material .05 to Rule 2231 would specify the following information to be clearly and prominently disclosed on the front of the account statement: (1) the identity of the introducing and clearing firm, if different, and their respective contact information for customer service, permitting the identity of the clearing firm and its contact information to appear on the back of the statement provided such information is in “bold” or “highlighted” letters; (2) that the clearing firm is a member of SIPC; and (3) the opening and closing balances for the account.

6. Assets Externally Held (Proposed Supplementary Material .06)

NYSE Rule Interpretation 409T(a)/04 provides that where the account statement includes assets for which a member organization does not have fiduciary responsibility, does not have access to and which are not included on the member organization’s books and records, such assets must be clearly separated on the statement. In addition, the statement must indicate that such externally held assets are included on the statement solely as a service to the customer and are not covered by SIPC, and that information is derived from the customer or other external

source for which the member organization is not responsible.<sup>22</sup> Rule 2231 does not contain a similar provision.

FINRA is proposing to transfer the requirements of NYSE Rule Interpretation 409T(a)/04, without substantive changes, as proposed Supplementary Material .06 to Rule 2231. Under proposed Supplementary Material .06, where the account statement includes assets that the member firm does not carry on behalf of a customer and that are not included on the member firm's books and records, such assets must be clearly and distinguishably separated on the statement. In addition, in such cases, the statement must: (1) clearly indicate that such externally held assets are included on the statement solely as a courtesy to the customer; (2) disclose that information, including valuation, for such externally held assets is derived from the customer or other external source for which the member firm is not responsible; and (3) identify that such externally held assets may not be covered by SIPC.

7. Use of Logos, Trademarks, Etc. (Proposed Supplementary Material .07)

NYSE Rule Interpretation 409T(a)/05 provides that where the logo, trademark or other identification of a person (other than the introducing firm or clearing firm) appears on an account statement, then the identity of such person and the relationship to the introducing, carrying or other organization included on the statement must be provided and may not be misleading or confusing to customers. Rule 2231 does not contain a similar provision. FINRA is proposing to transfer, without substantive change, NYSE Rule Interpretation 409T(a)/05 as proposed Supplementary Material .07. FINRA notes that proposed Supplementary Material .07 would be consistent with the general requirements of Rule 2210 (Communications with the Public).

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<sup>22</sup> See NYSE Information Memo 97-56 (December 1997) (stating, “[t]his provision is not intended to cover assets (e.g., stocks or mutual funds) to which the member organization has access that may be held at a depository or mutual fund.”).



## 8. Use of Summary Statements (Proposed Supplementary Material .08)

NYSE Rule Interpretation 409T(a)/06 addresses the responsibilities associated with the practice of firms, with other related financial institutions, to jointly formulate and distribute to their common customers their respective customer account statements, together with “summary statements.”<sup>23</sup> In general, a summary statement reflects information from entities that is part of a financial services “group” or “family” or where a firm carries accounts for another broker-dealer that is part of such group or family. A summary statement provides an overview of the customer’s accounts at the separate entities and is supported by and derived from the detail on the separate underlying respective account statements. NYSE Rule Interpretation 409T(a)/06 sets forth several requirements for the use of summary statements that include: (1) an indication that such summary statement is provided for informational purposes and includes assets held at different entities; (2) the summary statement identifies each entity from which information is provided or assets are being held are included, their relationship to each other, and their respective functions (e.g., introducing or carrying brokerage firms, fund distributor, banking or insurance product providers, etc.); (3) relative to services provided for assets included on the summary, the summary statement must clearly distinguish between assets held by each entity, identify the customer’s account numbers at each entity, and provide a customer service telephone number at each entity (if the account number and customer service numbers are not included on the underlying statements); and (4) identify each entity that is a member of SIPC. These requirements help ensure that customer account statements clearly identify the respective entities involved and distinguish brokerage assets from non-brokerage assets.<sup>24</sup> Rule 2231 does not have

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<sup>23</sup> See generally NYSE Information Memo 97-56 (December 1997).

<sup>24</sup> NYSE Rule Interpretation 409T(a)/06 also provides that to the extent that the summary statement aggregates the values of the various accounts summarized or portions thereof,

a counterpart provision.<sup>25</sup> In the Notice, FINRA had proposed transferring the requirements of NYSE Rule Interpretation 409T(a)/06, without substantive changes, as proposed Supplementary Material .08 to Rule 2231.

FINRA is proposing to retain this approach, but with some clarifying revisions to proposed Supplementary Material .08 to expressly state that the summary statement is for a customer's convenience and includes assets that may not be held by the broker-dealer, and does not replace any other statement the customer may receive from other financial institutions that may hold the customer's assets. Under proposed Supplementary Material .08, as revised, if a multi-entity summary statement is sent to customers, it must: (1) indicate that the summary statement is provided for the customer's convenience and includes assets that may not be held by the broker-dealer; (2) indicate that the summary statement does not replace any other statement(s) the customer may receive from other financial institutions that hold the customer's

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such aggregation must be recognizable as having been arithmetically derived from the separately stated totals or their components. In addition, the summary statement, and the beginning and end of each underlying account statement, must be clearly distinguishable from each other by using some distinct form of demarcation (e.g., color, pagination or columns). Further, there must be a written agreement between the parties that are jointly distributing the combined statements with the summary, that each entity has developed procedures and controls for testing the accuracy of its own information included on the customer statement. Finally, NYSE Rule Interpretation 409T(a)/06 requires that summary statements must comply with NYSE Rule 409T and all interpretations thereof.

<sup>25</sup> While Rule 2231 does not have a counterpart provision to NYSE Rule Interpretation 409T(a)/06, FINRA has issued guidance reminding firms of their responsibilities when providing customers with consolidated financial account reports or "consolidated reports," which offer a broad view of customers' investments, may include assets held away from the firm, and may provide not only account balances and valuations, but performance data as well. In that guidance, FINRA noted that these types of communications "may supplement, but do not replace, the customer account statement required pursuant to [Rule 2231] and [NYSE Rule 409T], which is prepared and disseminated to the customer through a separate process. Consolidated reports may not be represented as a substitute for, and must be distinguished from, account statements that are required by rule." See Regulatory Notice 10-19 (April 2010).

assets; (3) identify each entity from which information is provided or assets being held are included, their relationship to each other (e.g., parent, subsidiary or affiliated organization), and their respective functions (introducing firm, carrying firm, fund distributor, banking or insurance product provider, etc.); (4) clearly distinguish between assets held or categories of assets held by each entity included in the summary; (5) identify the customer's account number at each entity and provide a customer service contact information at each entity (if the account number and customer service information at each entity are included on their respective account statements, then such information need not be included on the summary statement); and (6) identify each entity that is a member of SIPC. Proposed Supplementary Material .08 would also require a member firm to ensure that to the extent that the summary statement aggregates the values of the various accounts summarized or portions thereof, such aggregation is recognizable as having been arithmetically derived from the separately stated totals or their components. In addition, proposed Supplementary Material .08 would require that a member firm also must distinguish the beginning and end of each separate statement by a distinct form of demarcation. Finally, the proposed supplementary material would require a member firm to ensure that there is a written agreement between the parties jointly formulating or distributing the 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, and that the summary statement complies with Rule 2231.

C. NYSE Provisions to be Eliminated and Not Harmonized with Rule 2231

FINRA is proposing to delete NYSE Rule 409T and NYSE Rule Interpretation 409T in their entirety on the basis that the underlying concepts in these provisions have been included in Rule 2231, are duplicative of other rules, or are outdated. The following describes concepts found in the NYSE provisions that would not be incorporated into Rule 2231.

1. NYSE Rule 409T Provisions

a. Confirmations or Other Communications (NYSE Rule 409T(b))

As described above, the proposed rule change would confine proposed Supplementary Material .02 to customer account statements to lend clarity to the scope of the provision. FINRA notes that the delivery requirements of confirmations are governed by SEA Rule 10b-10 (Confirmation of transactions) and FINRA Rule 2232 (Customer Confirmations).

b. Person Holding Power of Attorney (or Attorney-in-Fact) (NYSE Rule 409T(b) and Paragraphs (1) through (6) Under NYSE Rule 409T.10 (Exceptions to Rule 409T(b))

In addition to eliminating NYSE Rule 409T(b), the proposed rule change would eliminate NYSE Rule 409T.10(1) through (6), which provides exceptions to the requirements of NYSE Rule 409T(b) for certain identified persons or entities, such as persons having powers of attorney.<sup>26</sup> As described above, FINRA is proposing to adopt proposed Supplementary Material .02 relating to the transmission of customer account statements to other persons or entities, which would provide an exception for court-appointed fiduciaries.

c. Legend on Account Statements Pertaining to Firm's Financial Statements (NYSE Rule 409T(e)(1))

In general, NYSE Rule 409T(e)(1) requires the inclusion of a legend on all account statements that notifies a customer that the firm's financial statements are available for inspection at its offices or a copy can be mailed upon request. The proposed rule change would eliminate this requirement in light of existing requirements under paragraph (c) (Customer

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<sup>26</sup> See NYSE Rule 409T.10(4): "Corporations of which partners, stockholders or employees are officers or directors, and corporation accounts over which such persons have powers of attorney, provided, in each such case, the partner, stockholder or employee is duly authorized by the corporation to receive communications covering the account."

Statements) of SEA Rule 17a-5 (Reports to be Made by Certain Brokers and Dealers),<sup>27</sup> which generally requires broker-dealers that carry customer accounts to provide statements of the broker-dealer's financial condition to their customers, and FINRA Rule 2261 (Disclosure of Financial Condition), which requires a member to make information relative to a member's financial condition available to inspection by customers, upon request.

d. Duplicate Copies of Monthly Statements to Guarantors (NYSE Rule 409T(g))

NYSE Rule 409T(g) provides that member firms carrying margin accounts for customers should send duplicate copies of monthly statements of guaranteed accounts to the respective guarantors unless such guarantors have specifically provided in writing that they do not want such statements sent to them. The proposed rule change would eliminate NYSE Rule 409T(g) because this provision, which provides that members should send duplicate account statements to guarantors, would be addressed by the general requirement in proposed Supplementary Material .02 to obtain written instructions from the customer to send account statements to a third party.

e. Holding Customer Mail (NYSE Rule 409T.10(7))

As noted above, the proposed rule change would eliminate the concept of holding customer mail set forth in paragraph (7) under NYSE Rule 409T.10, as a member's obligations with respect to this activity are addressed in Rule 3150, and proposed Supplementary Material .04 would expressly permit a member to hold customer mail consistent with Rule 3150.

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<sup>27</sup> 17 CFR 240.17a-5.

2. NYSE Rule Interpretation 409T

a. Use of Third Party Agents (NYSE Rule Interpretation 409T(a)/03)

In general, NYSE Rule Interpretation 409T(a)/03 requires a written representation or undertaking from the member organization to the NYSE, representing that certain conditions are satisfied when using third party agents (e.g., service bureaus or other independent entities) to prepare and transmit customer account statements.<sup>28</sup> The proposed rule change would eliminate NYSE Rule Interpretation 409T(a)/03 because such arrangements are addressed under Rule 4311 and other relevant guidance.<sup>29</sup>

b. Standards for Holding Mail for Foreign Customers – Rule 409T(b)(2) Waivers (NYSE Rule Interpretation 409T(b)/01)

The proposed rule change would eliminate NYSE Rule Interpretation 409T(b)/01, which provides guidelines for holding confirmations, statements, and broker-dealer financial statements for foreign customers. A member's obligations with respect to holding customer mail are addressed in Rule 3150, which is referenced in proposed Supplementary Material .04.

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<sup>28</sup> Under NYSE Rule Interpretation 409T(a)/03, a member organization must represent that the third party is acting as agent for the member organization, that the member organization retains responsibility for compliance with NYSE Rule 409T(a), and that the member organization has developed procedures and controls for reviewing and testing the accuracy of statements, and will retain copies of all such statements in accordance with applicable books and records requirements. In addition, NYSE Rule Interpretation 409T(a)/03 addresses the allocation of responsibilities for preparation and transmissions of statements under a carrying agreement and provides that an introducing organization that is a provider of services included in a member organization's statements of accounts may not function as a third party agent and may not itself prepare or transmit such statements.

<sup>29</sup> See Notice to Members 05-48 (July 2005) (describing a member's responsibilities when outsourcing activities to third party service providers).

#### D. Technical Changes to Other FINRA Rules

The proposed harmonization of the NYSE provisions with Rule 2231 would require technical amendments to Interpretative Material (“IM”)-1013-1 (Membership Waive-In Process for Certain New York Stock Exchange Member Organizations) and IM-1013-2 (Membership Waive-In Process for Certain NYSE American LLC Member Organizations), which describe a waive-in membership application process for some member organizations of the NYSE and NYSE American LLC. In general, subject to specified terms set forth in these interpretative materials, a firm admitted to FINRA membership through either of these provisions (*i.e.*, “waived-in firm”) is not subject to the remaining FINRA rules that have yet to be harmonized with their corresponding NYSE rules or interpretations under the Temporary Dual FINRA-NYSE Member Rule Series. Currently, these rules are Rule 2231 and the NYSE provisions. FINRA is proposing to amend IM-1013-1 and IM-1013-2 to remove the reference to Rule 2231 as all waived-in firms will become subject to Rule 2231, as amended herein.

If the Commission approves the proposed rule change, FINRA will announce the effective date of the proposed rule change in a Regulatory Notice. The effective date will be no later than 365 days following publication of the Regulatory Notice announcing Commission approval of the proposed rule change.

#### 2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>30</sup> which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes

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<sup>30</sup> 15 U.S.C. 78o-3(b)(6).

that the proposed rule change will further the purposes of the Act because the proposed rule change will help protect investors and the public interest by largely retaining the existing requirements under Rule 2231 that promotes effective regulation of account statements. FINRA believes that by proposing several new supplementary materials that provide clarity in areas such as compliance with other FINRA rules, the use of electronic delivery, transmission of account statements to other persons or entities, information to be disclosed on statements, assets externally held, the use of logos and trademarks, and the use of summary statements, the proposed rule change will establish consistent industry standards pertaining to the substance and the presentation of customer account statements.

In addition, FINRA believes proposed Supplementary Material .02, as revised in light of comments received in response to the Notice, strikes an appropriate balance to protect investors by ensuring that customers continue to receive their account statements while reducing the proposed rule change's impact on member firms. As discussed previously, these revisions include: (1) confining the scope only to customer account statements; (2) adding a limited exception from the general requirement to continue providing account statements to customers who have authorized third party delivery by permitting member firms to cease sending such statements to customers upon written instructions from a court-appointed fiduciary acting on behalf of the customer; and (3) clarifying that, notwithstanding the general requirement to obtain written instructions from a customer to establish third party delivery of account statements, firms may provide duplicate customer account statements under Rule 2070, Rule 3210 or other similar applicable federal securities laws, rules and regulations in accordance with the requirements of such rules.



B. Self-Regulatory Organization's Statement on Burden on Competition

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.

Economic Impact Assessment

FINRA has undertaken an economic impact assessment, as set forth below, to analyze the regulatory need for the proposed rule change and its potential economic impacts, including anticipated costs and benefits, and the alternatives FINRA considered in assessing how to meet its regulatory objectives.

1. Regulatory Need

Rule 2231 and the NYSE provisions have remained substantively unchanged since their adoption into the consolidated FINRA rulebook. Having two sets of rules with differing application or scope may prevent firms from consistently applying the rules and thus create uncertainties in compliance and lead to unnecessary costs. In an effort to harmonize these rules, FINRA is proposing to amend Rule 2231 to incorporate guidance and several provisions that exist under the NYSE provisions and in other FINRA rules as supplementary materials. Notably, FINRA is proposing to adopt new Supplementary Material .02, derived in large part from NYSE Rule 409T(b), but with some adjustments from the terms set forth in the Notice that would address a situation in which a customer may want to transmit account statements to other persons or entities, and stop receiving statements due to particular circumstances. As a result of the proposed harmonization, FINRA is proposing to eliminate the NYSE provisions in their entirety as they are, to some degree, duplicative of Rule 2231 or would become obsolete by the proposed rule change.

## 2. Economic Baseline

The current provisions governing customer account statements under Rule 2231 and the NYSE provisions, and other related rules and current industry practices serve as an economic baseline for the proposed rule change. While all FINRA members are subject to Rule 2231, dual members are also subject to several additional requirements existing only in the NYSE provisions. As of December 31, 2020, there are 3,435 FINRA members, of which 134 are dual members.

## 3. Economic Impacts

The substantive changes to Rule 2231 described in this proposed rule change relate to the supplementary materials, most of which are derived from the NYSE provisions and for that reason, the economic impacts herein focus primarily on the proposed supplementary materials, particularly proposed Supplementary Material .02.

### Proposed Supplementary Material .02

In general, proposed Supplementary Material .02 addresses a situation where a customer instructs the firm, in writing, to send his or her account statements to another person or entity and limits the customer's ability to stop receiving them, except where there is a court-appointed fiduciary.<sup>31</sup> One issue some commenters raised was the requirement for firms to continue delivering account statements to the customer even where the customer directs the firm, in writing, to send the customer's account statements to a third party, and does not wish to continue receiving them due to health concerns, among other reasons. For example, SIFMA expressed the

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<sup>31</sup> Proposed Supplementary Material .02 also provides that members are not required to obtain prior written consent to send customer account statements in compliance with Rule 2070, Rule 3210, or other similar applicable federal securities laws, rules, and regulations in accordance with the requirements of such rule.

belief that the requirement to continue delivering account statements to the customer may result in the fraud that will likely arise from identity theft where account statements are sent to a customer against his or her request or against the request of a person with the legal authority to act on behalf of the customer. SIFMA added that proposed Supplementary Material .02 may have a material negative impact on the client experience and serve to drive clients to advocacy models without this requirement.

FINRA believes that the customer's ability to stop receiving his or her own account statements when there is a court-appointed fiduciary strikes the appropriate balance between the investor protection functions of Rule 2231 to ensure that the customer is able to monitor and verify the transactions occurring in the customer's account and the concerns raised by some commenters about ceasing the delivery of account statements to a customer under compelling circumstances. FINRA recognizes that some customers may incur supplemental costs to conform to the continuous delivery requirement in proposed Supplementary Material .02. Customers who do not wish to receive their account statements may bear some burden in controlling and destroying them. Alternatively, customers may incur costs associated with seeking the exception through a court-appointed fiduciary. Customers may incur the direct cost of seeking a court-appointed fiduciary as well as the indirect cost of giving away other rights not associated with account statements when a fiduciary is appointed by the court. To alleviate the potential compliance costs associated with continuous statement delivery to customers and the concern over possible identity theft and fraud, members could encourage, if appropriate, their customers to choose to receive their statements electronically in a manner consistent with proposed Supplementary Material .03, a further discussion of which follows below.

In addition, firms may also incur costs to conform to proposed Supplementary Material .02 including the tracking and retention of each customer's written instructions and official documents related to the court appointment of a fiduciary, and where statements are delivered in paper format, the costs of additional postage, printing, and other attendant expenses.<sup>32</sup> However, FINRA understands that in practice, some firms already provide continuous account statement delivery to their customers even with third party delivery arrangements in place except in special circumstances (e.g., validated medical excuse), and that concerns related third party delivery arrangements rarely arise.

#### Other Proposed Supplementary Materials

Proposed Supplementary Materials .01, .03, and .04, respectively, would remind firms of existing requirements under Rule 4311, SEC guidance on using electronic media to satisfy delivery obligations, and Rule 3150. The NYSE provisions that FINRA is proposing to incorporate into Rule 2231 as Supplementary Materials .05, .06, .07, and .08 would address, respectively, the information to be disclosed on statements, externally held assets, the use of logos and trademarks, etc., and the use of summary statements. FINRA does not expect these proposed harmonizing amendments to Rule 2231 to impose material burdens on member firms as these proposed supplementary materials are substantially similar to existing rules or otherwise consistent with current guidance.

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<sup>32</sup> In the Notice, FINRA asked specific questions concerning, among other things, the direct and indirect costs that may result from proposed Supplementary Material .02. See generally Notice, Section C (Request for Comment). SIFMA commented that a firm with approximately 7.4 million accounts provided a cost estimate of over 14 million dollars just for the postage and mailings associated with the nearly 2.2 million accounts potentially impacted by the prospective application of proposed Supplementary Material .02, excluding substantial staffing and technology costs.

#### 4. Alternatives Considered

FINRA considered various suggestions in developing the proposed rule change. The proposed rule change reflects the changes that FINRA believes at this time to be the most appropriate for the reasons discussed herein.

##### a. Frequency of Delivery of Account Statements to Customer

In the Initial Rule Filing and Amended Rule Filing, FINRA had considered amending then NASD Rule 2340 to change the frequency of the delivery of account statements to customers from quarterly to monthly. The comments FINRA received in response to these prior filings suggested that such a proposed change would result in significant compliance costs for the industry without commensurate benefits for customers, and could create conflicts with some securities laws and regulations, among other things. Based on these comments, FINRA has determined to retain the quarterly delivery requirement for customer accounts statements currently set forth in Rule 2231(a).<sup>33</sup>

##### b. Definition of “General Securities Member”

Currently, under Rule 2231(d)(2) a “general securities member” refers to “any member that conducts a general securities business and is required to calculate its net capital pursuant to the provisions of SEA Rule 15c3-1(a). Notwithstanding the foregoing definition, a member that does not carry customer accounts and does not hold customer funds or securities is exempt from the provisions of this section.”<sup>34</sup> In the Notice, FINRA specifically requested comment on

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<sup>33</sup> The account delivery frequency aligns with NYSE Rule 409T(a).

<sup>34</sup> The NYSE provisions do not have a corresponding definition.

potential clarifications to the definition of “general securities member.”<sup>35</sup> At this time, FINRA is not proposing to amend Rule 2231(d)(2).

c. Exception from the General Requirement to Send Account Statements to Customers

Proposed Supplementary Material .02 as presented in the Notice did not contemplate an exception from the firm’s general requirement to continue sending account statements to customers. In the Notice, FINRA specifically requested comment on whether the proposal should include specific exclusions that would allow members not to send account statements to customers under identified situations. FINRA also specifically sought comment on current industry practices, safeguards, or best practices with respect to sending account statements to a customer who is disabled or incapacitated, resides in a nursing home, has a trusted person to review statements, or where there is a valid POA or guardianship established.

In consideration of the comments to the Notice, FINRA has modified proposed Supplementary Material .02 from the terms outlined in the Notice. In addition to limiting the scope of the proposed supplementary material to only customer account statements and omitting the specific reference to POA, the proposed provision would create a limited exception from the general requirement for firms to continue to deliver account statements to a customer in cases where there is a court-appointed fiduciary acting on behalf of the customer. The other aspects of the proposed supplementary material would remain substantively unchanged from the terms set forth in the Notice, including the option to send account statements to the customer either in paper format or electronically as provided in proposed Supplementary Material. 03.

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<sup>35</sup> FINRA did not receive comments in this area, but FAF noted that registered investment advisors (“RIAs”) do not fall under the definition.

FINRA notes that members could request customers that provide written instructions to the member to send account statements to other persons or entities to authorize the member to satisfy the requirement to continue delivering statements to the customer through electronic delivery consistent with proposed Supplementary Material .03. In this manner, FINRA believes that member firms could both mitigate the concerns relating to the costs of postage, printing and mailing account statements, and address concerns relating to possible identity theft and fraud in circumstances where account statements are sent. With respect to the general requirement for firms to continue to deliver account statements to the customer even when the customer has directed the firm, in writing, to send account statements to other persons or entities, FINRA understands that even where there is a third party delivery arrangement in place, in general, firms continue to send account statements to their customers except under extenuating circumstances (e.g., validated medical excuse). This industry practice accords with Rule 2231(a), which reflects the core principle that customers should be fully informed of the status of their accounts.

FINRA believes that proposed Supplementary Material .02, as modified, lends the appropriate balance between ensuring that customers continue to receive their account statements in accordance with Rule 2231(a) to ensure that they have the ability to monitor their account activity while recognizing that there may be special circumstances where a firm may stop the delivery of account statements to customers.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The proposed rule change was published for comment in the Notice 14-35 Proposal. FINRA received 14 comment letters in response to the Notice 14-35 Proposal. A copy of the Notice 14-35 Proposal is available on FINRA's website at <http://www.finra.org>. A list of the comment letters received

in response to the Notice 14-35 Proposal is available on FINRA's website.<sup>36</sup> Copies of the comment letters received in response to the Notice 14-35 Proposal are also available on FINRA's website.

Several commenters expressed general support for the purpose and intent of the Notice 14-35 Proposal.<sup>37</sup> In addition, several commenters noted that the proposed rule change includes meaningful changes in response to comments on the Initial Rule Filing.<sup>38</sup> However, as discussed below, commenters to the Notice 14-35 Proposal objected to limiting a customer's ability to decline receiving statements, particularly where the customer's health or capacity was in question. In addition, the commenters raised concerns regarding existing customer account relationships with third party delivery arrangements in place. FINRA considered the commenters' concerns, including the attendant operational aspects of sending account statements to customers and third parties. The comments and FINRA's responses are set forth below.

1. General (Rule 2231(a))

- A. Quarterly Customer Account Statement Delivery Requirement

Currently, Rule 2231(a) generally requires a general securities member to send account statements to customers at least once each calendar quarter containing a description of any securities positions, money balances or account activity in the accounts since the prior account statements were sent, except if carried on a DVP/RVP basis. NYSE Rule 409T(a) similarly establishes a quarterly account statement delivery requirement.

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<sup>36</sup> See SR-FINRA-2021-024 (Form 19b-4, Exhibit 2e) for a list of abbreviations assigned to commenters (available on FINRA's website at <http://www.finra.org>).

<sup>37</sup> See GSU, PIRC, SIFMA, WFA, and Wulff.

<sup>38</sup> See Edward Jones, FSI, PIRC, SIFMA, WFA, and Wulff.



Several commenters expressed support for retaining the delivery frequency in the current rule, noting that the quarterly delivery requirement is consistent with industry practices.<sup>39</sup> NASAA, however, urged FINRA to revert to the monthly delivery frequency as originally proposed in the prior rule filings, stating that monthly delivery would allow customers to better monitor their accounts and identify any potential unauthorized fraudulent activity. PIRC recommended that customers should have the option of receiving quarterly or monthly statements based on their own individual needs, and also recommended that customers be provided with the option to receive account statements electronically and to make available to customers a status of their accounts via telephone or online at the customer's request.

FINRA notes that nothing in the rule, in its current form, precludes a firm from sending account statements to a customer on a more frequent schedule in a particular medium to meet the needs of the customer. Consistent with the Notice 14-35 Proposal, FINRA is proposing to retain the existing requirement in Rule 2231(a) for members to send customer account statements at least once each quarter.

#### B. Securities Investor Protection Act ("SIPA") Disclosure Requirement

Rule 2231(a) requires a general securities member to include in the account statement a statement advising a customer to report promptly any inaccuracy or discrepancy in that person's account to the member firm, and that any oral communication to the member firm should be reconfirmed in writing to further protect the customer's rights, including rights under SIPA. NYSE Rule 409T(e)(2) similarly requires a member organization to include a legend in the account statement with the same advice.

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<sup>39</sup> See Edward Jones, FSI, SIFMA, and WFA.

PIRC expressed concerns with the SIPA disclosure requirement in Rule 2231(a). PIRC stated that it has encountered firms that have used the disclosure as a defense to claims in arbitration, suggesting that the disclosure only appears to be intended to protect investors. PIRC recommended that FINRA amend this portion of the rule to ensure that such disclosure cannot be used against a customer in a dispute.

In 2001, the then U.S. General Accounting Office, now known as the Government Accountability Office (“GAO”), issued a report in which it made recommendations to the SEC and SIPC about ways to improve the information available to the public about SIPC and SIPA.<sup>40</sup> Among other things, the GAO recommended that self-regulatory organizations, such as FINRA, consider requiring firms to include information on periodic statements or trade confirmations to advise investors that they should document account discrepancies in writing. In response to that recommendation, Rule 2231(a) was amended in 2006 to require that account statements include a statement advising each customer to report promptly any inaccuracy or discrepancy in that person’s account to his or her brokerage firm and clearing firm (where these are different firms), and such statement also must advise the customer that any oral communication should be re-confirmed in writing to further protect the customer’s rights, including rights under SIPA.<sup>41</sup> Written documentation is important because in the event a firm goes into SIPC liquidation, SIPC and the trustee generally will assume that the firm’s records are accurate unless the customer is

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<sup>40</sup> See Securities Investor Protection: Steps Needed to Better Disclose SIPC Policies to Investors, GAO-01-653 (May 25, 2001), <https://www.gao.gov/products/gao-01-653>.

<sup>41</sup> See Securities Exchange Act Release No. 54411 (September 7, 2006), 71 FR 54105 (September 13, 2006) (Order Approving File No. SR-NASD-2004-171), as corrected by Securities Exchange Act Release No. 54411A (October 6, 2006), 71 FR 61115 (October 17, 2006). See also Notice to Members 06-72 (December 2006).

able to prove otherwise.<sup>42</sup> As FINRA noted in the 2006 rule filing to amend Rule 2231(a), the disclosure requirement does not impose any limitation whatsoever on a customer's right to raise concerns regarding inaccuracies or discrepancies in his or her account at any time, either in writing or orally.<sup>43</sup> Further, a customer's failure to promptly raise such concerns, either in writing or orally, does not preclude a customer from reporting an inaccuracy or discrepancy in his or her account during any SIPC liquidation of his or her brokerage or clearing firm.<sup>44</sup> FINRA believes that the provision continues to enhance customer protection in accordance with GAO's recommendation and has determined to maintain Rule 2231(a) pertaining to SIPA disclosure in its current form.

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<sup>42</sup> See supra note 41. SIPC advises investors who discover an error in a confirmation or statement to immediately bring the error to the attention of their brokerage firm in writing and to keep a copy of any such writing. See SIPC, How SIPC Protects You: Understanding the Securities Investor Protection Corporation (2015), <https://www.sipc.org/media/brochures/HowSIPCProtectsYou-English-Web.pdf>. More recently, FINRA, NASAA, and SIPC jointly issued an investor alert discussing the importance of regularly reviewing brokerage account statements, and the steps a customer should take to document concerns with an error on a brokerage statement or trade confirmation. See FINRA Investor Alert, It Pays to Pay Attention to Your Brokerage Account Statements (December 18, 2019), <https://www.finra.org/investors/alerts/pay-attention-brokerage-account-statements>. See also NASAA Investor Advisory, It Pays to Pay Attention to Your Brokerage Account Statements" (December 2019), <https://www.nasaa.org/53392/53392/?qoid=investor-advisories> and SIPC News Release, It Pays to Pay Attention to Your Brokerage Account Statements, <https://www.sipc.org/news-and-media/news-releases/20191218>).

<sup>43</sup> See supra note 42.

<sup>44</sup> See supra note 42.

## 2. DVP/RVP Accounts (Rule 2231(b))

Currently, Rule 2231(b) and NYSE Rule 409T(a) provide that quarterly account statements do not need to be sent to a customer if the customer's account is carried solely for execution on a DVP/RVP basis, subject to specified conditions.<sup>45</sup>

Auerbach recommended that Rule 2231 provide an exemption from the requirement to issue periodic account statements in the case of DVP/RVP customers of a member firm that use a third party custodian selected by the customer that is required to issue periodic account statements to the customer. Auerbach stated that in such cases, periodically issued brokerage firm account statements are duplicative, unnecessary and increase costs for the broker, the customer, and the third party custodian, and such accounts statements will compel the customer and its custodian to reconcile their records with the statement from the broker and require all three parties to expend additional time, energy, and cost on a matter that is already handled through the normal clearance and settlement process. SIFMA requested confirmation that members may treat an institutional customer trading pursuant to discretionary authority in the DVP/RVP account or the authorized person or institution that opened the account as the "customer" for these purposes and collect and maintain the consents from such institutions, instead of the underlying customers.

FINRA believes that the issues raised by the commenters are better addressed through FINRA's interpretative guidance process so that FINRA has the opportunity to fully consider the relevant facts and circumstances. In addition, FINRA emphasizes that the rule in its current form allows a DVP/RVP customer to affirmatively elect not to receive account statements. By

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<sup>45</sup> These rules do not qualify or condition the obligations of members under SEA Rule 15c3-3(j)(1) concerning quarterly notices of free credit balances on statements.

requiring the customer's affirmative consent, the customer's ability to receive quarterly statements is preserved, and the member is precluded from unilaterally terminating delivery of customer statements. Moreover, the customer is able to promptly receive particular account statements upon request, and promptly reinstate the delivery of account statements upon request.<sup>46</sup>

### 3. Definitions (Rule 2231(d))

Rule 2231(d)(2) provides that a "general securities member" refers to any member that conducts a general securities business and is required to calculate its net capital pursuant to the provisions of SEA Rule 15c3-1(a). Notwithstanding the foregoing definition, a member that does not carry customer accounts and does not hold customer funds or securities is exempt from the provisions of [Rule 2231]." FAF noted that RIAs need to have access to customer information in order to perform their duties to their customers or clients. FAF expressed concern that RIAs are not covered by the definition of "general securities member" in Rule 2231(d) and consequently, RIAs would not be entitled to receive customer or client information.

The term "general securities member" identifies which FINRA member firms are required to deliver account statements, not which firms are entitled to receive such statements. Moreover, FINRA notes that nothing in proposed Supplementary Material .02 would preclude a customer from providing written consent to his or her member firm to send account statements to an RIA, subject to the conditions set forth in the proposed rule.<sup>47</sup>

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<sup>46</sup> See Notice to Members 06-68 (November 2006).

<sup>47</sup> RIAs also should consider their obligations under the Investment Advisors Act of 1940, including Rule 206(4)-2 (Custody of Funds or Securities of Clients by Investment Advisors).

4. Compliance with Rule 4311 (Carrying Agreements) (Proposed Supplementary Material .01)

Proposed Supplementary Material .01 to Rule 2231 would remind firms that Rule 4311(c)(2) generally requires each carrying agreement, in which accounts are carried on a fully disclosed basis, to expressly allocate to the carrying firm the responsibility for the safeguarding of funds and securities for the purposes of SEA Rule 15c3-3 and for preparing and transmitting statements of account to customers.<sup>48</sup> Rule 4311(c)(2) provides that the carrying firm may authorize the introducing firm to prepare and transmit such statements on the carrying firm's behalf with the prior written approval of FINRA.

SIFMA requested clarification from FINRA regarding the obligation to obtain written authorization from a customer regarding the mailing of statements to a third party, and the ability of a clearing firm to rely on introducing brokers in asserting the authenticity of a written approval. SIFMA stated that introducing firms are in the best position to know the customer and, as long recognized through contract and in practice, and as permitted under Rule 4311, introducing firms are typically allocated the responsibility for opening accounts as well as maintaining and updating customer addresses, which ultimately drives the delivery of account statements.

FINRA agrees that consistent with guidance on the allocation of responsibilities between carrying firms and introducing firms and as permitted under Rule 4311, clearing firms may reasonably rely on introducing firms with respect to updating and keeping track of required consents and addresses for third parties that may receive account statements under this rule.

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<sup>48</sup> See Regulatory Notice 11-26 (May 2011).

However, both carrying firms and introducing firms must have policies and procedures in place to ensure that their respective responsibilities are met.<sup>49</sup>

5. Transmission of Customer Account Statements to Other Persons or Entities  
(Proposed Supplementary Material .02)

Many commenters, while supportive of the Notice 14-35 Proposal overall, expressed views on proposed Supplementary Material .02.<sup>50</sup> NAELA expressed doubt that the proposed provision would protect vulnerable persons (e.g., persons with disabilities or who are incapacitated) in any meaningful way. The views of many other commenters generally related to the scope of the proposed provision, customer instructions to establish delivery of the customer's account statements to a third party, the circumstances that may warrant an exception to the general requirement for a firm to continue delivering account statements to the customer even where there is a third party delivery arrangement in place, operational concerns, and implementation.

A. Scope

In the Notice 14-35 Proposal, proposed Supplementary Material .02 pertained to account statements "or other communications" relating to the customer's account. Commenters expressed concerns and sought clarification relating to the scope of the proposed provision.

SIFMA raised concerns with the inclusion of "other communications," stating that the proposed supplementary material could include a host of operational communications with third

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<sup>49</sup> See Regulatory Notice 09-64 (November 2009) (stating that while firms may allocate responsibility for complying with particular requirements between the clearing and the introducing firms, both firms must have policies and procedures in place to ensure that their respective responsibilities are met).

<sup>50</sup> See Edward Jones, FAF, Feaver, FSI, GSU, Malecki, NAELA, NASAA, PIRC, SIFMA, WFA, and Wulff.

parties (e.g., custodians, issue and transfer agents, counterparties to trades, banks in connection with disbursements and deposits and a member firm's own vendors) where firms need to send "communications" about a customer's account in order to provide a service requested for the customer. SIFMA requested clarity regarding the scope of "other communications" in the context of the proposed rule. FINRA agrees with the concerns raised by SIFMA in this regard and for clarity, has adjusted the language by deleting the references to "or other communications" from proposed Supplementary Material .02 so that the scope of the proposed provision is limited solely to customer account statements.

SIFMA also sought clarification pertaining to the implications of Supplementary Material .02 on a firm's existing obligations under SEA Rule 17a-3(a)(17)(B)(2) and FINRA Rule 3110(c)(2) to confirm a customer's address change. FINRA notes that proposed Supplementary Material .02 is not intended to impose additional requirements that would impact a firm's current obligations to validate a change in address for a customer under the applicable SEA and FINRA rules.

#### B. Customer Instructions to Deliver Account Statements to Third Party

Proposed Supplementary Material .02 provides that in general, a member may not send account statements relating to a customer's account to other persons or entities unless the customer has provided written instructions to the member to send such statements to a designated third party. However, in order to comply with Rule 2070, Rule 3210 or other similar applicable federal securities laws, rules and regulations, proposed Supplementary Material .02 would provide that a firm is not required to obtain written instructions from the customer to meet the requirements of such applicable rules or regulations.



Several commenters expressed views on the general requirement for firms to obtain written instructions from customers.<sup>51</sup> PIRC expressed its support for the general requirement. NAELA noted that persons with disabilities or who are incapacitated are unlikely able to send written direction to their financial institution to send account statements to a third party. Two commenters questioned the need for written instructions, suggesting that oral instructions should suffice.<sup>52</sup> Other commenters recommended imposing additional methods to validate customer instructions and the nature of the relationship between the customer and third party.<sup>53</sup>

a. Oral Instructions

Two commenters recommended that oral consent of the customer, combined with prominent disclosure on the customer's account statements, identifying the third party or interested party that is also receiving statements or other appropriate documentation of such instruction, would lend more flexibility to firms and customers to establish third party delivery of account statements.<sup>54</sup> Edward Jones explained that there was a regulatory distinction between adding a third party to an account to receive account statements and directing all account statements to a third party instead of to the customer, noting that when a third party is being added to an account, a more effective approach would be to require the oral consent of the customer. SIFMA added that oral instructions would prevent the operational challenge of obtaining written consent in instances where written consent is impracticable. These commenters stated that oral consent and disclosure would be consistent with current industry practice.

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<sup>51</sup> See Edward Jones, FAF, NASAA, and SIFMA.

<sup>52</sup> See Edward Jones and SIFMA.

<sup>53</sup> See Malecki and NASAA.

<sup>54</sup> See Edward Jones and SIFMA.

FINRA notes that similar views were expressed by commenters to the prior rule filing,<sup>55</sup> and FINRA continues to maintain the view that instructions from customers with respect to the delivery of account statements should be in writing to ensure proper consent is received and can be evidenced. FINRA believes that oral instructions are insufficient in this context due to several concerns such as identify theft and privacy concerns, among others, and that firms must be able to document and record a customer's consent to send account statements to a third party. FINRA has permitted firms to act on oral instructions from customers in other circumstances (e.g., trading instructions) largely to allow customer and firms to act expeditiously to execute securities transactions that are time sensitive in nature. However, the delivery of customer account statements to a third party presents no such concerns and therefore must require written customer consent for this delivery arrangement.

b. Written Instructions from Third Party or Account Holder of Joint Account

Two commenters raised practical concerns with procuring written instructions from customers.<sup>56</sup> FAF noted that some third parties such as RIAs or retirement custodians have a need to receive customer account statements in order to perform their duties for customers, and these third parties that commonly receive customer account statements may have their own paperwork or form that a customer completes to authorize a designated third party to receive account statements. FAF recommended adjusting the language in the proposed supplementary material to permit a firm to treat a customer's completion of the third party's own paperwork or form as the written instructions from the customer, suggesting that this adjustment would

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<sup>55</sup> See supra note 6.

<sup>56</sup> See FAF and SIFMA.

represent a more practical approach to the process by permitting a firm to accept written instructions to authorize the transmission of account statements to a third party directly from such third party rather than from the customer directly. In the alternative, FAF recommended allowing firms to send account statements to third parties without customer consent “by simply relying on the nature of the third party[,]” reasoning that third parties such as RIAs or custodians of individual retirement accounts “have a need to receive a duplicate statement of the client for the client’s benefit.” FINRA believes that FAF’s recommendation does not assure the goal of limiting provision of customer account information to situations where the customer affirmatively instructed or consented to delivery of account statements to third parties. Moreover, FINRA believes that proposed Supplementary Material .02 in its current form would not preclude a customer from using a third party’s form or other template to help a customer convey the written instructions directly to the firm to establish the delivery account statements to a third party such as an RIA or other custodian of customer assets.

With respect to accounts that have more than one owner, SIFMA noted that there could be significant operational challenges in requiring all joint account holders to consent to a third party delivery arrangement requested by one of the account holders. SIFMA expressed the belief that in such cases, a firm should be able to accept instructions from one accountholder to send statements to a third party, provided the accountholder making the request would not be seeking to suppress the delivery of customer account statements to the other joint accountholder(s) in accordance with the rule. FINRA believes that the proposed provision would contemplate the situation SIFMA described to require a customer, irrespective of the type of account—joint or individual—to provide written instructions to the firm to send account statements to a third party without affecting the delivery of account statements to the other joint accountholders.

c. Validation of Customer Instructions

Proposed Supplementary Material .02 does not specify the manner in which firms must validate a customer's written instructions or the nature of the relationship between the customer and third party receiving the account statements. Two commenters recommended ways to verify a customer's instructions and the nature of the customer's relationship to the third party.<sup>57</sup>

NASAA recommended rigorous verification of a customer's instructions by requiring a firm to obtain a medallion signature guarantee or notarization to help ensure that a customer in fact wishes to have the account statements delivered to a third party. NASAA also recommend requiring the firm to provide the customer with notices, delivered on the same frequency as account statements, indicating that the account statements have been delivered to the third party pursuant to the customer's instructions, and directing the customer to contact the firm to inform the firm if he or she no longer desires to have the account statements delivered to the designated third party. Feaver seemed to express support for a customer's ability to send account statements to a third party, but also seemed to suggest that some verification or confirmation practices as to the identity of the third party be imposed. Malecki expressed its support for the ability for a customer to elect to have account statement delivered to a third party, noting that the ability for a family member, tax professional, estate lawyer or trusted friend to be able to obtain copies of statements may be important to quickly identify and prevent fraud. However, Malecki suggested that the proposed provision go further and require a firm to identify the relationship between the customer and the third party receiving the account statements in order to clearly delineate the roles of the respective parties, noting that a firm should clearly understand the third party's relationship to the customer.

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<sup>57</sup> See Malecki and NASAA.

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. Thus, under Rule 2090, member firms are generally required to know the names of any persons authorized to act on behalf of a customer and any limits on their authority that the customer establishes and communicates to the member firm.

d. Exception to the Requirement to Obtain Instructions from Customer

As noted above, proposed Supplementary Material .02 would clarify that notwithstanding the general requirement for a firm to obtain written instructions from the customer to transmit accounts statements to a third party, a firm may provide such statements under Rule 2070, Rule 3210, or other similar applicable federal securities laws, rules and regulations in accordance with the requirements of such rules or regulations.

SIFMA expressed its appreciation for this clarification, but stated that the exception should be broadened to permit firms to send customer account statements to an employer that is a registered investment company or RIA, both of which are also required to obtain this information about their associated person's personal securities dealings under Rule 17j-1 under the Investment Company Act of 1940<sup>58</sup> and the provisions of an investment advisor's code of ethics

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<sup>58</sup> 17 CFR 270.17j-1.

as required by Rule 204A-1 under the Investment Advisors Act of 1940,<sup>59</sup> respectively. In response to this comment, FINRA has adjusted the language in proposed Supplementary Material .02 to refer, in general terms, to other similar applicable federal securities laws, rules and regulations in accordance with the requirements of such rule.

C. The Requirement to Continue Delivery of Account Statements to Customer Even with Third Party Delivery Arrangement in Place

Consistent with the Notice 14-35 Proposal, the proposed rule change would limit a customer's ability to decline receiving account statements by requiring a firm to continue sending account statements to the customer even where the customer directs the firm, in writing, to send the customer's account statements to a third party. This general requirement is intended to serve investor protection functions by ensuring that the customer is able to monitor and verify the transactions occurring in the customer's account. The proposed provision accords with the Commission's policy view in the context of the delivery of transaction confirmations to a third party (e.g., a fiduciary); that is, where a customer has duly waived receipt of confirmations, the customer may not waive the receipt of periodic account statements.<sup>60</sup>

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<sup>59</sup> 17 CFR 275.204A-1.

<sup>60</sup> In adopting amendments to SEA Rule 10b-10 in 1994, the Commission acknowledged that a customer may waive the personal receipt of an immediate confirmation in the context of where a fiduciary has discretion over the customer's account under the following conditions: "the broker-dealer must (1) obtain from the customer a written agreement that the fiduciary receive the immediate confirmation; and (2) send to the customer a periodic report, not less frequently than quarterly, containing the same information that would have been contained in an immediate confirmation. [Citation omitted]. The customer may not waive this periodic report. [Citation omitted]." See Securities Exchange Act Release No. 34962 (November 10, 1994), 59 FR 59612, 59614 (November 17, 1994) ("SEA Rule 10b-10 Release"). As indicated in the Amended Rule Filing, FINRA reiterates the reminder to members that they remain subject to any conditions or requirements specified in any release, interpretation, "no-action" position or exemption issued by the SEC or its staff in the context of SEA Rule 10b-10 that members may rely on for relief from certain delivery obligations of trade confirmations as specified in such rule (e.g., the manner and frequency of delivering periodic account

With the exception of GSU favoring the continuous statement delivery requirement, several other commenters expressed concerns with it, asserting, in general, that the proposed provision would undermine a customer's express wishes to decline receiving account statements and would not further customer protections by increasing the risk for fraudulent activity, particularly for investors who are elderly, disabled or incapacitated, or who rely on a caregiver in an assisted living facility or at home.<sup>61</sup> SIFMA offered several suggestions for FINRA to consider, including to delete the proposed general continuous delivery requirement or in the alternative, follow the existing approach under NYSE Rule 409T(b). Other suggestions included creating exceptions to the general delivery requirement under specified circumstances (e.g., incapacitation)<sup>62</sup> or permitting a customer to opt-out of receiving statements.<sup>63</sup> The comments to proposed Supplementary Material .02 as presented in the Notice 14-35 Proposal are set forth below.

a. The Existing Approach Set Forth Under NYSE Rule 409T(b)

As described above, NYSE Rule 409T(b) currently allows a customer to instruct a firm to direct account statements, confirmations or other communications to a third party holding a POA over the account where the customer either provided the firm written instructions or the firm continued to send the customer duplicate copies of the statements, confirmations or other communications. Thus, under NYSE Rule 409T(b), a customer who has declined or waived the

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statements in lieu of immediate trade confirmations) and Rule 2231, as proposed herein, is not intended to alter any such conditions or requirements.

<sup>61</sup> See Edward Jones, FSI, NAELA, NASAA, SIFMA, WFA, and Wulff.

<sup>62</sup> See SIFMA and Wulff.

<sup>63</sup> See PIRC.

receipt of account statements may then effectively forego the opportunity to directly monitor account activities.

SIFMA noted that in the SEA Rule 10b-10 Release, the Commission did not invalidate NYSE Rule 409T(b). However, when discussing the application of the Commission’s policy and its relationship with NYSE Rule 409T, the Commission suggested that NYSE Rule 409T was less restrictive than the Commission’s policy view by noting that under NYSE Rule 409T, a customer “who waived receipt of the immediate confirmation would receive more information with his quarterly account statement than that currently required under NYSE Rule [409T]. To the extent the rule of the NYSE, or any self-regulatory organization, conflict with the Commission’s stated policy, the more restrictive requirement would govern. Thus, an NYSE member wishing to take advantage of a waiver would be required to adhere to these Commission requirements in addition to any obligations imposed by Rule [409T]”<sup>64</sup>

SIFMA observed that proposed Supplementary Material .02 would be more restrictive than NYSE Rule 409T(b), particularly as applied to the delivery of account statements in connection with the custody of advisory accounts, noting that duplicate account statements are not required to be sent to customers when a designee has been appointed under Rule 206(4)-2 of the Investment Advisers Act of 1940 (“Advisers Act”).<sup>65</sup> SIFMA expressed the belief that NYSE Rule 409T(b) has served both the investing public and the industry well, and that FINRA has not established widespread complaints or problems in this area that would justify such a substantial, potentially risky, and costly expansion of account statement delivery obligations. SIFMA urged FINRA to delete the general requirement or alternatively, retain the more flexible approach in

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<sup>64</sup> See SEA Rule 10b-10 Release, supra note 60, at 59 FR 59614 n.36.

<sup>65</sup> 17 CFR 275.206(4)-2.



NYSE Rule 409T(b). By taking the approach in NYSE Rule 409T(b), SIFMA expressed the view that firms would then be able to honor the requests of customers, and those with appropriate legal standing on behalf of their customers, to direct account statements to a designated third party and avoid the additional costs and potential account security concerns associated with sending account statements to the customer's address of record. SIFMA recommended that FINRA amend proposed Supplementary Material .02 to model the requirements of NYSE Rule 409T(b) by replacing "and" with "or" in the proposed rule text to provide firms with greater flexibility to comply with the proposed rule and defining the term "customer," for purposes of proposed Supplementary Material .02 to mean a person with the legal authority to act on behalf of an accountholder, including an attorney-in-fact, a court-appointed fiduciary or person with similar legal authority.

SIFMA also noted that firms are currently subject to rules that mitigate concerns that a customer might be financially exploited by an individual who has authority over the customer's financial affairs. For example, SIFMA stated that 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 essential facts would include those about anyone who has authority over a customer's account. In addition, SIFMA noted that a firm is required to have reasonable procedures in place to identify and react to "red flags" that might indicate the occurrence of potential fraud.

b. Create Exceptions to the General Requirement to Continue Delivery of Account Statements to Customer

In the Notice 14-35 Proposal, FINRA requested comment on the situations that would merit an exception from the general requirement to continue delivery of account statements to a customer. Several commenters expressed views on the general requirement for a firm to continue

delivering account statements to the customer even where there is a third party delivery arrangement in place, stating that imposing such a requirement as a matter of course would increase a customer's risk of exposure to fraud or other misconduct.<sup>66</sup> FINRA recognizes that in some cases, it may not be in the customer's interest to continue receiving account statements when there is an arrangement to deliver the statements to a third party. In response to comments, FINRA has adjusted proposed Supplementary Material .02 as presented in the Notice 14-35 Proposal by creating an exception that would permit a "court-appointed fiduciary" (as that term is described in the proposed provision) to stop sending account statements to the customer upon written instructions from the court-appointed fiduciary, and other specified conditions. Absent a court-appointed fiduciary, a firm cannot cease delivering account statements to a customer. Further, FINRA believes that a customer may authorize the firm to satisfy the requirement to continue delivering account statements through electronic delivery consistent with proposed Supplementary Material .03, which would eliminate the need for delivery of physical statements to the customer's home, while still providing the customer the opportunity to review their account statements in a timely manner. FINRA believes that proposed Supplementary Material .02, as adjusted, creates an appropriate balance between investor protection and the concerns raised by the commenters. As set forth below, some commenters described a variety of circumstances that should warrant an exception to the general requirement. These circumstances relate to customers with legal representatives and other trusted contacts; customers who are elderly, disabled or incapacitated; and foreign and high net worth customers.

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<sup>66</sup> See Edward Jones, FSI, NASAA, SIFMA, WFA, and Wulff.

## (I) Legal Representative and Other Trusted Contacts

SIFMA expressed concern that proposed Supplementary Material .02 could potentially erode the legal authority of the person granted a POA and may potentially create a conflict with state laws governing POAs. SIFMA noted that 17 states have laws that outline penalties for financial institutions that refuse to respect the legal standing of a person acting with the authority of a POA. Two commenters expressed concern that the proposed provision would also prevent the operability of a springing POA or limit its usefulness because a springing POA only becomes effective under certain circumstances outlined by the customer.<sup>67</sup> SIFMA added that the proposed provision would create a situation where a person with the power to stand in the shoes of the incapacitated person, and perform many other aspects of his or her legal rights, would not be able to redirect mail away from an address at which the incapacitated person once resided. Two commenters indicated that an exception should also be made for legal executors of a decedent's estate or for a person with legal authority to act on behalf of a customer.<sup>68</sup> FAF expressed concern that the proposed provision does not create an exception for certain third parties, such as investment advisers, trust departments, custodians and pension plan trustees. FAF indicated that these entities need to receive customer accounts statements to perform their duties for the customer.

## (II) Elderly, Disabled or Incapacitated Customers

Several commenters contended that mandating the delivery of account statements to a customer who is deemed incapacitated or impaired, living in a nursing facility or receives in-home care, or an elderly customer who has expressly designated another person or entity to

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<sup>67</sup> See SIFMA and WFA.

<sup>68</sup> See FSI and Wulff.

receive the statements would increase the risk of unintended or involuntary exposure of financially sensitive information to third parties.<sup>69</sup> Wulff noted that these persons would involuntarily have their financial affairs and personally identifiable information exposed to unvetted third parties. PIRC recommended that a customer be permitted to opt-out, in writing, of receiving account statements, particularly where the customer is disabled or incapacitated, or a customer resides in a nursing home facility. Two commenters stated that this class of investors should be able to decline delivery of their statements and instead have them delivered to an authorized third party.<sup>70</sup> Edward Jones recommended that FINRA consider an exemption to the general requirement where a firm has received written documentation from a medical professional verifying the disability or incapacity of the customer. Several commenters expressed the view that the preference of the customer, as to his or her own best interests, should govern.<sup>71</sup>

### (III) Foreign and High Net Worth Customers

SIFMA raised similar concerns with respect to foreign or high net worth customers who would also be at risk of exposure of their financial information since in some foreign jurisdictions, mail delivery may not be secure, and a display of wealth may put such customers at risk of harm (e.g., kidnapping for ransom). SIFMA noted that high net worth customers do not want sensitive information contained within statements to be delivered to their homes because of unique challenges such as frequent travel or multiple homes and, as such, often delegate the handling and review of statements to a trusted agent or third party, who may not be a legal

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<sup>69</sup> See Edward Jones, FSI, NASAA, SIFMA, WFA, and Wulff.

<sup>70</sup> See Edward Jones and FSI.

<sup>71</sup> See FSI, PIRC, and Wulff.

representative of the customer. While Rule 3150, incorporated under proposed Supplementary Material .04, cites safety or security concerns as examples of acceptable reasons for a customer's written instruction to "hold mail," SIFMA noted that the circumstances described above are not "hold mail" arrangements under Rule 3150. SIFMA indicated that arrangements to deliver statements to a third party for similar reasons should be permitted with written customer instruction.

D. Operational Concerns and Implementation of Proposed Supplementary Material .02

Two commenters requested prospective application of the provision.<sup>72</sup> Edward Jones stated that requiring remediation of existing accounts would impose significant costs and would not provide meaningful additional protection to investors. SIFMA emphasized the need for prospective application due to material operational challenges, which include persons who have become incapacitated since providing the original instruction to direct mail to a third party, as well as the significant costs associated with remediating hundreds of thousands of account relationships. The proposed rule change would apply prospectively, and FINRA intends to give member firms sufficient time to comply with the proposed rule change.<sup>73</sup>

6. Proposed Supplementary Material .03 (Use of Electronic Media to Satisfy Delivery Obligations)

Proposed Supplementary Material .03 would allow a firm to satisfy its account statement delivery obligations under Rule 2231 by using electronic media, subject to compliance with

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<sup>72</sup> Edward Jones and SIFMA.

<sup>73</sup> A member firm with a customer having a pre-existing arrangement to deliver account statements to a third party that was established before the effective date of proposed Rule 2231.02 would not be subject to the requirements of the proposed new rule solely with respect to such account until that pre-existing third party delivery arrangement is modified in any manner. Where any existing or new customer of the firm seeks to establish a third party delivery arrangement on or after the effective date of proposed

standards established by the SEC on the use of electronic media for delivery purposes. As stated above, this provision is consistent with prior guidance FINRA has issued on the use of electronic media to satisfy delivery obligations.<sup>74</sup>

SIFMA asserted that the cost burden associated with this new requirement would be particularly severe for members where customers have not elected to receive electronic account communications. GSU supported the use of electronic delivery of account statements only if the customer affirmatively elects that option on the basis that a customer who is not technologically savvy might not know how to electronically opt-out of an electronic statement policy, creating confusion as well as the possibility of a customer not being able to access his or her statements. The Center for Copyright Integrity urged that customer account statements should be delivered in paper form only on the belief that paper format will keep customers better informed on the contents of their files.

Proposed Supplementary Material .03 does not mandate the use of electronic media to deliver account statements, but permits a firm to do so subject to the standards established by the SEC. A firm may be able to evidence satisfaction of delivery obligations, for example, by obtaining the intended recipient's informed consent to deliver through a specified electronic medium and ensuring that the recipient has appropriate notice and access. SEC guidance

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Rule 2231.02, the firm would be subject to the terms of the new rule. Relatedly, in connection with its support for the proposed rule change to eliminate NYSE Rule Interpretation 409T(a)/03, SIFMA requested that FINRA confirm in a rule release commentary or an adopting Regulatory Notice that though the conditions in NYSE Rule Interpretation 409T(a)/03 would no longer apply, firms may continue to rely on this NYSE interpretation for preexisting agreements that use third party agents. The proposed rule change is not intended to impact preexisting agreements that use third party agents if they comport with applicable FINRA rules and guidance.

<sup>74</sup> See supra note 20.

describes “informed consent” as one that specifies the electronic medium or source through which the information will be delivered and the period during which the consent will be effective, and describes the information that will be delivered using such means.<sup>75</sup> FINRA notes that proposed Supplementary Material .03 is not intended to impose any new delivery obligations beyond existing requirements.

7. Proposed Supplementary Material .05 (Information to be Disclosed on Statement)

Proposed Supplementary Material .05, derived largely from NYSE Rule Interpretation 409T(a)/02, including note 1, would specify the information that must be clearly and prominently disclosed on the front of a customer account statement, i.e., the identity of the introducing and carrying organizations, that the carrying organization is a member of SIPC, and the opening and closing account balances for the customer’s account.

Two commenters expressed views on the appearance of SIPA disclosures on account statements.<sup>76</sup> GSU indicated its support for the requirement to provide the SIPA disclosure on the front of an account statement because doing so would aid smaller investors to seek the help they might need in order to better understand their statements and monitor their accounts. PIRC recommended that FINRA provide guidelines with respect to how the SIPA disclosure should appear on an account statement, citing as an example, that FINRA should consider requiring firms clearly highlight the SIPA disclosure to prevent firms from “burying SIPA disclosures in the back of accounts statements or in the fine print, which customers may not be able to locate easily.”

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<sup>75</sup> See supra note 20.

<sup>76</sup> See GSU and PIRC.

FINRA believes that proposed Supplementary Material .05 gives member firms adequate guidance and allows flexibility in providing this information while also ensuring that the SIPC status of the clearing firm is disclosed on the front of the statement.<sup>77</sup>

8. Use of Logos, Trademarks, etc. (Proposed Supplementary Material .07)

Proposed Supplementary Material. 07 incorporates, without substantive change, NYSE Rule Interpretation 409(a)/05, which governs the use of trademarks and logos of other persons on account statements by requiring that firms not use the logo, trademark or other similar identification of a person (other than the introducing firm or clearing firm) on a customer account statement in a manner that is misleading or causes customer confusion. SIFMA requested clarification as to what logos, trademarks, and other similar identification would be “misleading” to customers or cause “customer confusion.” To the extent commenters have questions about the application of the proposed rule to particular facts and circumstances, FINRA will work with the industry to address interpretive issues as needed.

9. Other Comments

SIFMA requested confirmation that unless a customer requests otherwise, a firm may combine account statements for accounts of two or more customers sharing the same address in the same envelope addressed to one member of the household. In the SEC Householding Release, the SEC stated that it was adopting the “householding” rules because “the distribution of multiple copies of the same document to security holders who share the same address often

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<sup>77</sup> Rule 2266 (SIPC Information) requires all member firms, unless they are excluded from SIPC membership and are not SIPC members, or whose business consists exclusively of the sale of investments that are ineligible for SIPC protection, to advise all new customers, in writing, at the opening of an account, that they may obtain information about SIPC, including the SIPC brochure, by contacting SIPC. Such member firms also must provide SIPC’s website address and telephone number, and provide all customers with the same information, in writing, at least once each year.



inundates security holders with unwanted mail and causes the company to incur higher than necessary printing and mailing costs.”<sup>78</sup> To avoid duplication, the SEC rule allows funds to deliver a single copy of the same document to investors who share the same address.<sup>79</sup> FINRA has not formally provided guidance on the issue of “householding” customer account statements and believes that the commenter raises an issue that is outside the scope of this proposed rule change. As such, FINRA believes that the questions raised by SIFMA requires further discussion with the industry and investors to better understand the relevant facts and circumstances.

### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve or disapprove such proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

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<sup>78</sup> See Securities Act Release No. 7912 (October 27, 2000), 65 FR 65736 (November 2, 2000) (“SEC Householding Release”).

<sup>79</sup> See Rule 154 (Delivery of prospectuses to investors at the same address) under the Securities Act of 1933. 17 CFR 230.154. See also SEA Rule 14a-3 (Information to be furnished to security holders). 17 CFR 240.14a-3. Rules 154 and 14a-3 permit the “householding” of prospectuses, annual reports, investment company semi-annual reports, and proxy statements or information statements to investors who share an address. Firms must obtain affirmative consent from investors or may rely on a finding of implied consent, subject to the conditions outlined in the Rule.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-FINRA-2021-024 on the subject line.

##### Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-FINRA-2021-024. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change. Persons submitting

comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-FINRA-2021-024 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>80</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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<sup>80</sup> 17 CFR 200.30-3(a)(12).