NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.
750 First Street N.E., Suite 1140
Washington, D.C. 20002
202/737-0900
Fax: 202/783-3571
www.nasaa.org

NASAA

January 20, 2016

Submitted electronically to rule-comments@sec.gov

Brent J. Fields, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

RE: Release No. 34-76767, File Number SR-FINRA-2015-056

Dear Mr. Fields:

On behalf of the North American Securities Administrators Association ("NASAA"),[1] I hereby submit the following comments in response to Release No. 34-76767, File Number SR-FINRA-2015-056 entitled Notice of Filing of a Proposed Rule Change to Adopt FINRA Rule 2030 and FINRA Rule 4580 to Establish "Pay-to-Play" and Related Rules ("the Proposal").[2] NASAA appreciates the opportunity to offer its comments on the above-referenced Proposal.

Investment Adviser Act Rule 206(4)-5 prohibits SEC-registered investment advisers from engaging the services of a third-party to solicit a government entity for advisory business unless such third-party is a "regulated person."[3] The rule was adopted by the Commission in July 2010.[4] Rule 206(4)-5 defines regulated person to include SEC-registered broker-dealers that are members of a national securities association, such as FINRA, whose rules "prohibit members from engaging in distribution or solicitation activities if certain political contributions have been made" and whose "rules impose substantially equivalent or more stringent restrictions" than the SEC rules.[5]

As SEC Rule 206(4)-5 and its Adopting Release make clear, any FINRA rule must be equivalent to or more stringent than the SEC's own pay-to-play rule in order for FINRA members to be considered regulated persons. [6] While the Proposal appears to satisfy this requirement, in NASAA's view, FINRA should take this opportunity to create more stringent rules for its members to promote greater transparency and investor protection.

[1] NASAA is the association of the 67 state, provincial, and territorial securities regulatory agencies of the United States, Canada, and Mexico. NASAA serves as the forum for these regulators to work with each other in an effort to protect investors at the grassroots level and to promote fair and open capital markets.
[2] 80 Fed. Reg. 81,650 (Dec. 30, 2015).
[3] 17 CFR 275.206(4)-5.
[4] Political Contributions by Certain Investment Advisers, 75 Fed. Reg. 41,018 (July 14, 2010).
[5] 17 CFR 275.206(4)-5.
[6] *See id.*; *see also* 75 Fed. Reg. at 41,041.

The Proposal is FINRA's effort to create such rules so that investment advisers can engage FINRA members to solicit government entities and is based upon proposed rules first published for comment by FINRA in Regulatory Notice 14-50 ("Regulatory Notice") in November 2014. NASAA offered comments on the Regulatory Notice encouraging FINRA to strengthen the investor protection aspects of its pay-to-play rules by including state-registered investment advisers and maintaining a mandatory disgorgement provision.[7] FINRA, however, has declined to include state-registered investment advisers and has also removed the mandatory disgorgement provision in the Proposal.

In the Proposal, FINRA declined to expand the applicability of its proposed pay-to-play rules to cover arrangements between FINRA members and state-registered investment advisers, an enhancement previously encouraged by NASAA.[8] In declining to make this change, FINRA pointed to the fact that the "[Commission] declined to make a similar change to its proposed rule, because it is [the Commission's] understanding that few of these smaller firms manage public pension plans or other similar funds."[9] NASAA, however, notes that the Commission adopted its pay-to-play rule on July 1, 2010, before the Dodd-Frank Wall Street Reform Act was signed by President Obama on July 21, 2010, which expanded state regulatory authority over investment advisers from those with assets under management ("AUM") of less than $25 million to those with AUM of less than $100 million. State-registered investment advisers now include these larger firms. Therefore, it is much more likely that state-registered investment advisers advise or manage public pension plans or similar funds. Because these larger firms would not be covered under the Proposal's definition of investment adviser, FINRA members could provide solicitation or distribution services for these firms without being subject to the terms of FINRA's proposed pay-to-play rules. To address this potential regulatory gap, FINRA should include state-registered investment advisers in its definition of investment adviser for the purposes of its proposed pay-to-play rule.

In its prior comments, NASAA also supported FINRA's inclusion of mandatory disgorgement provisions for violations of the rule. NASAA is disappointed that FINRA has removed the mandatory disgorgement provisions from the Proposal. In NASAA's view, this provision would act as a significant deterrent to engaging in pay-to-play schemes, and it should remain in the final rule. In removing the mandatory disgorgement penalties, FINRA points to comments received from industry trade groups that noted such provisions were unnecessary because FINRA has the authority to order disgorgement in its enforcement actions and that mandatory disgorgement penalties could discourage FINRA members from voluntarily disgorging fees when violations are self-discovered.[10]

These arguments are unpersuasive. While FINRA has the authority to order disgorgement in an enforcement action, this remedy is not guaranteed for pay-to-play violations.

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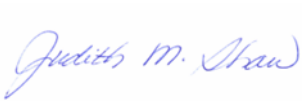
[7] NASAA's comments to the Regulatory Notice are *available at* http://www.finra.org/sites/default/files/notice_comment_file_ref/p602177.pdf.
[8] 80 Fed. Reg. at 81,660.
[9] *Id*.
[10] *Id*. at 81,662.

Making disgorgement mandatory will ensure that improper fees are returned by FINRA members. Further, mandatory disgorgement will serve as a significant deterrent for FINRA members that may engage in pay-to-play schemes. While industry commenters implied that FINRA members regularly self-identify potential pay-to-play schemes and voluntarily disgorge improper fees, a mandatory regime would be a significantly more effective deterrent. NASAA also fails to see why mandatory disgorgement would dissuade voluntary disgorgement in the event of self-identified violations, as noted by some commenters. While FINRA noted that this was the concern of some industry commentators, there was little support given for this assertion except vague concerns regarding the possibility of double penalties for firms that voluntarily disgorge improper fees.[11] This concern could, however, be easily addressed by guidance from FINRA indicating that it will, in determining any amount of required disgorgement, consider any fees already disgorged voluntarily. NASAA therefore urges FINRA to reintroduce its mandatory disgorgement provisions.

The Proposal mirrors the SEC's rules, ensuring that FINRA's members can continue to engage in the lucrative business of soliciting government entities on behalf of investment advisers, but FINRA should take this opportunity to create more stringent pay-to-play regulations that increase the underlying investor protection goals of such rules. Should you have any questions regarding the comments in this letter, please do not hesitate to contact A. Valerie Mirko, NASAA's General Counsel, at vm@nasaa.org or 202-737-0900.

Sincerely,



Judith M. Shaw
NASAA President
Maine Securities Administrator

[11] *See* Investment Company Institute ("ICI") Comments on Regulatory Notice 14-50, *available at* http://www.finra.org/sites/default/files/notice_comment_file_ref/p602179_0.pdf; *see also* Securities Industry and Financial Markets Association Comments on Regulatory Notice 14-50, *available at* http://www.finra.org/sites/default/files/notice_comment_file_ref/SIFMA%20-%20Comments%20on%20Regulatory%20Notice%2014-5_0.pdf (citing ICI Letter).