



# Protocol for Broker Recruiting

## How a Financial/Investment Advisor Can Use the Protocol to Transition Accounts

By Thomas B. Lewis, Esquire

### Protocol Overview

The Protocol for Broker Recruiting originated in 2004 between Citigroup Global Markets, Inc. (“Smith Barney”), Merrill Lynch, and UBS Financial Services, Inc. The principal goal of the protocol was to further clients’ privacy and freedom of choice as financial/investment advisors move between firms. If a departing advisor follows the protocol, neither the advisor nor the new firm has any monetary or other liability. However, the protocol does not bar the prior firm from bringing a claim for raiding. The protocol is to be implemented and adhered to in good faith.

### Recruiting Q & A

**Q.** I am thinking about leaving my current job as a financial/investment advisor to join another company. What should I do and what should I be thinking about?

**A.** Many issues should be reviewed before making a decision to leave your current employer. We have handled about 650 transition cases. Every case has similarities, and every case has differences. Consult with counsel experienced with industry trends and the nuances of each company. Address the following questions, among other issues, to help determine the best way to leave your current employer.

1. How long have you been employed? Did you start your career at your current employer or did you leave an existing position with a book of business transferring over to your current employer?
2. When you joined your current employer, did you sign any type of a

restrictive covenant agreement, nonsolicit agreement, or confidentiality agreement?

3. What, traditionally, does your current employer do with a departing advisor? Is there usually litigation and arbitration?
4. Have you recently signed any promissory notes or retention bonuses, or do you have any trading errors that you would be responsible for if you leave your current employer?
5. Do you have good reason to believe that, if you leave your current employer, the majority of your clients will follow you to your new employer?
6. Are there any other employees, sales assistants, or anyone else that you want to join you at your new position?
7. What information do you need to successfully transfer your clients to your new employer?
8. Are you emotionally and financially prepared for the transition to a new employer?

**Q.** Let’s talk about the first issue: How long have I been employed? Why is that important?

**A.** This is an important question because it affects your book of business. If you were a seasoned advisor and you recently joined your current employer, you likely brought a substantial number of clients with you. In many cases, the book of business you brought may be able to leave with you. Some case law supports this set of circumstances, which is affected by many factors too numerous to detail here.

**Q.** I do not remember if I signed a restrictive covenant. What should I do?

**A.** An experienced attorney can give you an educated guess as to whether your current employer mandates restrictive covenant agreements. Many firms have a history of requiring incoming advisors to sign restrictive covenants. For instance, if you are employed at Merrill Lynch, you probably signed a nonsolicit agreement. Further, many advisors starting out with new firms sign training agreements, and a training agreement in all likelihood includes a nonsolicit agreement. The restrictive covenant contained in the training agreement continues to be in force after the training concludes, so even after 20 years on the job, nonsolicit terms in the training agreement may be valid.

**Q.** I have heard many people say that a nonsolicit agreement is “not worth the paper it’s written on.”

**A.** False. In every state in the nation, nonsolicit agreements that are reasonable and compliant with law are enforceable. There is a distinction between a nonsolicit agreement and a noncompete agreement. A nonsolicit agreement prohibits a departing advisor from contacting and soliciting business serviced at that employer. However, a noncompete agreement prohibits an advisor from obtaining employment in a related field for a specified period of time. In many states, a noncompete agreement can be challenged and may not be enforceable, but a nonsolicit agreement usually can be enforced.

**Q.** Why is it important that I look at what my current employer has done with departing brokers in the past?

**A.** Some employers will not litigate claims against a departing advisor, for a variety of reasons. Some employers



don't require employees to sign nonsolicit agreements. It would be difficult, but not impossible, for an employer to prohibit an employee from soliciting accounts absent a nonsolicit agreement. Some firms regard a book of business as belonging to the financial consultant and won't interfere with a proper transfer. Other firms routinely litigate and arbitrate claims against departing financial consultants. Contact an experienced attorney to find out what you can expect your employer to do and to map out your approach.

**Q.** If my current employer chooses to go after me, what can I expect?

**A.** Typically an employer sends a cease-and-desist letter reminding the advisor of obligations set forth in the nonsolicit agreement and admonishing the advisor to adhere to the agreement or face possible legal consequences. If the company chooses to "go after" the advisor, the advisor can expect the employer to seek a temporary restraining order in either a federal or state court. This restraining order routinely is granted to maintain status quo and prohibits an employee from soliciting accounts pending an injunction. Even if an injunction is granted, the court won't stop the filing of Automated Customer Account Transfer (ACAT) forms.<sup>1</sup> However, the court *will* stop the solicitation of accounts. Normally, within 10 days after a temporary restraining order is issued, the court either schedules a date for a preliminary injunction hearing or transfers the matter to the Financial Industry Regulatory Authority (FINRA) for a Rule 13804 hearing within two weeks of the issuance of the temporary restraining order to determine if the injunction should continue, be vacated, or modified. After the Rule 13804 hearing decision, the FINRA Panel schedules the case for a damages hearing if necessary. During this process, the overwhelming majority of cases settle.

**Q.** Am I permitted to take notes or files from my current clients to my new employer?

**“ You cannot take any customer financial documents. Under the protocol, you may take a list of client names, addresses, telephone numbers, e-mail addresses, and telefax numbers. You cannot take account numbers or financial documents. ”**

**A.** The law is fairly clear that a departing advisor should *not* bring any customer information to a new employer. Typically, customer information is considered confidential and proprietary to the employer. Therefore, a departing advisor copying information about clients will be subject to the return of that information and may provoke litigation. Additionally, the departing advisor may need to purge computers and sign an affidavit stating that he or she isn't taking confidential or proprietary information.

**Q.** How do I know if my book will transfer to my new employer?

**A.** Statistics show that between 50 percent and 90 percent of an established advisor's book normally will transfer to a new employer. Of course, many factors determine the number of accounts that will transfer. These factors include the particular relationship between the advisor and the client. Regardless, don't pre-solicit accounts while still employed at your current employer. It would be a violation of your legal duty of loyalty if you were to solicit accounts for transfer before your resignation. Horror stories ensue when management learns of pre-solicitation and include forced termination, all its ramifications, and potential U-5 issues.<sup>2</sup>

**Q.** If I want to bring my sales assistant, what should I do?

**A.** If you are confident that your sales assistant will leave with you, have confidential discussions with him or her just before you plan to resign. Don't involve the sales assistant before you decide to depart. Often sales assistants will gossip, alerting management of the impending departure.

**Q.** What information should I take to transfer accounts to my new employer?

**A.** You cannot take any customer financial documents. Under the protocol, you may take a list of client names, addresses, telephone numbers, e-mail addresses, and telefax numbers. You *cannot* take account numbers or financial documents. Normally, the law will allow you to use your memory to contact your clients, who then can provide you with copies of financial documents. Taking information from your current employer may violate the law, be subject to immediate return to your employer, and increase litigation risk.

**Q.** What do you mean that I must be emotionally and financially prepared to transfer?

**A.** Most advisors find it very enriching when they leave for new employers or start their own firms. However, problems may occur during the transfer. The advisor must be prepared to deal with loss of clients, technology problems, ACAT problems, potential litigation and/or arbitration, and other issues. But in the end, the change usually is beneficial.

#### Do's and Don'ts under the Broker Protocol

When followed appropriately, the protocol acts as a waiver against liability for a financial/investment advisor who leaves the employment of one firm and solicits former customers to transfer their brokerage accounts to the new firm—assuming the new employer also is a member of the protocol. The exception to this general provision applies to claims of "raiding" between protocol

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firms. Raiding claims are not waived by the protocol.

Below are do's and don'ts for advisors moving among firms under the protocol.

### Do:

1. Take the following information regarding the accounts you serviced at your "old" firm:
  - Client name
  - Client address
  - Client phone number
  - Client e-mail address
  - Client account name
2. Resign *in writing* to your local branch management.
3. Along with your resignation letter, give your local branch management a copy of the client information you are taking with you. *Important:* The information you leave with branch management will include account numbers (with matching account names) of all the accounts you serviced. However, you are not permitted to retain a copy of this information.
4. Use good faith when compiling the list of clients you serviced.
5. Consult with an attorney to answer your questions.

### Don't:

1. Don't deliver your resignation orally.

2. Don't take any customer information not specified above (especially Social Security or account numbers).
3. Don't forget to include account numbers in the customer information list you leave behind.
4. Don't forget to give the customer information list to your old branch management at the *exact same time* you deliver your resignation letter.
5. Don't be overgenerous with yourself on accounts you share with others. This is particularly important if you were working in partnership with another advisor.
6. Don't pre-solicit accounts before you resign.
7. Don't take any information about accounts you did not directly service.
8. Don't take copies of holding pages, monthly statements, or any other client documents not specified above.

### Conclusion

In 2004, the Protocol for Broker Recruiting was signed by several major brokerage firms with the pronounced goals of curtailing litigation and arbitration between member firms, allowing departing advisors to take limited customer contact information, and to further clients' interests of privacy and freedom of choice in connection with the movement

of financial advisors between member firms. Since 2004, many firms, both large and small, have joined the protocol.

The protocol, if followed, is an effective agreement for the transition of financial advisors and their clients. However, if one of the firms is not a member of the protocol, the protections of the protocol will not apply. 

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### Endnotes

- <sup>1</sup> The Automated Customer Account Transfer Service (ACATS) is the National Securities Clearing Corporation's (NSCC) central processing system for the transfer of positions and accounts between brokerage firms that are participants of the NSCC's ACATS program.
- <sup>2</sup> Form U5 is the Uniform Termination Notice for Securities Industry Registration. For more information, visit [www.finra.org](http://www.finra.org).