

MEMO# 29250

August 13, 2015

ICI Files Comment Letter with FINRA on Proposed Discretionary Authority Rule

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TO: BROKER/DEALER ADVISORY COMMITTEE No. 40-15
OPERATIONS COMMITTEE No. 18-15
PRINCIPAL UNDERWRITERS WORKING GROUP
SMALL FUNDS COMMITTEE No. 24-15
TRANSFER AGENT ADVISORY COMMITTEE No. 42-15 RE: ICI FILES COMMENT LETTER WITH
FINRA ON PROPOSED DISCRETIONARY AUTHORITY RULE

In June, FINRA published for comment a proposal to adopt new Rule 3260 relating to discretionary accounts and transactions. [\[1\]](#) The proposed rule is intended to incorporate previous rules of the NASD and NYSE relating to discretionary accounts and transactions into the FINRA rulebook. Generally speaking, consistent with the current NASD and NYSE rules, in the absence of exceptional circumstances, the new rule would require broker-dealers to obtain affirmative written consent from a customer prior to exercising discretionary authority in the customer's account. [\[2\]](#)

In response to FINRA's request for comment on its proposal, the Institute has filed a comment letter supporting the rule's adoption. Our letter notes that our interest in this proposal is limited to its impact on mutual fund shareholders and the mutual fund shares they hold in their brokerage accounts. While supporting the rule, the Institute's letter notes that we would not support any efforts of FINRA to broaden the ability of broker-dealers to use negative consent letters in instances involving non-exigent circumstances or when their use is intended to primarily benefit the broker-dealer and not the customer. As stated in the letter:

While some members of FINRA might advocate for FINRA permitting more liberal use of negative consent letters (e.g., to permit the transfer of mutual fund accounts held directly at a mutual fund company with a broker-dealer of record on the account to the broker-dealer's trading platform), we encourage FINRA to resist expanding the rule's exceptions except in exigent circumstances. In the absence of exigent circumstances, FINRA should not permit the use of negative consent letters and should, instead, require a broker-dealer to obtain from the customer a written authorization permitting the broker-dealer to exercise discretion over the account. Presumably, in order to obtain such affirmative

authorization, the broker-dealer would need to explain to the customer why providing such discretionary authority would be in the customer's best interest (as opposed to the broker-dealer's), thereby ensuring that any consent provided by the customer is informed consent.

A copy of the Institute's letter is attached.

Tamara K. Salmon
Associate General Counsel

[Attachment](#)

endnotes

[1] See Discretionary Accounts and Transactions, FINRA Regulatory Notice No. 15-22 (June 2015), which is available at:

http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory_Notice_15-22.pdf.

[2] The proposed rule would also address the treatment of customers' free credit balances, sweep programs, bulk transfer of customers' accounts, and change of the broker-dealer of record on a customer's account. Under exceptions circumstances, which are set forth in the rule, broker-dealers would be permitted to use negative consent letters to exercise limited discretionary authority.

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