The Asset Management Industry
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INVESTMENT COMPANY INSTITUTE

COMMENT LETTER

May 23, 2014

ICI Submits Comment Letter on FINRA's Retrospective Review of Communications with the Public Rules (pdf)

May 23, 2014 Marcia E. Asquith Office of the Corporate Secretary FINRA 1735 K Street, NW Washington, DC 20006-1506 Re: Retrospective Rule Review, FINRA Notice 14-14 (April 2014) Dear Ms. Asquith: The Investment Company Institute1 appreciates the opportunity to comment on FINRA's rules on communications with the public (collectively, the "Rules").2 FINRA is to be commended for conducting this review, which seeks comment on whether these Rules and others are meeting their intended investor protection objectives by reasonably efficient means. We have several comments and recommendations to enhance the effectiveness and efficiency of the Rules without compromising investor protection, all of which are discussed in greater detail below: 1 The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of $16.8 trillion and serve more than 90 million shareholders. 2 FINRA specifically requests comment on FINRA Rule 2210 (Communications with the Public), FINRA Rule 2212 (Use of Investment Company Rankings in Retail Communications), FINRA Rule 2213 (Requirements for the Use of Bond Mutual Fund Volatility Ratings), FINRA Rule 2214 (Requirements for Use of Investment Analysis Tools), FINRA Rule 2215 (Communications with the Public Regarding Securities Futures), and FINRA Rule 2216 (Communications with the Public Regarding Collateralized Mortgage Obligations). See FINRA Requests Comment on the Effectiveness and Efficiency of its Communications With the Public Rules, FINRA Notice 14-14 (April 2014) (the "Notice"). Marcia E. Asquith May 23, 2014 Page 2 • Electronic Media. While FINRA has made considerable progress in addressing members' use of electronic media to disseminate retail communications, the Rules continue to rest fundamentally on principles derived from paper-based communications. We recommend that FINRA reevaluate and revise the Rules to address more effectively the unique nature of electronic communications, without sacrificing important investor protections. More specifically, FINRA should consider ways to: (i) modernize procedural filing requirements to reduce filing and review costs and burdens; and (ii) limit duplicative filing of retail communications that essentially differ in media format only. • Investment Analysis Tools. We recommend that FINRA provide additional clarity with respect to the use of output from investment analysis tools within educational

materials. We also urge FINRA to consider taking a more flexible approach with respect to the disclosure requirements of Rule 2214 (Requirements for the Use of Investment Analysis Tools). • Streamlining Advertisements. FINRA should approach the Rules in a manner that recognizes that investors receive and have ready access to additional sources of information. Considering the Rules and their application in this broader context, FINRA should permit members and investors to make full use of current technology (e.g., by allowing greater use of hyperlinks to convey appropriate disclosures to investors). • Consistency and Timeliness in Review Process. We recognize the volume of materials that FINRA staff reviews, and we believe FINRA's overall performance in reviewing retail communications is commendable. Nevertheless, we encourage FINRA to continue to consider ways in which it might improve consistency and timeliness in connection with its reviews. • Closed-End Funds. As FINRA gains more experience with closed-end fund marketing materials through its review process, we encourage FINRA to consider codifying a set of clear disclosure standards tailored to closed-end fund marketing materials and then eliminating the Rule 2210 filing requirement for these communications. I. Rule 2210 and Electronic Media Rule 2210 governs FINRA members' communications with the public. Generally speaking, Rule 2210 defines different types of communications, and then specifies the approval, review, recordkeeping, filing and content requirements applicable to them. Rule 2210(a)(5)'s definition of "retail communication" includes electronic communications distributed or made available to more than Marcia E. Asquith May 23, 2014 Page 3 25 retail investors within any 30 calendar-day period, and Rule 2210(c) imposes filing requirements on retail communications concerning registered investment companies. It has become commonplace in the fund industry for FINRA members to utilize electronic media such as websites and mobile applications. While FINRA has made considerable progress in addressing members' use of electronic media,3 in some instances it has continued to apply paper-based communications principles to such media, particularly with respect to filing and recordkeeping.4 While we agree that content disseminated through electronic media should generally be subject to the applicable provisions of the Rules, we believe that this retrospective review is an ideal time for FINRA to evaluate the ways in which print and electronic communications differ and the implications of those differences for the Rules. Two examples highlight the practical difficulties in filing electronic media, even where some or all of the content disseminated through the electronic media may be substantially identical to previously filed or otherwise available material. In the first, a member was introducing a mobile application. It was initially asked by FINRA, as an attempt at an accommodation, to put together a video consisting of all of the screenshots available through the mobile application. The resulting video included over 14 hours of footage. Unsatisfied with this format for purposes of its review, FINRA subsequently asked this member to submit PDFs of every page accessible through the mobile application, which would have resulted in a 3,400-page submission. While FINRA ultimately completed its review of the video, the final filing fee for the new mobile application was in excess of $14,000, and the member estimates that it spent over 230 hours complying with these separate filing requests. In a second example, a member was redesigning a website. FINRA maintained that all of the content available through the redesigned website constituted "new" retail communications that are subject to the Rule's filing and review requirements. Accordingly, the member had to submit over 50,000 PDFs on computer discs in order to capture every page of content (approximately 5,500 pages) accessible through the newly-redesigned website, notwithstanding the fact that the large majority of the material on the pages was not new and had been previously filed with FINRA in different contexts. The filing fee was approximately $55,000, and this member estimates that it spent over 13,000 hours complying with this request. These examples demonstrate how filing costs, in time and money, can be substantial and disproportionate to any corresponding investor protections.

We encourage FINRA to limit duplicative filing of retail communications that essentially differ in media format only. Generally speaking, filing and review should be predicated to the greatest extent 3 See, e.g., Guidance on Blogs and Social Networking Web Sites, FINRA Notice 10-06 (Jan. 2010), and Guidance on Social Networking Websites and Business Communications, FINRA Notice 11-39 (Aug. 2011). 4 Rule 2210(b)(4) imposes recordkeeping requirements on retail communications and institutional communications in accordance with Rule 17a-4 under the Securities Exchange Act of 1934, as amended. Marcia E. Asquith May 23, 2014 Page 4 possible on substance rather than medium or form.5 As demonstrated in the examples above, the insistence that every page of material from a redesigned website be filed results in submissions with staggering costs and unnecessary amounts of duplication and overlap of efforts. We believe it is more beneficial for regulatory reviews to focus on new content that raises legitimate investor protection concerns. More specifically, we recommend that FINRA reconsider whether its current procedural filing requirements remain up-to-date, cost efficient, and effective in light of recent technological advances. Putting the onus on FINRA members to "convert" all material available through electronic media to something resembling a sequential print format is immensely time consuming and expensive, and is likely to result in reams of material. FINRA should allow members additional flexibility in how material is submitted. In particular, we recommend that FINRA consider the circumstances under which electronic access might be deemed "filed" for regulatory purposes6 and satisfy FINRA's staff review needs. For example, FINRA review staff could download the new mobile application or accept a hyperlink to the newly-redesigned website, and follow instructions from members about how and where to locate new and/or materially different content.7 This type of "access equals delivery" model would provide FINRA with full access to a member's retail communications available through the medium and would have the benefit of providing FINRA with a "roadmap" of what to focus on, resulting in more targeted and efficient reviews. Of course, nothing would preclude FINRA from spot- checking or examining as much or as little of the additional material made available through the medium as it wished. And as discussed below, use of new/updated media would continue to be subject to internal principal review and FINRA examinations. We also recommend that FINRA clarify that materials accessible through electronic media that contain no (or only passing) references to registered investment companies should not have to be filed.8 5 We recognize that Section 24(b) of the Investment Company Act of 1940, as amended (the "Investment Company Act"), requires registered open-end companies, registered unit investment trusts, and registered face-amount certificate companies, and their underwriters, to file with the SEC advertisements, pamphlets, circulars, form letters and other sales literature addressed to or intended for distribution to prospective investors. Investment Company Act Rule 24b-3, in effect, deems as filed with the SEC these types of sales literature if they are filed with FINRA. We intend our comments to be read in light of this statutory provision. 6 Id. 7 Of course, FINRA should have the technological resources (e.g., tablets) to conduct reviews in this manner, given that the benefits of increased efficiency on the part of FINRA's staff and the reduced compliance costs for FINRA members would more than offset any initial and ongoing technology-related expenditures. 8 See the SEC's Division of Investment Management Guidance Update, Filing Requirements for Certain Electronic Communications, March 2013, No. 2013-01 (stating that an incidental mention of a specific investment company or family of funds not related to a discussion of the investment merits of the fund is a type of interactive communication that generally need not be filed under SEC filing requirements), available at: http://www.sec.gov/divisions/investment/guidance/im-guidance-update-filing-requirements-for-certain-electronic- communications.pdf. Marcia E. Asquith May 23, 2014 Page 5 This would we similar to the SEC staff's approach in an analogous context and would not give rise to any investor protection concerns. We appreciate that FINRA has a legitimate interest

in reviewing retail communications that are provided through electronic media, but we believe that the process can and should be modernized and rationalized. The translation of electronic media to print format solely for filing and review simply is not workable in the long term. II. The Application of Rule 2214 to Educational Materials In recent years, retail investors have increasingly sought access to information to help them make investment decisions, and the fund industry has responded by using increasingly sophisticated technology that includes both interactive and non-interactive investment analysis tools. For example, some firms use investment analysis tools based on Monte Carlo simulations that randomly select thousands of plausible market scenarios. These tools allow investors to test investment and drawdown strategies across scenarios—both those that have, and have not, occurred—and can help investors decide how to allocate their assets, how much they should save for retirement and other financial needs, and how long they can reasonably expect their retirement assets to last, given various assumptions. We are concerned that interpretive ambiguity relating to the application of Rules 2210 and 2214 to materials and output generated by these tools has impeded their development and use. Rule 2210(d)(1)(F) generally prohibits communications that predict or project performance, imply that past performance will recur, or make exaggerated or unwarranted claims, opinions, or forecasts. The Rule provides exceptions for (i) "a hypothetical illustration of mathematical principles, provided that it does not predict or project the performance of an investment or investment strategy",9 and (ii) "an investment analysis tool, or a written report produced by an investment analysis tool, that meets the requirements of Rule 2214."10 For purposes of this second exception, Rule 2214(b) defines "investment analysis tool" as "an interactive technological tool that produces simulations and statistical analyses that present the likelihood of various investment outcomes if certain investments are made or certain investment strategies or styles are undertaken, thereby serving as an additional resource to investors in the evaluation of the potential risks and returns of investment choices." (Emphasis added.) These exceptions have generated some regulatory uncertainty. For example, a member may make an interactive tool available to investors, and also use that same or a substantially similar tool to produce output for inclusion in educational materials that illustrate the interplay between different asset allocations and different asset withdrawal rates in retirement, and their expected results. If the 9 FINRA Rule 2210(d)(1)(F)(i). 10 FINRA Rule 2210(d)(1)(F)(ii). Marcia E. Asquith May 23, 2014 Page 6 piece is not a written report produced by a tool, but rather uses only output from the tool, there is a question as to whether the "investment analysis tool" exception would apply. We understand that FINRA has provided some flexibility in this respect, and permitted the use of output from investment analysis tools within such educational materials provided that certain conditions are satisfied, notwithstanding the potential interpretive ambiguity. More specifically, we understand that FINRA has indicated that members may use educational materials that contain output from an investment analysis tool provided that: (i) no investment products are mentioned (whether generically or specifically); (ii) the recipients of the material have access to one of the member's online investment analysis tools; (iii) the material "advertises" the proprietary investment analysis tools that are available on the member's web site;11 and (iv) the material shows multiple outcomes and allows the investor to "interact" with the printed charts (e.g., the investor may select their own withdrawal rate, asset allocation, and number of years in retirement and find the resulting probability of success). This is a sensible approach, and we encourage FINRA to formalize this position in the Rules. In connection with this effort, we also recommend that FINRA revisit the disclosure requirements associated with output from investment analysis tools. In reliance on the informal guidance noted above, certain members make statements based on the use of such tools in limited ways within the context of larger educational pieces, and FINRA has insisted that the full disclosure requirements of Rules 2210 and 2214 apply. In

some cases, our members believe that the mandated disclosures are disproportionately large in comparison to the size of the communications themselves and the significance of the tool's output within the communications, and that these mandated disclosures may unduly obfuscate more important disclosures. Where the output from or discussion of an investment analysis tool is a relatively minor component of a retail communication, FINRA should impose less burdensome disclosure requirements. For instance, members should be given the flexibility to prominently note core tool imitations and provide a link to more fulsome disclosures regarding the tool. This would be broadly consistent with the policy approach reflected in Rule 2214.06, which imposes no disclosure or filing obligations for retail communications containing only an incidental reference to an investment analysis tool (e.g., a brochure that merely mentions a member's tool as one of the member's services), and limited disclosure obligations for retail communications that refer to an investment analysis tool in more detail but do not provide access to the tool or the results generated by the tool. We believe that the required disclosure should be commensurate with the amount and type of material related to the investment analysis tool, and providing more circumscribed disclosure and/or a link12 (as discussed 11 The material must refer investors to a tool and the fact that investors can use it to evaluate various investment styles or strategies similar to those shown in the material. Importantly, however, the investment analysis tools on the web site do not have to replicate exactly the results shown in the print materials. 12 The SEC's Division of Corporation Finance has recognized the benefits of allowing hyperlinking to satisfy certain disclosure requirements under Rules 134, 165, and 433 under the Securities Act of 1933, as amended (the "Securities Act"), Marcia E. Asquith May 23, 2014 Page 7 below) to more complete disclosure about the investment analysis tool would streamline retail communications while continuing to provide investors with access to thorough disclosure about the tool. III. Streamlining Advertisements by Recognizing Other Sources of Information Fund investors receive or have ready access to a considerable amount of information from sources other than retail marketing materials. Fund investors receive prospectuses13 and annual and semi-annual reports14, and have access to more detailed information contained in the funds' statements of additional information15 and quarterly reports of fund holdings made with the SEC.16 Thus, retail communications such as advertisements and sales literature are only one source of information provided or made available to investors, and should be thought of in the context of this larger mix of information. Given advances in technology, it is easier than ever for investors to access and review these other sources of fund information, which lessens the need for any one communication to include, directly and visibly, all information deemed necessary. This realization informed the SEC's work in creating the summary prospectus,17 and its views on summary information generally.18 In light of this, we encourage FINRA to explore ways to incorporate concepts such as layering, complementarity, incorporation by reference, and summary information into the Rules. For instance, if either FINRA or the SEC requires certain disclosure to be provided along with any particular content, we recommend permitting firms to hyperlink to all or portions of appropriate disclosures. This to accommodate social media communications with technological limitations on the number of characters or amount of text that may be included. See infra, note 21. 13 See Section 5(b)(2) of the Securities Act. 14 See Section 30(e) of the Investment Company Act and Investment Company Act Rule 30e-1. 15 See Section 8(b) of the Investment Company Act and related rules. 16 See Section 30(b) of the Investment Company Act and Investment Company Act Rule 30b1-5. 17 See Enhanced Disclosure and new Prospectus Delivery Option for Registered Open-End Management Investment Companies, SEC Release Nos. 33-8998; IC-28584 (Jan. 13, 2009) ("By using multiple means to provide information and by using technology to provide information in a layered format that permits users to move from key information to more detailed

information, the new rule is intended to facilitate each investor's ability to effectively choose to review the particular information in which he or she is interested."). 18 See Commission Guidance on the Use of Web Sites, SEC Release Nos. 34-58288, IC-28351 (Aug. 1, 2008). In this Release, the SEC notes that it has encouraged, and in some cases required, the inclusion of summaries or overviews in prospectuses and in certain reports to highlight important information for investors (e.g., in connection with Management's Discussion and Analysis disclosures, and executive compensation disclosure required under Regulation S-K). The SEC goes on to note that companies may wish to consider placing hyperlinks to more detailed information in close proximity to summary or overview sections to "help an investor understand the appropriate scope of the summary information or overview while making clearer the context in which the summary or overview should be viewed." Marcia E. Asquith May 23, 2014 Page 8 approach would be consistent with FINRA's recognition of the permissible use of hyperlinks to provide investors with information in electronic media19 and to provide investors with more information about fees in connection with IRA rollovers.20 More recently, the SEC's Division of Corporation Finance has recognized the benefits of allowing hyperlinking to satisfy certain disclosure requirements under Securities Act Rules 134, 165, and 433 to accommodate social media communications with technological limitations on the number of characters or amount of text that may be included.21 IV. The Need for Consistency and Timeliness in FINRA Reviews of Retail Communications As FINRA clearly recognizes, the consistency and timeliness of its review comments are of critical importance. We recognize that FINRA has taken steps to promote consistency in the comments made by its reviewers, which have improved member experiences over time. And given the increasing volume of retail communications that it is responsible for reviewing on a day-to-day basis and the complexity of that task, we believe FINRA's overall performance in reviewing retail communications is commendable. Nevertheless, we encourage FINRA to continue to seek improvements to the review process to ensure that comments made are both consistent and timely. For example, certain members have noted to us that materials that had been reviewed by FINRA multiple times over the course of several years without comment are now drawing comments, often when a new reviewer is assigned to review a member's communications. We understand that FINRA's review process and positions evolve over time and may change, for example due to product and market developments and regulatory changes (e.g., the 2012 revisions to Rule 2210, which among other things now require that member firms file with FINRA all of their retail communications concerning closed-end funds). If FINRA has changed a position, it should make every effort to communicate that new position broadly to all members before it is manifested through the review and comment process. If it has not changed a position, then it should make every effort to ensure that all of its staff reviewers provide the same types of comments to members over time. To the extent possible, a piece should not pass muster with one reviewer and draw a comment from another. Members also have expressed frustration with the timeliness of FINRA reviews. We recognize that FINRA faces staffing constraints and an ever-increasing volume of materials to review. Still, in 19 See NASD Regulatory & Compliance Alert–Ask the Analyst – Electronic Communications and Mutual Funds (June 1997) (permitting an Internet banner advertisement that contains only a mutual fund or fund family name to link to the home page containing properly disclosed prospectus offering language rather than including the language in the advertisement itself). 20 See FINRA Provides Guidance on Disclosure of Fees in Communications Concerning Retail Brokerage Accounts and Individual Retirement Accounts, FINRA Notice 13-23 (July 2013). 21 See Compliance and Disclosure Interpretations: Securities Act Rules of the SEC's Division of Corporation Finance, Questions 110.01, 164.02, and 232.15, available at: http://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm. Marcia E. Asquith May 23, 2014 Page 9 some cases, members note that they receive comments on

time-sensitive materials, such as quarterly fund fact sheets, after those materials have been removed from distribution. While those comments might be useful for the development of future fact sheets, a shorter turnaround time would increase the utility and investor protection benefits of the review. We encourage FINRA to explore ways to make more efficient use of its limited resources, such as modernizing the filing requirements and eliminating the filing and review of materials that are broadly duplicative or not on point, as outlined above. V. FINRA Filing Requirements for Closed-End Fund Marketing Materials Pursuant to its most recent set of comprehensive amendments to Rule 2210 adopted in 2012, FINRA now requires its members to file all retail communications concerning closed-end funds.22 Previously, NASD Rule 2210 required that members file only advertisements and sales literature concerning a closed-end fund when a fund was offering new shares to the public.23 As FINRA gains more experience with closed-end fund marketing materials through its review process, we encourage FINRA to consider codifying a set of clear disclosure standards tailored to closed-end fund marketing materials24 and then eliminating the Rule 2210 filing requirement for these communications. We believe that clear and tailored standards, coupled with continued principal review of these communications, would be consistent with investor protection and would create efficiencies and cost savings. ■ ■ ■ ■ ■ We appreciate FINRA's willingness to engage members in a constructive dialogue over both process improvements and changes of policy or position. We stand ready to assist FINRA in this regard in any way that we can. If you have any questions, please contact me at (202) 218-3563, Bob Grohowski at (202) 371-5430, or Matthew Thornton at (202) 371-5406. Sincerely, /s/ Dorothy Donohue Acting General Counsel 22 Rule 2210(c)(3)(A). 23 Advertisements and sales literature concerning continuously offered (interval) closed-end funds were subject to ongoing filing requirements. 24 FINRA already takes a similar approach with respect to security futures (Rule 2215) and collateralized mortgage obligations (Rule 2216).
