

COMMENT LETTER

January 15, 2009

Institute Comments On FINRA Proposed Self-Reporting Rule (pdf)

January 15, 2009 Ms. Marcia E. Acquith Office of the Corporate Secretary FINRA 1735 K Street NW Washington, DC 20006-1506 Re: Regulatory Notice 08-71: Member Reporting Requirements Dear Ms. Acquith: The Investment Company Institute¹ appreciates the opportunity to comment on Regulatory Notice 08-71, which seeks comment on FINRA's proposal to consolidate NYSE Rule 351 and NASD Rule 3070, relating to the reporting obligations of member firms, into new Rule 4530. The Institute supports the proposal but recommends certain provisions be modified slightly to avoid duplicative reporting and reporting of non-material events. In addition to consolidating existing rules, proposed Rule 4530(a)(3) would add a new requirement that members report whenever they conclude that a violation of any securities, insurance, commodities, financial or investment-related laws, rules, regulations, or standards of conduct of a regulatory body or self-regulatory organization has occurred. Proposed Supplementary Material .01 to the proposed rule would clarify, in part, that this provision would not require the reporting of an isolated violation by the member or an associated person of the member that can be reasonably viewed 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 \$9.86 trillion and serve over 93 million shareholders. Ms. Marcia E. Acquith January 15, 2009 Page 2 as a ministerial violation that did not result in customer harm and was remedied promptly upon discovery. We strongly support adoption of this Supplementary Material in connection with adoption of the rule because we believe it provides an appropriate carve-out from the rule's reporting requirements. In particular, it will alleviate the need for members to report – and FINRA to process – events of insignificant consequence to the member or its customers. We are concerned, however, that even with this carve out, the proposed rule may inadvertently require the reporting of non-material events that are not ministerial in nature and result in duplicative reporting. With respect to our first concern, as currently drafted, only those violations that are ministerial in nature are not required to be reported. While the term “ministerial” is not defined in the rule, it typically refers to administrative or non-discretionary activities. As such, when one considers the range of activities members and their representatives engage in that involve some measure of discretion or judgment, we think that the rule and this exception provides too narrow a carve out from the reporting requirement. As a result, it could result in the reporting of violations that, though not ministerial, were not material. To address the limited nature of the current exception, we recommend broadening it to include non-material violations that do not result in customer

harm and are remedied promptly upon discovery. This recommendation accomplishes two purposes. First, it takes the guess work out of determining what constitutes a “ministerial” violation. Second, it relieves FINRA from receiving reports of isolated de minimis – though non-ministerial – violations that were promptly remedied and did not result in customer harm. For example, assume that, for whatever reason, a broker-dealer used a piece of sales literature that was not first reviewed by a principal. Assume further that, while the piece did not entirely conform to FINRA’s advertising requirements, it was neither false nor misleading and it resulted in no customer harm or confusion. Pursuant to the Supplementary Material, the member would have to determine whether use of the literature was a ministerial violation. If it concludes it was not a ministerial violation, it would have to report the incident. We question the value of such report to FINRA. If, however, the Supplementary Material provided a carve out for non-material events, the incident would not need to be reported, provided the violation was remedied promptly upon discovery. Moreover, if the event was not an isolated one, but one that recurred, our recommendation would require its reporting. With respect to our second concern relating to duplicative reporting, we note that there are other reporting requirements applicable to FINRA’s members under FINRA’s rules (e.g., the annual compliance certification required by Rule 3013 and IM-3013) or Federal law (e.g., pursuant to the Sarbanes-Oxley Act). To the extent a member currently has a duty to report a violation, we recommend that the Supplementary Material clarify that it is not required to re-report the same event pursuant to Rule 4530. Ms. Marcia E. Acquith January 15, 2009 Page 3 To address both of these concerns, we recommend that the proposed Supplementary Material .01 be revised in relevant part to read: . . . FINRA does not expect a member to report an isolated violation by the member or an association person of the member that can be reasonably viewed as either a ministerial or non- material violation of the applicable rules that did not result in customer harm and was remedied promptly upon discovery. Any violation that a member has a duty to report to a regulator under other FINRA rules or other laws or rules applicable to the member are not required to be additionally reported under paragraph (a)(3). ■ ■ ■ ■ ■ We appreciate the opportunity to provide these comments to FINRA. If you have any questions concerning them, please contact the undersigned by phone (202-326-5825) or email (tamara@ici.org). Sincerely, /s/ Tamara K. Salmon Tamara K. Salmon Senior Associate Counsel