

## COMMENT LETTER

June 17, 2014

# ICI Submits Comment Letter in Response to FINRA's Rule 2210 BrokerCheck Proposal (pdf)

June 16, 2014 Marcia E. Asquith Office of the Corporate Secretary FINRA 1735 K Street, NW Washington, DC 20006-1506 Re: BrokerCheck, FINRA Notice 14-19 (April 2014) Dear Ms. Asquith: The Investment Company Institute<sup>1</sup> appreciates the opportunity to comment on FINRA's proposed amendment to Rule 2210 (the "Rule") related to BrokerCheck.<sup>2</sup> The Institute supports investors receiving meaningful information regarding their investment professionals, and FINRA's efforts to increase investor awareness of the information available through BrokerCheck. We support the Proposal, which seeks to achieve this objective without imposing undue burdens on FINRA members, with the two specific recommended changes described below. In January 2013, FINRA proposed to amend Rule 2267 (Investor Education and Protection) to require, among other things, that members include a prominent description of and hyperlink to <sup>1</sup> 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. <sup>2</sup> See FINRA Requests Comment on a Revised Proposal to Require a Hyperlink to BrokerCheck in Online Retail Communications With the Public, FINRA Notice 14-19 (April 2014) (the "Proposal"). FINRA's BrokerCheck provides the public with information on the professional background, business practices, and conduct of FINRA member firms and their associated persons. BrokerCheck is meant to help investors make informed choices about the individuals with whom and firms with which they may wish to conduct business. Marcia E. Asquith June 16, 2014 Page 2 BrokerCheck on their websites, social media pages, and any comparable Internet presence.<sup>3</sup> The Institute, along with many other commenters, opposed the 2013 Proposal.<sup>4</sup> In April 2013, FINRA withdrew the 2013 Proposal<sup>5</sup> in order to assess and respond to commenters' concerns.<sup>6</sup> The current Proposal would require a firm to include a readily apparent reference and hyperlink to BrokerCheck on each website that is available to retail investors and in online retail communications that include a professional profile of, or contact information for, an associated person. These new requirements would be subject to specified conditions and exceptions.<sup>7</sup> The current Proposal is far superior to the 2013 Proposal, reflecting FINRA's thoughtful consideration of the comments it received. Most importantly, the Proposal is more sensible in its scope and application to social media and other electronic communications, and as a result will be significantly easier for members to understand and implement. For example, consistent

with FINRA's interest in increasing awareness and use of BrokerCheck among retail investors, proposed Rule 2210(d)(8)(A) relates only to each website<sup>8</sup> of a member that is "available to retail investors"; proposed Rule 2210(d)(8)(B) relates only to "online retail communication[s]"; and proposed Rule 2210(d)(8)(C)(iii) provides an exception to referring and hyperlinking to BrokerCheck for members that do not "provide products or services to retail investors." FINRA's changes largely mitigate our concerns about the 2013 Proposal. Notwithstanding our overall support for the Proposal, there are two issues that we recommend that FINRA address before submitting the Rule amendment to the Securities and Exchange Commission for approval. The first relates to proposed Rule 2210(d)(8)(A), which states that "[a] member must include a readily apparent reference and hyperlink to BrokerCheck on each website of the member that is available to retail investors." (Emphasis added.) While we appreciate that the Proposal

<sup>3</sup> See Notice of Filing of Proposed Rule Change to Amend FINRA Rule 2267 (Investor Education and Protection), SEC Release No. 34-68700 (Jan. 18, 2013), 78 Fed. Regis. 5542 (Jan. 25, 2013) (the "2013 Proposal").

<sup>4</sup> The Institute opposed the 2013 Proposal primarily due to concerns that, as drafted, it may have adversely impacted FINRA members' continued use of social media. See Letter from Tamara K. Salmon, Senior Associate Counsel, the Investment Company Institute, to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission (Feb. 15, 2013), available at [www.ici.org/pdf/27020.pdf](http://www.ici.org/pdf/27020.pdf).

<sup>5</sup> See Notice of Withdrawal of Proposed Rule Change to Amend FINRA Rule 2267 (Investor Education and Protection), SEC Release No. 34-69440 (Apr. 24, 2013), 78 Fed. Regis. 25331 (Apr. 30, 2013).

<sup>6</sup> See the Proposal.

<sup>7</sup> See proposed Rule 2210(d)(8).

<sup>8</sup> We note with approval that proposed Rule 2210(d)(8)(A) is limited to firms' websites. In contrast to the 2013 Proposal, we believe that this provision strikes the right balance in increasing retail investors' awareness of BrokerCheck by requiring placement of the reference and hyperlink on each firm's website, without burdening other firm-specific forms of electronic retail communications (e.g., mobile applications). Marcia E. Asquith June 16, 2014 Page 3 makes clear that a single reference and hyperlink to BrokerCheck would suffice,<sup>9</sup> it is unclear where the required reference and hyperlink to BrokerCheck should appear. A website may contain a number of entrypoints for retail investors, who may not view the same pages. Additionally, it is common for websites of broker-dealers that act as underwriters and distributors of registered investment company securities to direct their visitors by category (e.g., "U.S. investors," "individual investors," "institutional investors," and "investment professionals") to different locations on the websites, which has the effect of limiting the portions of the websites that are targeted to and designed for retail investors. Including the reference and hyperlink to BrokerCheck once on a website, in the location where retail investors are most likely to see it, would be consistent with both the text and the spirit of the Proposal. Given the variety of website designs in the industry, we do not believe that FINRA should dictate a specific location for the reference and hyperlink. Instead, FINRA should provide each member with the flexibility to choose the webpage that it reasonably determines will reach retail investors. FINRA could accomplish this by (i) replacing the words "available to" in Rule 2210(d)(8)(A) with "intended for" and (ii) clarifying in any accompanying Regulatory Notice or otherwise that a member should include the reference and hyperlink to BrokerCheck on a webpage that the member reasonably determines will draw the attention of retail investors.<sup>10</sup>

Our second recommendation relates to proposed Rule 2210(d)(8)(C)(i), which provides an exception to referring and hyperlinking to BrokerCheck for electronic mail or text messages. We strongly support this exception, which implicitly recognizes that requiring a reference and hyperlink in these communications would be overly burdensome and adversely affect their use. Consistent with this policy judgment, we recommend that FINRA expand this exception to include other similar forms of communication that may emerge in the future. Therefore, we recommend that FINRA revise proposed Rule

2210(d)(8)(C)(i) to include “electronic email, text messages, or other similar forms of messaging.” Finally, if and when a final Rule amendment is approved, we request that firms be given a reasonable amount of time to implement these new requirements (we think that at least six months from the time of approval would be appropriate). Even with the Proposal’s more sensible scope, it will 9 Additionally, we see nothing in proposed Rule 2210(d)(8) that would preclude a firm from utilizing “buffer screens” (i.e., screens that indicate to viewers that they are being transferred to a website not maintained or controlled by the firm). Firms often use buffer screens to state that they do not warrant or endorse the information contained on the third party’s website. We expect that firms would want to do so with regard to BrokerCheck. In addition, members may wish to indicate through the buffer screen (or as part of the “readily apparent reference” to BrokerCheck) that questions that investors may have about BrokerCheck or its contents could be directed to FINRA. (In this regard, we note that adoption of this proposed Rule amendment likely will increase use of BrokerCheck.) Notwithstanding the terms of the proposed amendment, we request that FINRA clarify in any accompanying Regulatory Notice or otherwise that a member may utilize buffer screens in this way. 10 Cf. Rule 482(b)(5) under the Securities Act of 1933 (which permits legibility requirements for required disclosures in advertisements delivered through an electronic medium to be satisfied by presenting the statements “in any manner reasonably calculated to draw investor attention to them”). Marcia E. Asquith June 16, 2014 Page 4 take firms time to evaluate their websites and other online retail communications and determine how best to implement the new requirements. ■ ■ ■ ■ ■ We appreciate the opportunity to provide comments on the Proposal. 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