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May 23, 2014

VIA E-MAIL

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, N.W.
Washington, DC 20006-1506

Re: Retrospective Rule Review of the Communications with the Public Rules – FINRA Regulatory Notice 14-14

Dear Ms. Asquith:

On behalf of our client, the Money Management Institute ("MMI"), we respectfully submit this comment letter reflecting MMI's response to the request for comment in Regulatory Notice 14-14. MMI would like to thank FINRA and its staff for this opportunity to comment on the retrospective review of the communications with the public rules (commonly referred to as the "advertising rules"). MMI is the national organization for the advisory solutions industry, representing asset management firms, sponsors of investment advisory programs, and service providers.[1] Accordingly, MMI's comments reflect the impact of FINRA's advertising rules on a broad range of member firms engaged in sponsoring and managing advisory programs, including dual registrants and investment advisers that have affiliated broker-dealers.

MMI supports the overall objective of conducting the retrospective review of the advertising rules, particularly given the critical importance of those rules to the business of FINRA member firms. At the same time, however, MMI believes there are several areas where the advertising rules – and particularly FINRA's interpretation and application of those rules – can be updated to provide more flexibility, while still honoring the important objectives of investor protection and market integrity. Specifically, MMI urges FINRA to consider: (i) the implications of the FINRA advertising rules to

[1] MMI was created in 1997 to serve as a forum for the managed account industry's leaders to address common concerns, discuss industry issues and work together to better serve investors. MMI is the leading advocate for the industry on regulatory and legislative issues. Information about MMI is available on the MMI website: www.moneyinstitute.com.

investment advisory programs and services offered by dual registrants and investment advisers with affiliated broker-dealers; (ii) harmonizing the advertising standards for broker-dealers and investment advisers; and (iii) providing more flexibility in connection with the interpretation of the content standards for communications to institutional investors.

Dual Registrants and Investment Advisers with Affiliated Broker-Dealers

As noted in Regulatory Notice 14-14, MMI believes that any assessment of the effectiveness of the advertising rules must begin by considering whether they are appropriately tailored to address the problems they were intended to mitigate. We submit that, although MMI believes the advertising rules are appropriately structured to govern broker-dealer communications with the public, FINRA's interpretation and application of these rules has, in some instances, extended beyond its jurisdiction to include investment advisory programs and services that are offered by dual registrants or investment advisers that have an affiliated broker-dealer.

To our knowledge, FINRA has only addressed the application of the advertising rules to advisory services in one instance – a 1998 interpretive letter issued by the NASD to FSC Securities Corporation.[2] In that letter, the NASD stated that then "NASD Conduct Rule 2210 governs all member communications with the public, including all third-party marketing materials used by a member or its registered persons." The NASD attempted to provide some flexibility to this approach by noting that it did not, in practice, require member firms to file third-party marketing materials that: (i) purport to solicit customers for investment advisory services; (ii) do not include the member's name; and (iii) do not contain references to mutual funds, variable annuities or other securities. Ultimately, however, this flexibility was eclipsed by the further statement that:

> If the third party marketing materials are used to solicit customers for wrap fee programs or other arrangements in which the member or its registered representatives participate in the execution of securities transactions and receive transaction-based compensation in lieu of or addition to an advisory fee, the materials are being used to solicit for the member's securities business and they are subject to all of the requirements, including the filing requirements where appropriate, provided in NASD Conduct Rule 2210.

MMI respectfully suggests that the 1998 guidance should be reconsidered. Given the increasing convergence of investment adviser and broker-dealer services, MMI believes this approach is no longer effective, nor is this approach necessary for the protection of investors and preservation of market integrity. Nowhere is this more clear than in the context of communications relating to managed account programs, which are by their very nature investment advisory programs that also

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2 *Letter to Dawn Bond*, FSC Securities Corporation, NASD Interpretive Letter (July 30, 1998) (the "FSC Letter").

provide clients with access to custody and execution services. Based on the current guidance, managed account communications arguably would be subject to Rule 2210 by virtue of the fact that: (i) the communications generally mention individual securities holdings; (ii) securities transactions are executed through the broker-dealer sponsoring the program; and/or (iii) the communications are distributed by member firms (or, less commonly, registered representatives) that earn transaction-based compensation in connection with transactions effected on behalf of clients participating in the managed account program.

In addition, in MMI's view, the current FINRA guidance is also problematic in the case of investment advisers to institutional clients that have a single sales force that offers both separately managed account strategies and collective investment vehicles, such as mutual funds, collective funds and private investment funds that are considered to be securities. In such a case, the sales personnel are often licensed with an affiliated broker-dealer in order to permit them to discuss securities with prospective clients and the affiliated broker-dealer (or, less commonly, its registered representatives) may earn transaction-based compensation in connection with executing securities transactions on behalf of the investment adviser's clients. This structure, which is very common among investment advisers to institutional clients, creates the same friction under the FSC Letter as that described above with respect to advisory services.

MMI urges FINRA to consider setting forth new guidance clarifying that the determination of whether a particular communication is subject to FINRA Rule 2210 should be based on the content of that communication and the services promoted by the communication. Under this approach, because of their clear nexus to brokerage activities, communications that are used to sell individual securities, including mutual funds or private investment funds, or to promote a member firm's execution capabilities or other features of its securities business should remain subject to Rule 2210. On the other hand, communications that are primarily used to promote investment advisory programs, such as managed account programs, or that are primarily used to promote investment strategies that are implemented through an advisory account should not be subject to FINRA Rule 2210. This should be the case regardless of whether those communications mention particular securities or whether a broker-dealer has some ancillary involvement with the services such communications promote. This approach is designed to recognize that many investment advisers implement their investment strategies and provide advice regarding investments in specific securities. Accordingly, the discussion of individual securities or holdings should not trigger the application of FINRA Rule 2210 where that discussion is part of the implementation of an advisory strategy.

This approach is consistent with the long standing interpretation under the Investment Advisers Act of 1940 ("Advisers Act") that a broker-dealer that is also registered as an investment adviser is not

deemed to be acting as an investment adviser to all of its brokerage customers.[3] We submit that the reverse is also true. A dual registrant or an employee of an investment adviser who is also a registered representative of a broker-dealer should be able to differentiate between communications to advisory clients and brokerage customers.[4] In each of these instances, a communication should not be considered to be made in furtherance of a broker-dealer's securities business simply because it is distributed by a member firm or a registered representative of a member firm or because it refers to specific securities by name. Rather, MMI suggests that the treatment of the communication should be governed by the content of the communication and the services that are being promoted.

Harmonization of Investment Adviser and Broker-Dealer Rules

The current application of FINRA Rule 2210 to advisory communications creates a competitive disadvantage for member firms and has the unintended consequence of subjecting dual registrants and investment advisers with affiliated broker-dealers to content restrictions that do not apply to stand-alone investment advisers. Accordingly, if FINRA is not willing to consider clarifying and limiting the application of FINRA Rule 2210 and the corresponding advertising rules covered by the retrospective review as discussed above, MMI suggests that FINRA's interpretation of the content standards set forth in FINRA Rule 2210(d)(1) – and particularly 2210(d)(1)(F) – should be harmonized with Advisers Act Rule 206(4)-1.[5]

As you are aware, the Advisers Act takes a principles-based approach to regulating advertisements. Advisers Act Rule 206(4)-1, with a few exceptions, does not explicitly prohibit particular content from advertisements.[6] Instead it contains a "catch-all provision" that broadly prohibits investment advisers from using advertisements that contain any untrue statement of a material fact or are otherwise false or misleading.[7] The vast majority of the regulatory landscape applicable to

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3 *See Final Extension of Temporary Exemption from the Investment Advisers Act for Certain Brokers and Dealers*, Advisers Act Release No. 626 (April 27, 1978).

4 *See Interpretative Rule Under the Advisers Act Affecting Broker-Dealers*, Adviser Act Release No. 2652 (Sept. 24, 2007).

5 We submit that this is the optimal time to harmonize the regulatory standards applicable to investment adviser and broker-dealer advertising given the ongoing debate about the uniform standard of care and regulatory standards prompted by Section 913 of the Dodd-Frank Act.

6 Rule 206(4)-1 generally prohibits the use of testimonials, references to past specific recommendations that would have been profitable, representations that any graph, chart or formula or other device can in and of itself be used to determine which securities to buy or sell, and statements that any report, analysis or service will be furnished free or without charge, unless it actually is free of charge and not subject to any condition or obligation.

7 Advisers Act Rule 206(4)-1(a)(5).

investment adviser advertisements has come in the form of SEC no-action letter guidance. Through such guidance, the SEC staff has provided firms with a principles-based framework and the flexibility to design various performance presentations, subject to appropriate disclosure and internal controls. Despite the flexible, principles-based approach employed by the SEC and its staff under the Advisers Act, the SEC still is able to bring enforcement actions for violations of Section 206 and Rule 206(4)-1 thereunder.

While FINRA's general content standards contain similar concepts to the SEC's catch-all provision, FINRA has historically taken a more restrictive view in interpreting its rules and, with limited exceptions, explicitly prohibits a wide variety of content. These prohibitions include, among other things, the use of projections, target returns, related performance, hypothetical and back-tested performance. The result is that many types of advertisements that are permitted under the Advisers Act standards are flatly prohibited by FINRA's interpretation of its advertising rules.

While MMI appreciates the intent behind Rule 2210, and the important investor protection role played by FINRA in implementing and interpreting the advertising rules, it respectfully submits that FINRA's interpretation and application of the rules fails to differentiate among businesses conducted by various types of FINRA member firms. It is MMI's view that applying narrowly tailored rules to vastly different types of member firms without taking into account differences in size, business and types of clients results in imprecise regulation. For example, a dual registrant that solely serves institutional clients may receive the same types of comments from FINRA's staff on communications directed to institutional investors as those received by an online broker-dealer dealing exclusively with retail customers. Moreover, because the definition of institutional investor contains such a high financial threshold ($50 million), the standard does not acknowledge the sophistication of different business models, nor does it allow firms any flexibility in communications with high net worth individuals. We submit that FINRA's institutional investor designation is higher than most sophistication standards applicable in other securities law contexts.[8] Accordingly, MMI urges FINRA to consider implementing an intermediate sophistication standard applicable to high net worth individuals and other types of sophisticated investors. Alternatively, MMI urges FINRA and its staff to consider the business model and intended audience of each firm when reviewing its communications.

MMI believes that if FINRA takes a more principles-based approach to regulating advertisements, industry participants would be in a better position to tailor marketing materials to their particular business and for the intended audience without compromising investor protection. Further, taking an approach that is more consistent with the standards applicable to investment advisers, would level the commercial playing field with respect to advertising distributed by dual registrants,

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[8] For example, the Investment Company Act of 1940 contains the "qualified purchaser" designation, which generally includes individuals who own not less than $5,000,000 in investments. Investment Company Act Section 2(a)(51)(A)(i).

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investment advisers with affiliated broker-dealers, and stand-alone investment advisers. This approach would also provide regulatory clarity to market participants that MMI believes would ultimately result in clearer and more consistent communications with the investing public, regardless of whether the source of the communication is an investment adviser or a broker-dealer.

Communications with Institutional Investors

MMI strongly encourages FINRA to consider providing additional flexibility in interpreting the application of the content standards to communications directed to institutional investors, as that term is defined in FINRA Rule 2210(a)(4).[9] MMI recognizes that FINRA's goal is investor protection and maintaining the integrity of the markets. However, in order to evaluate the appropriate level of regulation necessary to protect investors, it is important to consider the nature of the investors themselves. FINRA already recognizes this distinction in its advertising rules and interpretative guidance. For example, FINRA Rule 2210 differentiates between communications distributed solely to institutional investors[10] versus retail investors,[11] in that communications to institutional investors do not need to be filed with FINRA for approval prior to use. Further, in its 2013 interpretive letter to ALPS Distributors, Inc.[12] FINRA permitted the use of pre-inception index performance in communications to institutional investors, subject to various conditions. Finally, FINRA has eased its general prohibition on the use of related performance in the case of hedge fund materials that are distributed to qualified purchasers.[13]

Specific areas where MMI would implore FINRA to consider additional flexibility in the regulation of communications to institutional investors include the use of pre-inception or back tested performance, projections, target returns, and various forms of hypothetical or simulated performance.

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[9] As discussed above, we would also like the flexibility to use these types of communications with high net worth investors who, despite having significant assets, may not necessarily qualify as institutional investors under FINRA Rule 2210(a)(4).

[10] "Institutional investor" generally includes, among others, a bank, savings and loan association, insurance company, registered investment company, federal or state registered investment adviser, or any person (whether natural person, corporation, partnership, trust or otherwise) with total assets of at least $50 million. *See* FINRA Rule 2210(a)(4).

[11] FINRA Rule 2210(a)(6) defines "retail investor" to include any person other than an institutional investor, regardless of whether the person has an account with a member.

[12] *Letter to Bradley J. Swenson, ALPS Distributors, Inc.*, FINRA Interpretive Letter (April 22, 2013) ("ALPS Letter").

[13] *See Letter to Yukako Kawata*, FINRA Interpretive Letter (Dec. 30, 2003).

Back tested Performance

In the ALPS Letter, FINRA granted much needed flexibility to member firms in connection with marketing materials presented to institutional investors. Specifically, the ALPS Letter permits member firms, under certain circumstances, to issue communications regarding exchange-traded funds that contain pre-inception index performance. ALPS noted in its request to FINRA that it believed such data was useful to institutional investors in analyzing exchange traded products and that "institutional investors should be able to understand the potential benefits and drawbacks of such information." MMI concurs that institutional investors have a level of sophistication that should make them adept at understanding the nature of such pre-inception performance. Indeed, institutional investors often request a full range of hypothetical performance presentations, including back tested data as part of their due diligence and investment review process.

Accordingly, MMI believes that the flexibility to use pre-inception index performance that was granted in the ALPS Letter should be extended to all institutional communications and should be expanded to include other types of back tested index and fund performance in other contexts. For example, MMI believes that this notion extends beyond pre-inception index performance in institutional communications relating to exchange traded products, and should be applied broadly to permit member firms to show back tested performance presentations for mutual funds, collective funds and private investment funds, as well as any other investment products that are offered to institutional investors. Further, such back tested presentations should be able to be generated based on the historical performance of specific products, indices or asset classes.

Projections and Hypothetical or Simulated Performance

In addition to the use of back tested performance, MMI believes that FINRA should also permit the use of prospective performance information and other forms of hypothetical or simulated performance, as long as there is a sound basis for such information and the performance is accompanied by appropriate disclosures. Firms are frequently asked by clients, particularly institutional clients, for presentations containing prospective or simulated performance information as a means of evaluating potential investment products or strategies. The types of information MMI believes should be expressly permitted in communications to institutional investors include:

- Target performance returns, expected risk and return projections and portfolio characteristics regarding a particular investment product or strategy;

- Projections regarding the performance of a single underlying portfolio company, asset or investment;

- Projections that relate to the performance and risk characteristics of various asset classes and market segments;

- Portfolio comparisons, including comparisons of the projected return and risk characteristics of a client's current portfolio to a recommended portfolio, or illustrations that show the impact of adding a new investment product to an existing portfolio; and

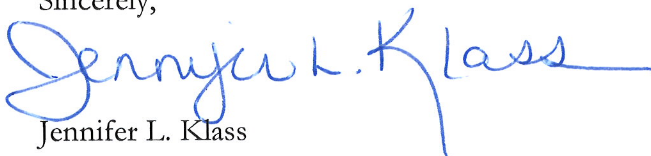
- Stress tests and other illustrations depicting how a particular investment product or strategy hypothetically would have performed in response to simulated market events or other variables.

We note that FINRA Rule 2214 currently provides a narrow exception from the restrictions on predictions and projections set forth in FINRA Rule 2210(d)(1)(F) to members using investment analysis tools that are interactive in nature, provided certain disclosures are included in the communication. MMI would propose expanding FINRA's application of the principles set forth in Rule 2214 to permit projections and hypothetical simulations based on quantitative models (*e.g.*, based on formulas, algorithms and models) that present the likelihood of various investment outcomes, regardless of whether they are generated by an investment analysis tool. The use of performance illustrations generated by such quantitative models should be permissible subject to appropriate disclosure and procedures reasonably designed to ensure that the quantitative models are not structured to lead to a particular investment outcome. MMI's members would also like the flexibility to show the outcome of the analytical models in a range of communications that are not limited to written reports generated by a tool.

Conclusion

MMI appreciates FINRA's consideration of the comments set forth above and would welcome an opportunity to meet with the FINRA staff to discuss these issues in more detail.

Sincerely,



Jennifer L. Klass

c: Christopher L. Davis, Money Management Institute