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July 2, 2015

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

Re: Communications with the Public,
FINRA Regulatory Notice 15-16 (May 2015)

Dear Ms. Asquith:

The Investment Company Institute¹ appreciates the opportunity to comment on FINRA's proposed amendments to certain of its rules governing communications with the public.² FINRA's Proposal follows from FINRA's 2014 retrospective review of these and a few other communications with the public rules, which was intended to assess their effectiveness and efficiency.³ We support FINRA's Proposal. If adopted, it should reduce burdens on FINRA member firms related to the filing

¹ The Investment Company Institute (ICI) is a leading, global association of regulated funds, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's U.S. fund members manage total assets of \$18.2 trillion and serve more than 90 million U.S. shareholders.

² FINRA has specifically proposed amendments to FINRA Rule 2210 (Communications with the Public), FINRA Rule 2213 (Requirements for the Use of Bond Mutual Fund Volatility Ratings), and FINRA Rule 2214 (Requirements for the Use of Investment Analysis Tools) (collectively, the "Rules"). *FINRA Requests Comment on Proposed Amendments to Rules Governing Communications With the Public*, FINRA Regulatory Notice 15-16 (May 2015) (the "Proposal").

³ FINRA Regulatory Notice 14-14, *FINRA Requests Comment on the Effectiveness and Efficiency of its Communications with the Public Rules* (April 2014), available at www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p479810.pdf. FINRA specifically sought comment on FINRA Rule 2210, FINRA Rule 2212 (Use of Investment Company Rankings in Retail Communications), FINRA Rule 2213, FINRA Rule 2214, FINRA Rule 2215 (Communications with the Public Regarding Securities Futures), and FINRA Rule 2216 (Communications with the Public Regarding Collateralized Mortgage Obligations).

of registered investment company advertisements and sales literature, without an attendant reduction in investor protection. In addition, we recommend that the Proposal be enhanced further to:

- Clarify that a firm may rely on the proposed FINRA filing exclusion for shareholder reports if the firm files them in compliance with applicable SEC requirements.
- Further expand the proposed filing exclusion for retail communications based on templates previously filed with FINRA (the “templates exclusion”) to also include updates to: (i) narrative information that is based on disclosure contained in certain SEC filings (*e.g.*, fund prospectuses); (ii) narrative factual information provided by a “ranking entity;” and (iii) market- and investment-related commentary.
- For closed-end funds, codify a set of clear disclosure standards tailored to their retail communications and eliminate the current filing requirement.

I. Background on the Retrospective Rule Review

FINRA announced this retrospective rule review in April 2014. In the initial “assessment” phase, FINRA staff solicited input from affected parties (*e.g.*, industry members) and experts and assessed

the existence of duplicative, inconsistent or ineffective regulatory obligations; whether market or other conditions have changed to suggest there are ways to improve the efficiency or effectiveness of a regulatory obligation without loss of investor protections; and potential gaps in the regulatory framework.⁴

In December 2014, FINRA published a Retrospective Rule Review Report (the “Report”), which represented the culmination of the assessment phase.⁵ Overall, the Report concluded:

FINRA staff believes that the rules have largely been effective in meeting their intended investor protection objectives. However, the staff believes that the rules and FINRA’s administration of them may benefit from some updating and recalibration to better align the investor protection benefits and the economic impacts.

Among other things, FINRA staff recommended aligning the filing requirements and review process applicable to retail communications with the relative risk of the communications.

⁴ *Id.*

⁵ The Report is available at www.finra.org/sites/default/files/p602011.pdf.

ICI has been strongly supportive of FINRA's retrospective rule review. ICI submitted a comment letter in May 2014 that offered several comments and recommendations to enhance the effectiveness of these rules while still respecting their investor protection aims, including recommendations related to electronic media, investment analysis tools, streamlining advertisements, consistency and timeliness of the review process, and regulation of closed-end funds' advertisements.⁶

II. Description of the Proposal

FINRA's Proposal, released in May 2015, is an early public step in the "action" phase of this retrospective rule review⁷ and would generally serve to lessen current filing obligations for FINRA member firms. Among other things, the Proposal would:

- Eliminate firms' FINRA filing obligation for shareholder reports filed with the SEC.⁸
- Expand the templates exclusion to allow firms to include updated non-predictive narrative descriptions of market events and factual changes in portfolio composition without having to refile the template.⁹
- Require newly registered FINRA firms to file only their websites and material changes to them within 10 business days of first use.¹⁰
- Eliminate the current obligation to file backup ranking or comparison information and replace it with an internal recordkeeping requirement.¹¹

⁶ Letter from Dorothy Donohue, Acting General Counsel, Investment Company Institute, to Marcia Asquith, Office of the Corporate Secretary, FINRA, dated May 23, 2014, available at www.finra.org/sites/default/files/NoticeComment/p519148.pdf.

⁷ We look forward to additional action items that may be forthcoming from FINRA. In particular, we request that FINRA continue to evaluate and consider ways of implementing comments received in response to the retrospective rule review with respect to the content, interpretation, and administration of the rules.

⁸ Currently, FINRA requires firms to file the manager's discussion of fund performance ("MDFP") portion of a registered investment company shareholder report if the report is distributed or made available to prospective investors.

⁹ Currently, firms are not required to file retail communications that are based on templates that were previously filed with FINRA if changed only to update recent statistical or other non-narrative information. Rule 2210(c)(7)(B).

¹⁰ Currently, newly registered FINRA firms are required to file with FINRA retail communications used in any electronic or other public media at least 10 business days prior to use. Rule 2210(c)(1)(A).

¹¹ Currently, firms that file a retail communication for a registered investment company that contains a fund performance ranking or performance comparison must include a copy of the ranking or comparison used in the retail communication. Rule 2210(c)(3)(A).

- Narrow the general filing requirement for registered investment companies to cover only retail communications “that promote or recommend a specific registered investment company or family of registered investment companies... .”¹²
- Eliminate the filing requirement for investment analysis tool¹³ templates and related retail communications.¹⁴

III. ICI Comments on the Proposal

We support FINRA’s Proposal. In crafting it, FINRA has demonstrated care in respecting the Rules’ investor protection aims while also removing unnecessary costly burdens on FINRA member firms. As explained more fully below, we particularly support the elimination of the (FINRA) filing requirement for shareholder reports and the expansion of the templates exclusion. We recommend one technical change to the shareholder report exclusion and certain additional modifications to the templates exclusion. We also reiterate our support for a filing exclusion for closed-end funds’ retail communications.

A. The Proposed Filing Exclusion for Investment Company Shareholder Reports

We support the proposed amendment to Rule 2210(c)(7)(F), which would exclude from FINRA’s filing requirements funds’ annual and semi-annual shareholder reports that have been filed with the SEC. This is a change that the ICI has long supported,¹⁵ and we strongly support its inclusion in the Proposal. From a technical perspective, however, we believe there is a potential ambiguity in this proposed provision. Read literally, one might conclude that the exclusion is available only if a fund files its shareholder report with the SEC prior to or perhaps contemporaneously with making the report

¹² Currently, firms must file within 10 business days of first use retail communications “concerning” registered investment companies, a broader requirement. Rule 2210(c)(3)(A).

¹³ Rule 2214(b) defines an 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.”

¹⁴ Currently, firms that intend to offer an investment analysis tool must file templates for written reports produced by, or retail communications concerning, the tool within 10 business days of first use. Rule 2210(c)(3)(C).

¹⁵ See, e.g., Letter from Dorothy M. Donohue, Senior Associate Counsel, Investment Company Institute, to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, dated December 7, 2011 (maintaining that, because fund shareholder reports are subject to extensive SEC regulation and are filed with the SEC, they are deserving of the same FINRA filing exclusion as fund prospectuses and certain other documents).

available to prospective investors.¹⁶ But under the applicable SEC rule, funds must file their shareholder reports with the SEC “not later than 10 days *after* the transmission to stockholders...”¹⁷ (emphasis added) We believe FINRA’s intent was to provide a blanket exclusion from FINRA filing requirements for shareholder reports, provided they are filed in a timely manner with the SEC. The precise timing of filing with the SEC (compared to that of the initial distribution) would not seem to matter. Therefore, we recommend that FINRA amend this provision further to make clear that funds may rely on this new exclusion for their reports (and parts thereof) provided those reports are filed in compliance with applicable SEC requirements.

B. The Proposed Changes to the Filing Exclusion for Templates

We support the proposed amendment to the filing exclusion for templates.¹⁸ This aspect of the Proposal clearly follows from FINRA staff’s recommendation in the Report to “align [] the filing requirements and review process with the relative risk of the communications.” We recommend expanding the exclusion in a few respects that would further advance this FINRA staff objective. First, we believe that it would be consistent with the tenor of this exclusion, particularly as proposed to be amended, to permit a registered fund to exclude from filing a template modified to conform its content to that appearing in a fund’s prospectus (as updated) or other documents that have been filed with the SEC. For instance, if a fund updates its risk disclosure, changes the description of an investment strategy, or updates information about portfolio managers in connection with an annual update of its prospectus (or as necessary throughout the course of the year), we recommend permitting the fund to make corresponding revisions to its template-based retail communications without triggering a new filing obligation. Registered funds’ registration statements are subject to detailed SEC requirements,¹⁹ and they (and all of their subsequent amendments) are filed with the SEC.

We also recommend that FINRA exclude from filing those templates with modifications limited to narrative factual changes provided by any “ranking entity.”²⁰ Ranking entities are independent, recognizable entities that provide periodically updated information for inclusion in some

¹⁶ A fund could make available its shareholder report to prospective shareholders through a mailing (including e-mail) or by posting it on a website.

¹⁷ Rule 30b2-1(a) under the Investment Company Act of 1940.

¹⁸ See *supra*, note 9 and accompanying text.

¹⁹ See, e.g., SEC Forms N-1A (registration statement for open-end funds) and N-2 (registration statement for closed-end funds). Open-end funds update their registration statements at least annually.

²⁰ For this purpose, the definition of “ranking entity” could be the same as that found in Rule 2212(a), *i.e.* “any entity that provides general information about investment companies to the public, that is independent of the investment company and its affiliates, and whose services are not procured by the investment company or any of its affiliates to assign the investment company a ranking.”

funds' templates. As with changes that firms make to templates to conform them to certain SEC-filed documents, these types of changes are also frequent and rather mechanistic in nature.

Finally, we believe that the reference to “non-predictive narrative information that describes market events” in the proposed templates exclusion, depending on how it is construed, could be unduly narrow and difficult for member firms to apply. Our specific concerns are that:

- (i) these narratives are often a mix of fact *and commentary* regarding market events and fund performance and positioning; and
- (ii) commentary may have elements that could be deemed “predictive,” even though it is consistent with content standards such as Rule 2210(d)(1)(F).²¹

Because of the difficulty in disentangling descriptions of market events from this type of commentary, and the absence of a clear benefit in requiring firms to do so, we recommend broadening this provision to expressly permit commentary, which would remain subject to Rule 2210's content standards. The upshot of this expansion is that funds could provide in their templates, and update without refiling, commentary similar to the MDFP included in their shareholder reports. FINRA states in the Proposal that the MDFP “typically presents less investor risk than other types of promotional communications concerning investment companies...” and, as noted above, is proposing that shareholder reports be excluded from filing with FINRA. We agree with this assessment and policy determination, and believe that a similar determination with respect to templates would be appropriate.

A revised version of the templates exclusion, incorporating all of our recommended changes outlined above, is attached.

Our understanding is that under current FINRA staff practice, any time a firm makes the kinds of changes described above to a fact sheet (or similar types of template-based communications), that fact sheet must be re-filed with FINRA. Many of our members produce fact sheets and similar communications for a great number of funds, and update them frequently in a number of routine ways, with only some of those ways covered by this exclusion (even as proposed to be amended). When updates to a piece fall into the categories outlined above, we do not believe that refiling that piece is necessary for investor protection, given that (i) the changes still would be subject to Rule 2210's principal review and approval requirements, and (ii) FINRA still would have the ability to review such templates through spot checks or targeted examinations, and to take action against members for

²¹ Rule 2210(d)(1)(F) states that “[c]ommunications may not predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast... .”

Marcia E. Asquith

July 2, 2015

Page 7

violations of FINRA rules.²² Furthermore, eliminating these filings will result in substantial cost savings for many firms.

C. Filing Requirements for Closed-End Funds

Finally, we would like to reiterate a comment made in our 2014 comment letter regarding closed-end funds' filing obligations.²³ FINRA currently requires its members to file all retail communications concerning closed-end funds.²⁴ By now, we expect that FINRA has gained considerable experience with closed-end fund marketing materials through its review process, and we believe that FINRA could codify a set of clear disclosure standards tailored to closed-end fund marketing materials²⁵ and eliminate 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 for these member firms.

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We appreciate how FINRA has conducted its retrospective rule review, and we are encouraged by its initial action items, including the Proposal. We stand ready to assist FINRA in any way that we can. If you have any questions, please contact me at (202) 218-3563 or Matthew Thornton at (202) 371-5406.

Sincerely,

/s/ Dorothy Donohue
Deputy General Counsel

²² Moreover, we understand that a common review technique for FINRA staff is to ensure consistency between a communication and a fund's prospectus. If a firm updates a template for the sole purpose of conforming its content to the fund prospectus, then the benefits to this aspect of review would be rather limited.

²³ See *supra*, note 6 and accompanying text.

²⁴ Rule 2210(c)(3)(A). 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. (Advertisements and sales literature concerning continuously offered (interval) closed-end funds were subject to ongoing filing requirements.)

²⁵ FINRA already takes a similar approach with respect to security futures (Rule 2215) and collateralized mortgage obligations (Rule 2216).

Attachment

Recommended Revisions to FINRA Rule 2210(c)(7)(B)

(B) Retail communications that are based on templates that were previously filed with the Department, the changes to which are limited to updates of:

- (i) more recent statistical or other non-narrative information;
- (ii) narrative information that describes market events and provides related commentary about those events or the investment, including factual changes in portfolio composition, during the period covered by the communication;
- (iii) narrative information that is based on the materials described in Rule 2210(c)(7)(F); or
- (iv) narrative factual information provided by any 'ranking entity,' as defined in Rule 2212(a).