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June 19, 2017

Jennifer Piorko Mitchell  
Office of the Corporate Secretary  
FINRA  
1735 K Street, NW  
Washington, DC 20006-1506

Re: FINRA Requests Comment on Potential  
Enhancements to Certain Engagement  
Programs—FINRA Special Notice, dated  
March 21, 2017

Dear Ms. Mitchell:

The Investment Company Institute<sup>1</sup> supports FINRA's initiative to engage with the regulated fund industry to identify ways to tailor and make more effective its regulatory programs.<sup>2</sup> It is important for self-regulatory organizations periodically to assess current operations and, as part of that process, to collect and factor in industry feedback in making any needed enhancements.

Because fund distributors are FINRA members, certain of FINRA's rules—such as advertising, desk commentary, and suitability—may impact funds and their relationship with their distributors.<sup>3</sup> It is from this perspective that we provide our comments. In summary, (i) we support FINRA conducting retrospective rule reviews and disseminating information to its members through FAQs and Regulatory Notices; and (ii) we recommend improving FINRA's rulemaking process by lengthening the comment

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<sup>1</sup> The Investment Company Institute (ICI) is the leading association representing regulated funds globally, 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 members manage total assets of US\$19.6 trillion in the United States, serving more than 95 million US shareholders, and US\$5.6 trillion in assets in other jurisdictions. ICI carries out its international work through ICI Global, with offices in London, Hong Kong, and Washington, DC.

<sup>2</sup> See *FINRA Requests Comments on Potential Enhancements to Certain Engagement Programs*, Special Notice (Mar. 21, 2017), available at [http://www.finra.org/sites/default/files/notice\\_doc\\_file\\_ref/Special-Notice-032117.pdf](http://www.finra.org/sites/default/files/notice_doc_file_ref/Special-Notice-032117.pdf) ("FINRA Special Notice").

<sup>3</sup> We refer to registered investment companies throughout this letter as "funds" and open-end registered investment companies as "mutual funds."

period and providing more meaningful responses to comments that identify concerns with FINRA proposals. We discuss each of these items in more detail below.

## **I. Engagement in Connection with FINRA Rulemaking**

### *A. FINRA's Retrospective Rule Reviews*

FINRA's Special Notice seeks comment on its engagement in retrospective rule reviews. We support FINRA's use of these reviews and encourage FINRA to continue conducting them. We have participated in both of the retrospective rule reviews FINRA has conducted to date—the public communications rules and the rules governing non-cash compensation arrangements.<sup>4</sup>

We have found both of these reviews to be very meaningful exercises, largely because of the breadth and thoroughness with which FINRA conducted the assessment portion of the review. FINRA's efforts included surveying its membership at large and holding in-person meetings with a variety of stakeholders. Far from being an empty regulatory exercise, the "action" phase of each review has resulted in meaningful progress, demonstrating that FINRA truly understood the concerns of interested persons. Since the commencement of the review of the public communications rules, for example, FINRA has: (i) amended the rules to reduce filing burdens, without sacrificing investor protections; (ii) issued helpful "Q&A" explanations on its website; (iii) proposed additional amendments to FINRA Rule 2210, which would permit member firms to provide their customers with investment planning illustrations; and (iv) issued a Regulatory Notice offering additional direction on social networking websites and business communications.

We applaud this holistic approach to examining rules, we appreciate FINRA's thoughtful and deliberate approach, and we support FINRA analyzing more of its rules in a similar manner.

### *B. FINRA's Publication of FAQs and Regulatory Notices*

FINRA's Special Notice seeks comment on FINRA's practice of publishing FAQs or Regulatory Notices to remind its members of their legal obligations. We generally support this practice as an effective means for FINRA to provide its members meaningful information and guidance regarding their regulatory responsibilities. We recommend, however, that FINRA consider expanding its use of this practice with respect to regulatory requirements beyond those in FINRA's rules or under the Securities Exchange Act of 1934. Indeed, FINRA members that distribute mutual fund shares or that act as recordkeepers for mutual funds may have regulatory responsibilities under the Investment Company Act of 1940.

Mutual fund distributors have an obligation under rule 12b-1(d) under the Investment Company Act, for example, to provide fund boards the information they request and need to determine

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<sup>4</sup> In August 2016, FINRA published for comment revisions to its rules governing non-cash compensation. ICI filed a comment letter supporting the FINRA proposal, and we urge FINRA to move forward with adopting its proposed revisions.

whether a rule 12b-1 plan should be implemented or continued.<sup>5</sup> If FINRA published a Regulatory Notice alerting its members to their obligations under rule 12b-1(d), we expect it would facilitate the ability of funds to obtain this information.

*C. FINRA's Rulemaking Process*

We recommend improving FINRA's rulemaking process in two respects.

First, we recommend that FINRA establish a standard 90-day comment period to provide meaningful feedback on FINRA proposals. FINRA typically provides a mere 45-day comment period, which is far too brief given the involved process necessary to provide thoughtful, considered industry feedback. As a trade association, we first circulate the relevant proposal to our members, arrange calls to discuss the proposal and any concerns our members may have, gather information from our members on the potential impact of the proposal, prepare a draft comment letter for our members to review, and then finalize the letter and submit it to FINRA. Undertaking this process within a 45-day timeframe presents a significant logistical challenge, particularly where the proposal addresses complex matters, and makes it difficult to provide thoughtful, considered feedback on FINRA proposals.

Second, we recommend that FINRA provide more meaningful responses to comments that raise concerns with its proposals. There are instances where we have submitted comments identifying concerns with FINRA proposals, and FINRA has not addressed those concerns in its response to comments. For example, FINRA undertook a substantial consolidation and rewrite of the supervisory rules of the NASD, NYSE, and FINRA a few years ago. During this rulemaking, we filed several letters with FINRA and the SEC. These letters expressed our concerns with FINRA taking a "one size fits all" approach to its rewrite, including imposing the same requirements on principal underwriters of mutual funds and full-service broker-dealers despite their many differences. Our comment letters explained the unique nature of mutual fund underwriters, and why it would be inappropriate to subject them to provisions designed to address concerns with full-service broker-dealers. FINRA's letter to the SEC discussing commenters' concerns failed to include any mention of this issue.<sup>6</sup>

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<sup>5</sup> See *Mutual Fund Distribution and Sub-Accounting Fees*, IM Guidance Update No. 2016-01, Office of Investment Management, SEC (Jan. 2016), available at <https://www.sec.gov/investment/im-guidance-2016-01.pdf> ("In this regard, the staff notes the requirements of rule 12b-1(d), which require a board to request, and parties to agreements related to a 12b-1 plan to furnish, any information reasonably necessary to make an informed determination of whether such plan should be implemented or continued. . . . In addition, the staff recommends that advisers and other relevant service providers provide boards with information sufficient for them to evaluate whether and to what extent sub-accounting payments may reduce or otherwise affect advisers' or their affiliates' revenue sharing obligations, or the level of fees paid under a rule 12b-1 plan.").

<sup>6</sup> See Letter from Tamara K. Salmon, Senior Associate Counsel, Investment Company Institute, to Elizabeth M. Murphy, Secretary, Securities Exchange Commission, dated Oct. 17, 2013, available at <https://www.sec.gov/comments/sr-finra-2013-025/finra2013025-21.pdf>, commenting on SEC Rel. No. 34-70612 (Oct. 4, 2013), available at <https://www.sec.gov/rules/sro/finra/2013/34-70612.pdf>.

We request that, in future rulemakings, FINRA publicly address in a meaningful way any significant concerns that commenters raise. A meaningful response would provide the industry with greater understanding of the basis for not following commenters' recommendations and would make the rulemaking process more transparent.

As a more general matter, FINRA's Special Notice correctly recognizes that FINRA "must understand what it regulates."<sup>7</sup> We agree that the more familiar FINRA is with our industry, the better equipped it will be able to tailor its rules appropriately. Toward that end, we encourage FINRA to deepen its knowledge of the role of principal underwriters play in the mutual fund industry. Principal underwriters of mutual funds have a very limited and unique business model, which does not lend itself to the regulatory requirements designed for full-service broker-dealers. We welcome the opportunity to assist FINRA in increasing its understanding of the business of mutual fund underwriters.

## **II. Engagement Through Member Relations, Education and Compliance Resources**

FINRA's Special Notice requests comment on the various ways in which FINRA engages with its members through member relations, education, and compliance resources, including FINRA conferences. Representatives of ICI and our members have attended a variety of FINRA's conferences, including the Annual Conference, the Senior Investor Protection Conference, and the Advertising Regulation Conference. We find these conferences incredibly informative and timely. The conferences also provide an excellent opportunity to learn about recent industry developments and to hear from and interact with FINRA's senior staff. We also appreciate that FINRA continues to expand the subject matter of its conferences to deliver timely and relevant content as the industry, the markets, and the regulatory environment continue to evolve.

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We appreciate FINRA's consideration of our comments. If you have any questions regarding our comments or would like additional information, please contact me at (202) 218-3563 or [ddonohue@ici.org](mailto:ddonohue@ici.org).

Sincerely,

/s/Dorothy M. Donohue

Dorothy M. Donohue  
Acting General Counsel

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<sup>7</sup> See FINRA Special Notice, at p. 2.