



July 9, 2018

Submitted electronically through <http://www.regulations.gov>

Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Covered Investment Fund Research Reports: File Number S7-11-18

Dear Mr. Fields,

Fidelity Investments (“Fidelity”)¹ appreciates the opportunity to provide comments to the Securities and Exchange Commission (“SEC” or “Commission”) on its proposed rule 139b under the Securities Act of 1933 (the “Securities Act”), which would provide a safe harbor for an unaffiliated broker-dealer’s publication or distribution of a covered investment fund research report from sections 2(a)(10) and 5(c) of the Securities Act.²

Fidelity supports the SEC’s proposed rule, as it will assist broker-dealers and fund distributors in making available informative research information on mutual funds and exchange traded funds (“ETFs”) to investors. Our comments are designed to help improve the proposed rule to ensure that retail and retirement investors who invest through mutual fund supermarket programs can benefit from mutual fund and ETF research when deciding how to invest their assets.

¹ Fidelity is one of the world’s largest providers of financial services, including investment management, retirement planning, portfolio guidance, brokerage, benefits outsourcing and many other financial products and services to more than 27 million individuals and institutions, as well as through 12,500 financial intermediary firms. Fidelity submits this letter on behalf of Fidelity Management & Research Company, the investment adviser to the Fidelity family of mutual funds; National Financial Services LLC (“NFS”), a Fidelity Investments company, a SEC registered broker-dealer clearing firm and FINRA member; and Fidelity Brokerage Services LLC (“FBS”), a SEC registered introducing retail broker-dealer, FINRA member, and affiliate of NFS.

² Covered Investment Fund Research Reports, Release Nos. 33-10498, 34-83307, IC-33106, 83 FR 26788 (June 8, 2018), at <https://www.gpo.gov/fdsys/pkg/FR-2018-06-08/pdf/2018-11497.pdf> (the “Proposing Release”).



I. EXECUTIVE SUMMARY

On May 23, 2018, the SEC proposed new rules, including Rule 139b, under the Securities Act of 1933 and the Investment Company Act of 1940, as required by the Fair Access to Investment Research Act (“FAIR Act”) enacted on October 6, 2017. The FAIR Act extends the SEC’s existing Rule 139 safe harbor for the publication or distribution of investment research concerning one or more issuers by a broker-dealer to include mutual funds, ETFs, registered closed-end funds and business development companies (“covered investment funds”). Proposed Rule 139b is intended to implement the requirements of the FAIR Act provided certain requirements are met.

Fidelity supports extending the existing Rule 139 safe harbor to covered investment funds, because we believe that providing broker-dealers with enhanced options for developing research on mutual funds and ETFs and easing the administrative burdens with existing research will result in investors having access to additional resources to help make informed, well-reasoned investment decisions. Our comments summarized below are designed to ensure that the proposed rule better meets the spirit of the FAIR Act and allows reasonable flexibility for broker-dealers who provide mutual fund and ETF investment choices to retail, retirement and institutional customers and clients.

Specifically, we recommend that the SEC:

- Ensure that the proposed rule’s “regular course of business” requirement will apply to broker-dealers who are currently distributing useful research information under different SEC rules to investors;
- Eliminate the performance reporting and public float requirements for funds that can be the subject of research reports under the proposed rule;
- Allow for affiliated funds and ETFs to be listed along with third-party funds and ETFs in industry research reports;
- Stay within the FAIR Act’s stated provisions and not require conflicts or revenue sharing disclosures in research reports; and
- Work with FINRA to harmonize its research rules with those of the SEC, with a particular focus on ensuring that FINRA’s regulations and interpretations provide appropriate relief from filing of research covered by the proposed rule.

II. BACKGROUND

Fidelity’s comments reflect the views of a diversified financial institution that offers proprietary and non-proprietary investment products and services to retail,

retirement and institutional customers, participants and clients. Investors who choose Fidelity have available to them a broad array of financial products and services to help them meet their goals, whether they are saving for retirement, college, health savings or other life events. We offer an extensive lineup of proprietary mutual funds and ETFs along with many other specialized products and services such as variable annuities, managed accounts and college saving plans. Investors also have the option of investing through Fidelity in third-party mutual funds and ETFs through our industry-leading FundsNetwork[®] program.

Launched in 1989, FundsNetwork provides access to third-party funds for our retail brokerage investors, investors using third-party banks, broker-dealers and investment advisers that custody at Fidelity, and investors saving for retirement through our workplace retirement business.³ FundsNetwork allows investors and their financial advisers to select from approximately 20,000 CUSIPS offered by more than 690 fund companies.

When investors come to Fidelity, they regularly ask for and seek information about the broad range of investment choices available to them. To assist our customers and clients with their investment journey and to help them meet their goals, Fidelity provides what we have called “Mutual Fund Research” through our public websites and for our retirement and advisor clients. This research takes the form of a mutual fund library, which contains all-in-one online webpages that provide detailed information and analysis about each fund available through our platform. Specifically, these pages contain comprehensive fund information (*i.e.*, performance returns, holdings, fees, expenses), descriptions (*i.e.*, objectives, strategies, risks), evaluations (*i.e.*, third-party ratings and rankings, risk categorizations), analytics and analyses (*i.e.*, comparison tables, hypothetical and interactive charts), and shareholder reports.⁴

With thousands of funds available through FundsNetwork, investors look to Fidelity for help in researching and evaluating investments. Investors who would like to compare fund options can use Fidelity’s *Mutual Fund Evaluator*, which provides the ability for investors to research and sort through thousands of funds in a web-based spreadsheet format containing various fund attributes and statistics. Fidelity also provides investors with *Fund Picks from Fidelity*[®], through which every quarter Fidelity screens all funds available from Fidelity and through FundsNetwork to provide investors

³ Collectively, as of 2018, investors hold approximately \$2.2 trillion in third-party fund assets through our FundsNetwork platform.

⁴ All of this information is found in Fidelity.com’s Mutual Fund Library, at <https://www.fidelity.com/learning-center/tools-demos/research-tools/researching-funds-mutual-fund-library>. Fidelity’s NetBenefits.com website also contains similar fund library research pages and fund evaluation tools for retirement plan participants for funds available through each retirement plan.

with a list of funds that meet fully disclosed screening criteria.⁵ Fidelity's Mutual Fund Research center on Fidelity.com and similar offerings through our retirement and institutional websites make it easier for our customers, clients and retirement plan participants to learn about, filter, sort and compare funds (thus, research), based upon many criteria such as ratings, fees and risks.

Fidelity provides similar research content regarding equity and fixed income securities for retail customers and, in these other contexts, those materials may fall under the rubric of existing Rule 139. We believe that the content regarding third-party funds and ETFs described above should obtain the same level of relief as content prepared about other securities.⁶

III. SAFE HARBOR REQUIREMENTS

The proposed rule largely mirrors existing SEC Rule 139 in requiring that broker-dealers that wish to take advantage of the safe harbor must meet certain requirements, depending on whether the research reports are issuer-specific or industry specific. The proposed requirements for issuer-specific research reports are: (1) the broker-dealer must publish or distribute research reports in the "regular course of its business," (2) covered investment funds must be subject to relevant reporting requirements under the Investment Company Act and/or Exchange Act for at least twelve calendar months and have filed in a timely fashion for the immediately preceding twelve months, and (3) the covered investment fund must satisfy a minimum public float requirement, which is currently \$75 million.

When the SEC developed the Rule 139 requirements, it was focused upon listed equity securities. There are significant differences between an equity security, with a limited distribution period, and a covered investment fund, which is continuously offered in the market. As discussed below, Fidelity believes that these differences warrant modification of the proposed rule's issuer-specific requirements.

A. "Regular Course of Business" Requirement

Under proposed Rule 139b, a broker-dealer could rely on the safe harbor for research reports only if it publishes or distributes research reports in the "regular course of its business." This condition is not included in the FAIR Act, nor is it defined in the proposed rule. On several occasions, the SEC's Proposing Release implies that the "regular course of business" requirement will include firms who have existing research

⁵ See *Fidelity Mutual Fund Evaluator*, at <https://www.fidelity.com/learning-center/investment-products/mutual-funds/mutual-fund-course/conducting-mutual-fund-research-evaluator-video>; *Fidelity Fund Picks*, at <https://www.fidelity.com/fund-screener/fund-picks.shtml>; and *ETF Investing Ideas and ETF/ETP Screener*, at <https://fidelity.com/etfs/overview>.

⁶ At present, this content is subject to SEC Rule 482. A Rule 482 communication is treated as a prospectus under section 10(b) of the Securities Act, and is subject to filing with FINRA.

departments and analysts.⁷ Alternatively, the SEC asks “should the proposed regular-course-of-business requirement be modified to address how broker-dealers who have not previously published or distributed research reports could satisfy this requirement?”⁸

If the SEC implements the “regular course of business” limitation to firms with established research departments, the result will likely be to limit the amount of fund research under the proposed rule that could potentially be available to investors in the marketplace. Firms currently without formal research departments could not begin covering funds, as they would not have already been in the business. A further consequence would be to freeze out new entrants from the research marketplace, which would provide a significant advantage to firms who were already publishing research about non-fund related securities. This result cuts against the FAIR Act’s inclusive approach in defining research broadly – even beyond the current definition in FINRA’s regulations.⁹

The SEC understands these limitations and acknowledges in its request for comment that “broker-dealers are generally not in the business of publishing and distributing what we consider issuer-specific research reports on registered investment companies or business development companies (although some broker-dealers have published and distributed communications styled as ‘research reports’ in compliance with rule 482, and some broker-dealers have published and distributed research reports on other issuers in reliance on the rule 139 safe harbor).”¹⁰ Indeed, Fidelity has published and distributed these types of communications for many years¹¹ and has maintained corresponding compliance policies and procedures, and such activity we believe meets the spirit of the SEC’s regular course of business requirement.

⁷ The SEC indicates in the Proposing Release that an existing research department and analysts are factors indicating if a firm is in the “regular course of business.” See Proposing Release, at 26797 (“[I]f a broker-dealer were to publish or distribute research reports in the regular course of its business, the broker-dealer may be more likely to have a research department with research analysts who regularly cover particular issuers or industries. This commitment in resources and infrastructure makes it more likely that the market recognizes the broker-dealer as a provider of research-related communications.”).

⁸ Proposing Release, at 26798. The Release also asks whether there would be challenges to broker-dealers who have not previously provided research if the rule proposal is not modified to address this issue.

⁹ The FAIR Act itself indicates a broader reading. The Act includes a definition of research that is broader than the definition found in FINRA’s rules. FINRA Rule 2241 defines a research report as “any written (including electronic) communication that includes an analysis of equity securities of individual companies or industries (other than an open-end registered investment company that is not listed or traded on an exchange) and *that provides information reasonably sufficient upon which to base an investment decision*” (emphasis added). Under proposed Rule 139b, a research report is defined as a “written communication, as defined in §230.405 that includes information, opinions, or recommendations with respect to securities of an issuer or an analysis of a security or an issuer, *whether or not it provides information reasonably sufficient upon which to base an investment decision*” (emphasis added).

¹⁰ Proposing Release, at 26797.

¹¹ See *supra* note 4 and related discussion.

Accordingly, Fidelity recommends that the Commission clarify that the proposed rule would apply to broker-dealers who have been regularly producing communications styled as “research reports” in compliance with rule 482. This approach would provide flexibility for firms with business models such as Fidelity’s – those firms who have been providing investors with useful and helpful research on funds and ETFs -- now to be covered under proposed Rule 139b.

B. Performance Reporting Conditions

Proposed Rule 139b would require that, before a broker-dealer produces a research report on a covered investment fund, the fund must have been subject to relevant requirements under the Investment Company Act and/or the Exchange Act, filed certain periodic reports for at least a twelve month period, and filed all reports in a timely fashion. Fidelity recommends either eliminating this requirement or revising it to allow firms to accept representations from unaffiliated fund families that they are in compliance.

As discussed above, Fidelity makes available for its retail and retirement customers research information on thousands of third-party funds. This publishing process is largely automated and updates are made on a regular basis. A requirement that a broker-dealer monitor funds to ensure both a twelve month reporting history and a timely reporting history creates operational hurdles that will likely result in less, rather than more resources for investors to access when making investment decision. If implemented as proposed, broker-dealers would be able to produce advertisements without any time limitation, however, they would be restricted from providing useful research materials to investors for twelve months; a result that does not appear to align with the intent of the FAIR Act.

The proposed rule should also recognize the differences in reporting obligations required of a covered investment fund compared to corporate issuers covered under existing Rule 139. Funds are required to file semi-annual reports, for example, as well as quarterly holdings reports. This reporting structure, unique for registered funds, mitigates concerns that there may not be sufficient publically available information regarding an issuer in the first year of its existence to help aid investors in making investment decisions and to understand the risks inherent in a potential investment.

In the event the Commission decides to retain this proposed requirement, we ask that firms producing research reports on covered investment funds be allowed to rely on a representation from the covered investment fund and not be required to confirm each fund’s compliance independently. Without such a representation, it would be difficult for a broker-dealer who maintains an industry research report (such as with our Mutual Fund Evaluator) to keep track of funds that do not meet the criteria at any point in time.

C. Minimum Public Float

The proposed rule conditions the availability of the safe harbor on the covered investment fund having a minimum of \$75 million in public market value or net asset value. This requirement is carried over from existing Rule 139 and is intended to protect investors by excluding research reports from issuers with a relatively small amount of total assets, and hence a limited market following.¹² While this threshold may be appropriate for issuers under that rule, it is not necessary for covered investment funds.

The Commission's rationale is that it has historically used "public float as an approximate measure of a security's market following, through which the market absorbs information that is reflected in the price of the security."¹³ This rationale, however, is inapplicable for covered investment funds that price and redeem their shares, or trade on the secondary market at or near, net asset value ("NAV"). This requirement also creates significant operational challenges for platforms that support investor access to thousands of third-party funds. Unlike issuers covered by Rule 139, the NAV for a mutual fund fluctuates on a daily basis and, for those funds close to the \$75 million dollar threshold, monitoring this would be a massive administrative burden.¹⁴

We believe that this requirement may limit the availability of additional information investors may use in researching viable investment options, as its application may unnecessarily discriminate against smaller covered investment funds. The SEC estimates that this threshold would remove approximately one-third of all covered investment funds from potential coverage. Nearly 41% of all ETFs and exchange traded products would be excluded.¹⁵ This potential result is concerning given the intent of the proposed rule is to "provide investors with greater access to research to aid them in making investment decisions."¹⁶ Fidelity believes that the more information available to inform and educate investors, the more likely it is that the public will make prudent and well-reasoned investment decisions.

IV. INDUSTRY RESEARCH REPORTS – COMPREHENSIVE LIST

Proposed Rule 139b conditions eligibility on the safe harbor for industry research reports on certain content requirements. Specifically, under the proposed rule, industry research reports must include either: (1) similar information about a substantial number

¹² Proposing Release, at 26796.

¹³ *Id.*

¹⁴ Using the Fidelity Fund Evaluator as an example of an industry research listing, it would be very difficult to monitor continuously the database of funds for those who fall below the \$75 million public market value threshold in order to keep the Evaluator up-to-date under the rule proposal.

¹⁵ Proposing Release, at 26819.

¹⁶ *Statement of SEC Chairman Clayton, Press Release, SEC Proposed FAIR Act Rules to Promote Research Reports on Investment Funds*, at <https://www.sec.gov/news/press-release/2018-92>.

of covered investment funds of the same type or investment focus; or (2) contain a comprehensive list of covered investment funds currently recommended by the broker-dealer. The proposed rule would restrict affiliated funds from being included in either a research report on a covered investment fund or in a comprehensive list of covered investment funds.

In some instances, a broker-dealer's affiliated fund may be as, or more, suitable than non-affiliated funds for a client's particular investment situation. Limiting the comprehensive list to non-affiliated funds may not serve investors' interests as this could lead them to consider only those funds included in research reports. Moreover, we question how "comprehensive" a list can be when an entire fund family is excluded based upon the affiliate exclusion.

To help mitigate any concerns regarding conflicts, Fidelity recommends that the final rule limit the type of information included in a list which includes affiliated funds to factual information or instructions on where to find additional research on a particular fund. This would provide investors with the ability to learn more about the affiliated fund if they so choose, but would not give the false impression that an affiliated fund is excluded from the list because it does not meet the investor's criteria. A general disclosure could be required that would indicate the affiliated funds included in a list and allow a firm to avail itself of the proposed rule's safe harbor for those non-affiliated funds under proposed rule 139b, and treat references to the affiliated funds as communications under Rule 482.

V. CONFLICTS OF INTEREST

Although the FAIR Act does not explicitly address conflicts of interest, the SEC requests comment on whether the existence of a revenue-sharing agreement should restrict a broker-dealer from publishing or distributing research reports and taking advantage of the safe harbor or, alternatively, that a broker-dealer should be required to disclose the terms behind the revenue sharing agreement.¹⁷

Given the extensive regulatory structures in place that govern communications subject to the proposed rule, we recommend that the SEC not adopt any specific requirements in this area. Research reports that are covered under FINRA Rule 2241 are subject to significant disclosure requirements and compliance procedures. Further, the anti-fraud provisions under FINRA Rule 2210 and the federal securities laws¹⁸ mitigate

¹⁷ See Proposing Release, at 26792.

¹⁸ FINRA 2210 requires among other things all member communications must be based on principles of fair dealing and good faith, must be fair and balanced, and must provide a sound basis for evaluating the facts in regard to any particular security or type of security, industry, or service. No member may omit any material fact or qualification if the omission, in light of the context of the material presented, would cause the communications to be misleading. Further, SEC Rule 156 under the Securities Act prohibits materially misleading material if they contain an untrue statement of a material fact; or omits to state a material fact necessary in order to make a statement made, in light of the circumstances of its use, not misleading.

any potential risk arising from potential conflicts of interest in research report communications. If the SEC strongly believes that such disclosures are necessary in this instance, Fidelity recommends that the SEC require general disclosures similar to what mutual funds currently include in their prospectus alerting clients to the potential of revenue sharing agreements.¹⁹

The SEC also addresses potential conflicts of interest when discussing the “affiliate exclusion,” noting its concerns for situations in which a firm *indirectly* publishes a research report that otherwise would be prohibited by the affiliate exclusion.²⁰ In discussing this possible scenario, the Proposing Release makes reference to the SEC’s “entanglement” and “adoption” theories as possible ways a firm could violate the affiliate exclusion.²¹

While we understand the possible concern under an entanglement theory where a firm is actively involved in the creation and review of the material, we do not believe the same concern exists under an adoption theory scenario. For example, under an “adoption theory” scenario, a fund would not be involved in the creation, review or approval of the research report, but instead would simply be distributing the research reports to its clients. Given the lack of control over the substance of the content and the absence of a conflict under an adoption theory scenario, we believe the SEC should revise the proposed rule to confirm that the prohibited scenario is limited to situations where the fund is “entangled” with the entity creating the research report.

VI. FINRA HARMONIZATION

We strongly urge the SEC to work with FINRA to harmonize FINRA’s rules explicitly with final Rule 139b. Currently, the definitions of “research report” under the proposed rule and FINRA Rule 2241 do not align with the FAIR Act’s definition. This may cause confusion and result in conflicting interpretive views on what communications may be deemed research for purposes of the safe harbor and filing exclusion. As an example, FINRA’s definition of research report under Rule 2241 excludes reports regarding mutual funds but includes reports regarding ETFs.

Fidelity also recommends that the SEC and FINRA work closely together to ensure that the FAIR Act’s filing exclusion is implemented appropriately. Congress recognized in the FAIR Act the ability for FINRA to require filing of communications with the public the purpose of which is not to provide research and *analysis*. Since the FAIR Act contains a broader definition of research report than the definition in FINRA’s regulations, we believe that FINRA should adhere to Congress’s wishes when making

¹⁹ See Item 8 Form N-1 A.

²⁰ See Proposing Release, at 26791-26792, note 39.

²¹ For additional details on the adoption and entanglement theory see SEC Release No. IC-28351 (Aug. 2008), at <https://www.sec.gov/rules/interp/2008/34-58288.pdf>.

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determinations for filing purposes. Research information, such as those materials described above, should be extended relief under the new rule and also be exempted from filing with FINRA under Section 24(b) of the Investment Company Act. While such materials may not always contain a specific call to action or recommendation, they contain important information that investors use for researching funds and ETFs and that squarely meets the definition of research under both the FAIR Act and SEC's definitions.

* * *

Fidelity would be pleased to provide further information, participate in any direct outreach efforts the Commission undertakes, or respond to questions the Commission may have about our comments.

Sincerely,



cc: The Honorable Jay Clayton, Chair
The Honorable Robert J. Jackson Jr., Commissioner
The Honorable Hester M. Peirce, Commissioner
The Honorable Kara M. Stein, Commissioner

Ms. Dalia Blass, Director, Division of Investment Management
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