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July 20, 2011

Elizabeth M. Murphy, Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: FINRA Rule 3110, Supervision;
File No. SR-2011-028

Dear Ms. Murphy:

The Investment Company Institute¹ appreciates the opportunity to comment on FINRA's proposed consolidated rule, FINRA Rule 3110, relating to supervision.² Due to the very short comment period, our comments focus on proposed Rule 3110(b)(4) governing the review of correspondence and internal communications. Given more time, we may have additional comments on other aspects of the proposal. Like the two commenters on the proposal to date,³ we recommend that the Commission provide at least an additional two-week extension of the comment period to permit a more in-depth analysis of this important proposal.

Proposed FINRA Rule 3110(b)(4), Review of Correspondence and Internal Communications

As proposed, new FINRA Rule 3110(b) would require every FINRA member to establish, maintain, and enforce written procedures to supervise the types of business in which it engages and the activities of its associated persons. Such procedures must be reasonably designed to achieve compliance with applicable securities laws and regulations, including the rules of FINRA and the Municipal Securities Rulemaking Board. Subdivision (b)(4) of this new rule addresses the review of

¹ 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 \$13.3 trillion and serve over 90 million shareholders.

² See *Notice of Filing of Proposed Rule Change to Adopt Rules Relating to Supervision in the Consolidated FINRA Rulebook*, SEC Release 34-64736, File No. SR-FINRA-2011-028 (June 23, 2011) (the "Release").

³ See comments submitted by the Financial Services Institute by letter dated July 14, 2011 and on behalf of the Committee of Annuity Insurances, dated July 12, 2011, which are posted on the Commission's website.

correspondence and internal communications. In particular, it requires the member's policies and procedures to "include procedures for the review of incoming and outgoing written (including electronic) correspondence with the public *and internal communications relating to the member's investment banking or securities business.*" [Emphasis added.] Such review "must be conducted by a registered principal and must be evidenced in writing, either electronically or on paper."

The proposed rule differs significantly from FINRA's current rule, NASD Rule 3010(d)(2) relating to a member's review of correspondence. In particular, the current rule requires a member to review its "incoming and outgoing written (i.e., non-electronic) and electronic *correspondence* with the public relating to its investment banking or securities business, including procedures to review incoming, *written correspondence* directed to registered representatives *and* related to the member's banking or securities business . . ." [Emphasis added.] In other words, members are currently only required to review "incoming and outgoing correspondence." The new rule broadens this to include *all internal communications.*

Proposed Rule 3110 does not define the term "communication." As such, the above provision appears to require members to supervise *all* internal communications – regardless of their nature, content, formality, or the medium by which they are sent – so long as they relate to the member's investment banking or securities business. This seems to be an unduly broad category of communications to review and one that would significantly expand members' current review obligations.⁴

The Release acknowledges that commenters raised this concern, but states that it "appears to be a misreading of the proposed rule change."⁵ We disagree. FINRA suggests that "although there are certain communications that members must review, members may use risk-based review principles to determine the extent to which additional communications should be reviewed."⁶ However, Proposed Supplementary Material .08 states merely that "[b]y employing risk-based principles, a member may decide the extent to which *additional* policies and procedures for the review of incoming and outgoing written (including electronic) correspondence with the public and internal communications *that fall outside of the subject matters listed in Rule 3110(b)(4)* are appropriate for its business and structure."

⁴ In addition, this broad reading does not appear consistent with the guidance provided in FINRA Regulatory Notice 07-59, which relates to the supervision of electronic communications.⁴ Attachment A to FINRA Regulatory Notice 07-59 states, in relevant part, "members must have policies and procedures for the review by a supervisor of employees' incoming, outgoing, and internal electronic communications *that are of a subject matter that require review under FINRA rules and federal securities laws.*" [Emphasis added.] By contrast, the current proposal appears to require a principal to review communications beyond those that are of a subject matter that requires review under FINRA or SEC rules.

⁵ Release at p. 41 and fn. 55 stating that Charles Schwab & Co. raised this same concern in their comments on FINRA's Regulatory Notice 08-24 (May 2008).

⁶ Release at pp. 41-42.

