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July 6, 2016

Mr. Robert W. Errett  
Deputy Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, D.C. 20549

Re: File Number SR-FINRA-2016-018

Dear Mr. Errett:

The Investment Company Institute<sup>1</sup> appreciates the opportunity to comment on the Securities and Exchange Commission (“SEC”) notice seeking comment on FINRA’s proposed amendments to certain of its rules governing communications with the public.<sup>2</sup> FINRA’s Proposal derives from its 2014 review of these and other communications with the public rules, which was intended to assess their effectiveness and efficiency.<sup>3</sup>

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<sup>1</sup> 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 \$17.9 trillion and serve more than 90 million U.S. shareholders.

<sup>2</sup> *Notice of Filing of a Proposed Rule Change to Amend FINRA Rules 2210 (Communications with the Public), 2213 (Requirements for the Use of Bond Mutual Fund Volatility Ratings), and 2214 (Requirements for the Use of Investment Analysis Tools)*, SEC Release No. 34-78026, 81 Fed. Reg. 39081 (June 15, 2016)(the “Proposal”), available at [www.gpo.gov/fdsys/pkg/FR-2016-06-15/pdf/2016-14084.pdf](http://www.gpo.gov/fdsys/pkg/FR-2016-06-15/pdf/2016-14084.pdf).

<sup>3</sup> 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](http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p479810.pdf). FINRA then requested comment on specific amendments to FINRA Rules 2210, 2213, and 2214 in 2015. FINRA Regulatory Notice 15-16, *FINRA Requests Comment on Proposed Amendments to Rules Governing Communications With the Public* (May 2015)(“2015 Notice”), available at [www.finra.org/sites/default/files/notice\\_doc\\_file\\_ref/Regulatory\\_Notice\\_15-16.pdf](http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory_Notice_15-16.pdf).

We strongly support FINRA's Proposal. If adopted, it should reduce burdens on FINRA member firms related to the filing of registered investment company advertisements and sales literature, without diminishing investor protection. In addition, we encourage FINRA to take further action to reduce burdens on member firms consistent with investor protection, as discussed in our comment letter on the 2015 Notice.<sup>4</sup>

## **I. Description of the Proposal**

FINRA's Proposal closely tracks the 2015 Notice, with a few notable changes. Among other things, the Proposal would:

- Eliminate firms' obligation to file shareholder reports with FINRA (provided they are filed with the SEC).
- Permit firms to update (without refiling) their templates' non-predictive narrative information that describes market events or factual changes in portfolio composition, or is sourced from a registered investment company's regulatory documents filed with the SEC.
- Require newly registered FINRA member firms to file retail communications within 10 - business days of first use. -
- Replace the current obligation to file backup ranking or comparison information with an internal recordkeeping requirement.
- Narrow the general filing requirement for registered investment companies' retail communications to those that promote a specific registered investment company or family of registered investment companies.
- Eliminate the filing requirement for investment analysis tool templates and related retail communications (FINRA staff would have access to the tool upon request).

## **II. ICI Comments on the Proposal**

We strongly support FINRA's Proposal. We have long favored aligning FINRA filing requirements with the potential investor protection risks they pose. For instance, we have advocated

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<sup>4</sup> See Letter from Dorothy Donohue, Deputy General Counsel, Investment Company Institute, to Marcia E. Asquith, Office of the Corporate Secretary, FINRA, dated July 2, 2015 ("ICI Comment Letter"), available at [www.finra.org/sites/default/files/notice\\_comment\\_file\\_ref/ICI-comment-letter-15-16.pdf](http://www.finra.org/sites/default/files/notice_comment_file_ref/ICI-comment-letter-15-16.pdf).

excluding shareholder reports from FINRA filing requirements.<sup>5</sup> Therefore, we were very pleased to see this item's inclusion in both the 2015 Notice and the Proposal, along with our recommended technical change to the 2015 Notice.<sup>6</sup> We also have supported a templates filing exclusion that recognizes the limited investor protection risks that updates to those templates pose.<sup>7</sup> Likewise, we were very pleased to see proposed expansion of this exclusion in the 2015 Notice, along with further expansion in the Proposal, so that changes to templates "sourced from a registered investment company's regulatory documents filed with the SEC" would not trigger a new FINRA filing.

Our strong support for the Proposal notwithstanding, we urge FINRA to make three additional changes—two related to the templates filing exclusion and one related to closed-end funds—that similarly would relieve burdens on FINRA members without reducing investor protections, as described below.

#### **A. Filing Exclusion for Templates**

We recommend two additional changes to the templates filing exclusion. First, FINRA should exclude from filing those templates with modifications limited to narrative factual changes provided by any "ranking entity."<sup>8</sup> The Proposal states, "FINRA declines to expand this filing exclusion also to cover [in addition to information sourced from SEC filings] any information that comes from an independent data provider regardless of its source, as that information is not subject to the same level of regulatory scrutiny as information in documents required by SEC rules."<sup>9</sup> While we recognize the distinction, as a practical matter these types of changes—whether sourced by the firm from an SEC filing or provided by an independent data provider—are similarly frequent, mechanistic, and low-risk in nature, and therefore are deserving of similar regulatory treatment.

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<sup>5</sup> See, e.g., Letter from Dorothy M. Donohue, Senior Associate Counsel, Investment Company Institute, to Elizabeth M. Murphy, Secretary, SEC, dated December 7, 2011, available at [www.ici.org/pdf/25696.pdf](http://www.ici.org/pdf/25696.pdf).

<sup>6</sup> This technical modification clarifies that firms may rely on this exclusion if they are complying with applicable SEC filing requirements. Under Rule 30b2-1(a) under the Investment Company Act of 1940, funds must file their shareholder reports with the SEC "not later than 10 days *after* the transmission to stockholders..." (emphasis added)

<sup>7</sup> See, e.g., Letter from Dorothy Donohue, Senior Associate Counsel, Investment Company Institute, to Marcia E. Asquith, Office of the Corporate Secretary, FINRA, dated November 19, 2009, available at [www.ici.org/pdf/23964.pdf](http://www.ici.org/pdf/23964.pdf).

<sup>8</sup> 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." Ranking entities are independent, recognizable entities that provide periodically updated information for inclusion in some funds' templates.

<sup>9</sup> Proposal at 39088.

Second, we recommend that FINRA broaden the reference to “non-predictive narrative information that describes market events” in the Proposal to expressly permit commentary. Otherwise, depending on how it is construed, the proposed exclusion could be unduly narrow and difficult for member firms to apply.<sup>10</sup> As with the manager’s discussion of fund performance (“MDFP”) included in shareholder reports that firms would no longer file under the Proposal, we see little investor risk in permitting these types of template updates without requiring a new FINRA filing.

We believe that these additional changes would be consistent with the tenor of this exclusion, particularly under the Proposal, and would further advance FINRA staff’s objective of better aligning filing requirements and the review process with the relative risk of the communications. And, of course, these types of template changes still would be subject to (i) Rule 2210’s content standards; (ii) a high degree of member scrutiny through principal review and approval requirements; and (iii) FINRA’s regulatory oversight, through spot checks, targeted examinations, and enforcement actions.

#### **B. Filing Requirements for Closed-End Funds**

ICI appreciates FINRA’s general willingness to consider additional rule changes suggested by commenters.<sup>11</sup> ICI previously recommended that FINRA codify a set of clear disclosure standards tailored to closed-end fund marketing materials and eliminate the Rule 2210 filing requirement for these communications, based on FINRA’s experience with closed-end fund marketing materials.<sup>12</sup> 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. We would be pleased to assist FINRA with this future rulemaking.

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<sup>10</sup> As noted in the ICI Comment Letter, 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). Disentangling descriptions of market events from this type of commentary can be quite challenging, and requiring firms to do so offers little in the way of investor protection.

<sup>11</sup> The Proposal states, “FINRA continues to consider additional rule changes related to the areas raised by commenters and will address those topics as part of its future proposed rule changes, as appropriate.” Proposal at 39086.

<sup>12</sup> See, e.g., the ICI Comment Letter.

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We appreciate how FINRA has conducted the retrospective rule review, and the opportunity to comment on the Proposal. We stand ready to assist FINRA in any way that we can. If you have any questions, please contact me at [REDACTED] or Matthew Thornton at [REDACTED].

Sincerely,

/s/ Dorothy Donohue  
Deputy General Counsel

cc: - Thomas Selman, Executive Vice President, FINRA  
Thomas Pappas, Vice President and Director of Advertising Regulation, FINRA  
Joseph Savage, Vice President and Counsel—Regulatory Policy, FINRA  
Amy Sochard, Senior Director, Advertising Regulation, FINRA