



P.O. Box 2600
Valley Forge, PA 19482-2600

(610) 669-1000
www.vanguard.com

May 23, 2014

VIA EMAIL TO PUBCOM@FINRA.ORG

Marcia E. Asquith
Senior Vice President and Corporate Secretary
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1500

Re: Request for Comment on the Effectiveness and Efficiency of FINRA's
Communications with the Public Rules; Regulatory Notice 14-14

Dear Ms. Asquith:

Vanguard¹ appreciates the opportunity to comment on the effectiveness and efficiency of FINRA's communications with the public rules.² We appreciate FINRA's efforts, through this request for comment, as well as through the rule consolidation process and ongoing collaboration with member firms, to seek improvements to the advertising standards. In particular, FINRA is appropriately focused on ensuring that these standards remain viable in a world of ever-evolving technology and methods of communicating.

FINRA poses important questions in Notice 14-14 to further the key policy underlying FINRA's rules – the promotion of investor protection. Vanguard has long been an advocate for clear and balanced communications with investors to help them better understand the potential risks and rewards of investing. And, like many member firms, Vanguard expends a tremendous amount of resources to ensure that its communications with the public are created in accordance with FINRA's rules. We believe that our recommendations support FINRA's and the industry's interest in improving advertising regulation and advancing the important policy goals of investor education and protection.

¹ Offering more than 160 U.S. registered mutual funds and headquartered in Valley Forge, Pennsylvania, The Vanguard Group, Inc. manages nearly \$3 trillion in U.S. mutual fund assets on behalf of fund investors. Vanguard Marketing Corporation, a Vanguard subsidiary, is an SEC registered broker-dealer and member of FINRA. Vanguard Marketing Corporation offers brokerage services through its Vanguard Brokerage Services operating division, and provides marketing and distribution services for the Vanguard funds and certain 529 plans and annuity programs.

² See FINRA Rules 2210-2216 (Feb. 4, 2013).

1. Advancing investor protection by focusing the advertising review process

FINRA's mandate to review registered investment company ("RIC") advertising stems from Section 24(b) of the Investment Company Act of 1940.³ That provision broadly requires the filing of *any* RIC advertisement, pamphlet, circular, form letter or other sales literature. At the inception of the Act, however, the contemporaneous understanding of the filing requirement was that communications with the public that merely mention RICs and lack promotional intent were not required to be filed.⁴ FINRA's Communications with the Public rule⁵ incorporates the concept that only promotional materials are required to be reviewed. Retail communications that do "not make any financial or investment recommendation or otherwise promote a product or service of the member" are not subject to pre-approval by a licensed principal.⁶ Additionally, such communications are not required to be filed with FINRA.⁷

Despite the fact that FINRA's advertising standards are consistent with the promotional intent concept underlying Section 24(b), we believe that the industry has strayed from this common sense application of the law by unnecessarily filing with FINRA materials containing only incidental references to RICs. The volume of RIC advertising materials that is currently filed with FINRA has some unintended effects on the goal of investor protection that could be alleviated.

A. Over-filing strains FINRA's resources

FINRA is required to commit a substantial amount of resources to accomplish its review of the RIC communications submitted by member firms. While RIC communications are heavily regulated, communications relating to competitive products and services offered by member firms are not subject to FINRA's review. Despite the fact that non-promotional communications are not required to be filed with FINRA, RIC sponsors routinely do so, adding to filing costs and placing a strain on FINRA's ability to complete timely reviews. The current situation should cause the industry to question whether the deployment of FINRA's resources is optimally aligned to serve the interests of investor protection.

FINRA's timeframe for reviewing and responding to member firms is increasing. In some instances, firms are not receiving FINRA's input on filed pieces until the communication has been retired or changed by the member firm. Other times, firms have utilized previously-filed communications across a variety of advertising media that ultimately must be changed if FINRA issues a noncompliant review on the original piece. If the flow of RIC advertising is reduced, FINRA can redeploy its resources with the goal of shortening review turnaround times.

³ 15 U.S.C.S 80a-24(1996).

⁴ In discussing the filing requirement under the recently promulgated Act, the General Counsel of the SEC at the time, Chester T. Lane, observed that the types of documents required to be filed all represent forms of sales literature, which must necessarily be construed in accordance with the term "sale" as set forth in the definition section of the Act. *See* Letter of General Counsel relating to section 24(b), Investment Company Act Release No. 150, 1941 SEC LEXIS 1833, 11 FR 10992 (June 20, 1941). According to Mr. Lane, "every written communication used by the issuer or an underwriter with the intention of inducing or procuring, or of facilitating the inducement or procurement, of any sale of the [RIC] is within the purview of that Section." *Id.*

⁵ FINRA Rule 2210 (2011).

⁶ *See* FINRA Rule 2210 (b)(1)(D).

⁷ *See* FINRA Rule 2210 (c)(7)(C).

Shortening the turnaround time for reviews would advance investor protection as non-compliant materials would be removed from circulation more quickly.

B. Refocusing advertising review upon promotional materials

FINRA can help guide the focus back to the intended purpose of the Act – the review of promotional RIC advertising materials – by issuing guidance specifying its expectations on the types of materials that require advertising review. For example, web and mobile sites that have been created using responsive design are identical in content, but the rescaling of the pages that occurs through the responsive design process causes slight alterations in the appearance of the same page when it is presented on different devices. Currently, some firms are treating these pages as materially different and are, therefore, making multiple filings with FINRA to ensure that each minor revision of each site is reviewed. FINRA could provide guidance that only a single version of substantially identical communications must be filed for review. The issue of responsive design is but a single example of guidance that FINRA could issue with the goal of enhancing the advertising review process.

C. Ongoing collaboration between FINRA and the industry on emerging issues

FINRA's Advertising Regulation Department has a good record of collaborating with the industry to advance the advertising review regime. One of the best examples of this partnership was the Social Media Task Force, which contained membership from FINRA and the industry and led to the issuance of guidance to member firms regarding the usage of social media. FINRA should continue its collaboration with the industry through the formation of a task force to study and make recommendations on the proliferation of new technologies available to the public through the web, social media, mobile technologies and other electronic communications. This task force could assist FINRA in the publication of guidance intended to tailor the advertising review process to the challenges and opportunities presented by these new technologies, with the ultimate goal of enhancing investor protection.

The investing public is increasingly looking to the web, social media and mobile technologies as a source of information, and as a forum for conducting business. Particular conventions have been developed across these electronic media for the display of information to consumers such as mouse-overs, links, expanding pages and layered disclosure. Investors have become accustomed to these common conventions for the display of information through their interactions with non-financial sites. Vanguard believes that the presentation of disclosures on financial or investment-related sites should be modernized to take full advantage of these interactive methods, which are capable of providing required disclosures in a far more effective manner than what is currently achieved under the existing advertising review regime. Accordingly, FINRA should convene a Technology Task Force with membership from the industry and FINRA to pioneer new ways of effectively deploying these and other interactive methods for the delivery of required disclosures.

2. Enhancing the advertising review process

FINRA can also enhance the efficiency of the advertising review process by making adjustments to the actual processes used to submit materials to FINRA for review, as well as the processes and systems used by FINRA to accomplish its reviews. The process for submitting materials to FINRA is structured primarily for the review of print-based advertising, despite the

fact that member firms are filing an ever-expanding volume of electronic materials. All materials must be submitted to FINRA in .PDF format. Requiring all materials to be submitted as .PDFs is cumbersome and costly for member firms, requiring the conversion of advertising from its native format solely for filing with FINRA. Such a review process hinders FINRA's ability to conduct contextual reviews of certain advertising pieces, particularly where the source material is an interactive web design. FINRA should explore permitting firms the flexibility of filing their communications with the public in other file formats. In order to support this change, FINRA should also investigate deploying technology solutions that will permit it to accept, review and retain these other formats in a manner compliant with SEC's recordkeeping requirements. The Technology Task Force could also investigate new solutions for the filing, review and recordkeeping of advertising materials.

* * * * *

Vanguard commends FINRA for providing the industry an opportunity to comment upon the effectiveness and efficiency of FINRA's communications with the public rules. If you would like to discuss these comments further, please do not hesitate to contact James Creel at (610) 669-1219.

Very truly yours,

/s/ Heidi Stam

Heidi Stam
Managing Director and General Counsel

cc: Norm Champ, Director, Investment Management
U.S. Securities and Exchange Commission