CENTER FOR CAPITAL MARKETS
COMPETITIVENESS

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Ms. Jennifer Piorko Mitchell
Office of the Corporate Secretary
Financial Industry Regulatory Authority
1735 K Street NW
Washington, DC 20006

Re: FINRA Special Notice–Engagement Initiative

Dear Ms. Mitchell:

The U.S. Chamber of Commerce ("Chamber") created the Center for Capital Markets Competitiveness ("CCMC") to promote a modern and effective regulatory structure for capital markets to fully function in a 21st century global economy.[1] The Chamber appreciates this opportunity to comment on the Financial Industry Regulatory Authority's (FINRA) notice regarding potential enhancements to certain engagement programs ("Engagement Notice"). CCMC has long advocated for a comprehensive review of our nation's financial regulatory structure, and we believe the Engagement Notice–as well as the overall FINRA360 review of FINRA's policies and procedures–is a positive step in the right direction.

Self-regulatory organizations (SROs) such as FINRA have historically had an important responsibility within our financial regulatory system. When operated effectively, SROs can be an efficient and even taxpayer-friendly mechanism for regulation of particular aspects of the financial industry. Given that FINRA's responsibilities have expanded significantly over the years, it is critical that FINRA seek to engage the public regarding its operations in order for it to be an effective SRO for the 21st century. As such, we look forward to working with FINRA on its FINRA360 initiative and offer below a few recommendations regarding some of the issues raised in the Engagement Notice.

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[1] The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region.

FINRA Rulemaking Process and Retrospective Review of Existing Rules

CCMC has long advocated for regulatory bodies to operate with open and transparent rulemaking processes that ensure the views of a wide variety of stakeholders are considered. Regrettably, over the last decade we have seen financial regulators rush through a number of post-crisis rules without gathering adequate public input, and as a result many rules have had detrimental impacts upon capital formation, the markets, as well as the broader economy.

In particular, we have advocated the regulators should only adopt new rules if they are able to demonstrate–by way of a rigorous economic analysis – that the benefits of such a rule outweigh its costs. While FINRA–like the Securities and Exchange Commission (SEC)–is not technically subject to the economic analysis requirements of Executive Orders 12866 and 13563, we believe that conducting a cost-benefit analysis is a basic principle of good governance. To that end, the creation of FINRA's Office of the Chief Economist in 2013 was a welcome development, and we encourage FINRA to continue to incorporate economic analysis into its rulemaking agenda.

We are also very encouraged by the recent focus of FINRA on retrospective reviews of its existing rule book. It is important to consider that although a regulator may conduct an economic analysis prior to promulgating a rule, the models used in that analysis could ultimately be shown to have been flawed, or there may have been extenuating factors not considered before the rule was adopted. By "looking back" to examine how a rule is working in practice, whether it is meeting its intended objective, and whether it is imposing more costs than benefits upon the economy, regulators can help ensure their rules remain relevant and necessary.

We would suggest that FINRA first conduct an updated economic analysis of rules two years after they are adopted, then regularly review rules based upon a schedule that could be modeled after the Economic Growth and Regulatory Paperwork Reduction Act ("EGRPRA") which applies to the federal financial regulators. EGRPRA requires that rules be reviewed by agencies at least once every ten years, although FINRA may consider a shorter cycle for its review schedule.

FINRA also typically provides a 45-day comment period with its regulatory notices. While this time frame may be sufficient for a host of rules that FINRA proposes, we would encourage that FINRA consider the complexities and costs of each individual rule when determining the length of comment periods, and to provide for a longer comment period if it is warranted. Additionally, while guidance and FAQs issued by FINRA can be helpful in assisting broker-dealers with compliance, such guidance or interpretations must be carefully vetted so that they do not inadvertently become de facto rules that have not gone through a normal notice and comment period.

Regulation by Enforcement

CCMC has long concerned about the phenomenon of "regulation by enforcement," whereby regulators use their enforcement powers to engage in what ultimately amounts to rulemaking. This issue occurs when regulators extract undertakings from a respondent in an enforcement proceedings, then pressure other industry participates to adopt those same undertakings or risk penalty. We believe this problem has become particularly exacerbated in the wake of the Dodd-Frank Wall Street Reform and Consumer Protection Act, as agencies have looked at other ways of adopting rules when they are unable or unwilling to through normal procedures.

In order to provide certainty to market participants, we believe that FINRA should avoid such harmful practices, and should publicly disclose on an annual basis a description of any emerging trends that it has focused on as part of its enforcement program over the preceding year. It should also disclose whether it has employed any novel legal theories or standards in its enforcement program, as well as a brief description of such standards. We believe this will provide the public with more transparency and certainty over FINRA's enforcement efforts while not sacrificing its ability to protect against wrongdoing.

Conclusion

We appreciate FINRA's willingness to engage the public on these important matters and look forward to working with FINRA to help make it a more effective and transparent regulator. We will provide additional comment as necessary, and stand ready to assist in any way that we can.

Sincerely,

Tom Quaadman