



June 3, 2022

Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: FINRA Regulatory Notice 22-08 on Complex Products and Options

Dear Ms. Mitchell:

The U.S. Chamber of Commerce’s Center for Capital Markets Competitiveness (“CCMC”) appreciates the opportunity to share our views on the Financial Industry Regulatory Authority, Inc.’s (“FINRA”) regulatory notice on complex products and options (the “Notice”). The purpose of Notice 22-08 is to remind financial professionals of their regulatory obligations regarding complex products and options and to solicit comment on effective practices and rule enhancements.

As the Notice explains, FINRA has “taken steps to address complex products and options over the years,” among which include:

- a process with which members must comply when opening a customer’s brokerage account for options, including ongoing supervisory reviews of those accounts;
- a comprehensive framework of rules to address specific products, including options, security features, direct participation programs, deferred variable annuities, index, currency index, and currency warrants;
- comprehensive risk-based examinations; and
- an enforcement process through which FINRA is able to sanction any professionals for violations of its rules.

Such guidance, rules, examinations, and enforcement help FINRA to meet its mission of protecting investors and safeguarding market integrity in a manner that facilitates vibrant capital markets.¹

In addition to reminding financial professionals about their regulatory obligations regarding complex products and options, the Notice solicits comments on practices members have developed for complex products and options. It also inquires whether the current regulatory framework is sufficient to address the current landscape regarding

¹ FINRA Mission Statement <https://www.finra.org/about>.

these products. While it is in FINRA's purview to review existing rules and guidance, CCMC is concerned with several areas of its initiative to solicit information.

We believe that FINRA has not adequately identified a particular problem regarding complex products and options that requires a solution. The Notice describes an increase in complex investment products available to retail investors and an increase in trading volume attributable to options products as reasons why FINRA is reminding member firms of their regulatory obligations. However, CCMC believes these are positive developments for both investors and U.S. capital markets. Additional investment options, when properly understood, can help investors diversify their portfolios and address their specific financial objectives. An increase in trading volume generally reflects a strong market and promotes enhanced liquidity and price discovery.

Separate from the request for information made in the Notice, we learn from the Notice that FINRA is also currently conducting examinations to review member practices specifically regarding the opening of options accounts and related areas. The Notice explains that FINRA has detected some variance in member practices regarding the opening of options accounts, disclosure practices, and cut-off times for options exercise instructions. However, the Notice does not associate any such variance with specific and recurring problems investors may have experienced when investing in options and complex products. If there are variances in member practices but no severe challenges have arisen for investors, FINRA should allow member firms to maintain their preferred practices when educating and disclosing relevant information to investors.

Negative consequences for U.S. capital markets and investors

CCMC is also concerned that regulatory over-reaction to the existing rules and guidelines for complex products and options could result in negative consequences for U.S. capital markets and harm the very investors that FINRA seeks to protect. The U.S. capital markets are among the most fair, transparent, efficient, and innovative in the world. It is a positive development that through firms' innovations they are able to offer investors a wide range of investment options, and thus enable investors to take charge of their financial future.

The various questions included in the Notice give rise to legitimate concern that FINRA is considering the following actions: establishing an overly broad definition for complex products; requiring firms to adopt expanded new disclosures; mandating unworkable investor testing processes; and restricting investor choice regarding complex products and options. We have serious concerns that such considerations will hamper innovation, raise the cost of investing, and needlessly restrict investor access to certain financial products and important risk management tools. Additionally, the Notice does not adequately recognize that certain investment strategies – particularly options strategies – can have the overall effect of *reducing* risk in an investment portfolio.

Challenge in defining “complex products”

The Notice describes “a complex product as a product with features that may make it difficult for a retail investor to understand the essential characteristics of the product and its risks.” Despite the further recognition in the Notice that there is “currently no standard definition of a ‘complex product,’” we are concerned that FINRA could nonetheless apply a broad definition and inadvertently capture unintended products (e.g., target-date funds), imposing additional disclosure requirements for account approvals and training, among others. It would be an impossible task to try to define “complex products” and such definition would eventually be made obsolete by future innovation. Moreover, arbitrary regulatory lines that require immaterial or unnecessary new disclosures would have unintended consequences for future financial innovation.

Importance of allowing investors choice

Further, complex products and options provide investors with additional choices from which to effectively manage their investment accounts and meet their financial goals. For example, options are legitimate risk management tools that can help investors protect their financial interests. Since many investors obtain important utility from such products, such choice should not be restricted through arbitrary definitions and investor testing programs.

Additionally, technological developments in trading allow a self-directed investor to actively trade in options online without continually needing the approval of a broker-dealer or adviser. Those individuals who choose to invest via self-directed accounts should not find themselves with limited investment options or heightened standards just because they do not work with a financial professional. Many investors who opt for self-directed accounts prefer that the management and choices made for the account are fully at their own discretion and control.

New disclosures and supervisory obligations for self-directed accounts are inappropriate

Requiring new and expansive disclosures and supervisory obligations for self-directed accounts are equally concerning. The requirements of Regulation Best Interest, and the attendant liability, do not extend to self-directed accounts. Yet, both broker-dealers and exchanges have been providing increasingly informative educational content and risk disclosures to investors with self-directed accounts to empower them to make informed investment decisions regarding complex products and options.

New obligations for investors are unnecessary and are at odds with a disclosure-based system

We are further concerned by the consideration in the Notice given to gating criteria that would seek to certify investors through highly subjective criteria, such as the number of years of investing experience or to test investor knowledge. Not only are such measures

inappropriate, but they would be arbitrary and exclusionary.² Requiring such processes would make it clear that U.S. regulatory entities believe U.S. investors are unsophisticated and cannot be trusted to make decisions in line with their own specific investment and risk preferences.

Furthermore, such ideas surrounding new obligations for investors seem to question the validity of the existing disclosure-based system in which financial professionals “disclose significant financial and other information so investors have the timely, accurate, and complete information they need to make confident and informed decisions about when or where to invest.”³ This guidepost protects investors of all types, including those who choose to invest through a self-directed account. The Notice seems to contemplate a type of merit-based system in which regulators or self-regulatory organizations decide what types of products are appropriate for investors. Congress has rightfully rejected this type of regulation for the securities markets since the passage of the securities laws nearly nine decades ago.

We encourage FINRA to carefully consider the potential disruption and unintended consequences from deviating from or undoing such a long-standing regulatory framework.

Conclusion

The consideration of any new rules and procedures with respect to complex products and options should balance investor protection concerns with the importance of maintaining strong capital markets and investor choice. Thank you for considering these comments. We stand ready to discuss them further with the FINRA staff at your convenience.

Sincerely,



Kristen Malinconico
Director
Center for Capital Markets Competitiveness
U.S. Chamber of Commerce

² The Investment Company Institute explains in its [comment letter to FINRA](#) that the products FINRA has described as complex or difficult to understand would amount to approximately 5,600 funds with over \$7.6 trillion of assets. As a result, approximately 2 out of every 5 funds and 22% of total U.S. fund assets would be deemed complex products, potentially subject to enhanced investor qualification or other requirements.

³ Securities and Exchange Commission <https://www.sec.gov/about/what-we-do>