VIA ELECTRONIC MAIL: pubcom@finra.org

May 9, 2022

Jennifer Piorko Mitchell
Office of the Corporate Secretary
The Financial Industry Regulatory Authority, Inc.
1735 K Street, NW
Washington, DC 20006-1506

Re: Regulatory Notice 22-08: FINRA Reminds Members of Their Sales Practice Obligations for Complex Products and Options and Solicits Comment on Effective Practices and Rule Enhancements

Dear Ms. Mitchell,

Cambridge Investment Research, Inc. ("Cambridge") appreciates the opportunity to comment in response to RN-22-08 (the "Notice") issued by The Financial Industry Regulatory Authority's ("FINRA") on March 8, 2022. The Notice solicits feedback on effective practices and rule enhancements related to the sale of complex products and options.

The Notice recognizes that the number of accounts trading in complex product and options has increased significantly and notes that FINRA has purposefully construed the term "complex product" flexibly in order to address the evolution of products and technology over time.[1] As outlined in the Notice, and reiterating previous guidance provided in RN-12-03[2], a complex product is defined 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 …"[3] The Notice expresses FINRA's concern that, while not necessarily translating to additional investment risk, the products FINRA deems complex may confuse investors. Similar concerns exist when investors may trade

[1] FINRA Regulatory Notice 22-08, FINRA Reminds Members of Their Sales Practice Obligations for Complex Products and Options and Solicits Comments on Effective Practices and Rule Enhancements (March 8, 2022), available here (Notice).
[2] FINRA Regulatory Notice 12-03, Complex Products (January 2012), available here (RN-12-03).
[3] *Id.* at 3.

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in options without fully understanding and appreciating their unique risks, strategies and terminology. These concerns are exacerbated by increasing and quickly developing technology that offers ready access by investors to self-directed platforms.

I. Potential Rulemaking Should Take a Narrow Focus on Self-Directed Accounts.

In light of the regulatory protections afforded to investors when engaged with a financial professional, Cambridge encourages FINRA to focus its rulemaking efforts on transactions in self-directed accounts.

a. FINRA and the SEC Have Expressed Enhanced Risk Exists for Self-Directed Investors Transacting in Complex Products and Options.

FINRA has consistently highlighted its concerns regarding investor confusion when it has issued guidance on complex products over the course of the last decade. In the Notice, FINRA explicitly expresses that its concerns are "heightened when retail investors make self-directed decisions through online platforms without the assistance of a financial professional."[4] Indeed, the Notice addresses the emerging reality that the regulatory framework in place today was structured on the underlying presumption that investors would generally engage a financial professional, and this presumption is increasingly challenged by enhancements in technology and online, self-directed trading platforms.

Notably, the Securities and Exchange Commission ("SEC") issued a statement in October 2020 also expressing the increased risk for self-directed investors as they are not afforded the same regulatory protections as investors who receive advice and recommendations from a financial professional.[5] The SEC specifically states it is "concerned that retail investors are independently selecting complex products for which they may not fully appreciate the unique characteristics and risks."[6] While regulations such a Regulation Best Interest ("Reg BI") and the fiduciary duty, as described in the 2019 Fiduciary Interpretation,[7] apply to financial professionals and the firms with which they are affiliated, they do not extend to self-directed investors and thus offer no investor protection to these individuals.

b. The Current Regulatory Framework Offers Sufficient Investor Protection When a Financial Professional Is Engaged.

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[4] *See* the Notice at 5.
[5] *See* Securities and Exchange Commission, Joint Statement Regarding Complex Financial Products and Retail Investors (Oct. 28, 2020), available here.
[6] *Id.*
[7] Regulation Best Interest Adopting Release; Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Investment Advisers Act Release No. 5248 (June 5, 2019) [84 FR 33669 (July 12, 2019)] ("Fiduciary Interpretation"), available here and here.

Cambridge primarily works with financial professionals that are dually registered with a broker-dealer and a registered investment adviser. Accordingly, Cambridge strongly believes a licensed financial professional provides vital expertise, assistance and guidance to investors that they do not receive in a self-directed environment. The role of a financial professional is particularly valuable when investors are considering investing in complex products or options.

Even before the promulgation of Reg BI and the Fiduciary Interpretation, existing rules and guidance established by FINRA and the SEC created a strong framework to guide financial professionals when recommending and selling complex products. In fact, under that framework, financial professionals educated the investor about key features, benefits and risks of a recommended product, whether complex or not, as it was understood this was necessary in order to determine a product was appropriate for the investor. For many in the industry, including Cambridge, Reg BI and the Fiduciary Interpretation was an extension of already established best practices.

With the implementation of the Reg BI rulemaking package in 2019, the SEC imposed this additional layer of suitability, disclosure and compliance obligations upon all firms and their affiliated financial professionals. Investor protection pervades each interaction, recommendation and piece of advice provided by a financial professional to an investor. Further, broker-dealers and registered investment advisers have created robust compliance and supervisory systems to ensure the individual financial professionals and the firm at large are meeting regulatory obligations. Regardless of which standard controls, the applicability of either Reg BI or the Fiduciary Standard create a sound and robust regulatory structure tightly focused on ensuring investors are fully informed and understand all aspects of their investments.

The recommendation to buy or sell complex products or options falls within the scope of Reg BI and the Fiduciary Interpretation. There can be no argument that firms and their financial professionals are not bound by these regulatory standards when making recommendations and placing trades in these products. In stark contrast, the self-directed environment has no such regulatory controls. Investors are without the protection of Reg BI, the Fiduciary Interpretation or any of the FINRA suitability rules, as well as the advice, guidance and assistance of experienced professionals.

Accordingly, Cambridge encourages FINRA to focus its efforts where investors are at the greatest risk and will receive the most benefit from its actions – the self-directed environment. As these platforms become increasingly accessible to individuals with little to no investment experience or expertise, Cambridge believes FINRA should narrowly construct any rulemaking efforts to address transactions by these self-directed investors that may engage in transactions involving complex products or options. FINRA is also encouraged to consider exemptions from any proposed rule for industry professionals and sophisticated investors.

II. The Definition of "Complex Product" Could Be Further Clarified.

Cambridge acknowledges that the product landscape is dynamic and many products offer features, strategies and risks that the everyday investor may not understand. Cambridge supports the establishment a flexible rule regime that both allows registered financial professionals the latitude needed to best address an investor's objectives and needs, while also protecting those investors that chose to make independent financial decisions in a self-directed environment. However, Cambridge encourages FINRA to provide firms with more definitive and objective guidance on what it deems to be a complex product so firms can properly and proactively establish a reasonably designed supervisory system to monitor the sale and use of such products.

While Cambridge appreciates the spirit in which FINRA has crafted its definition of "complex product", it must note some of the practical limitations this approach has created for firms. RN-12-03 offers various examples for firms of what may be considered a complex product, but openly states that the examples provided are not exhaustive.[8] Further, as FINRA itself acknowledges, some seemingly simple products may present such characteristics and thus require additional scrutiny and supervision.[9] FINRA itself has focused on the more apparent complex products, such as private placements and other non-traded alternative investments, when issuing guidance to firms. For example, the vast majority of the guidance related to the complex nature of funds registered under the Investment Company Act of 1940 is specific to hedge funds and certain exchange-traded funds.

The breadth and pace of new products and unique product features coming to market presents firms with the progressively daunting task of determining the presence of any complex characteristic for each new release. Cambridge urges FINRA to strike a balance between adopting a nimble definition that withstands the inevitable product innovation with one that provides firms with sufficient objective criteria to easily and properly identify a product as complex. Additionally, Cambridge encourages FINRA to review past product-specific guidance to ensure this does not conflict with the its guidance on complex products.

Cambridge is committed to investor protection and strives to create and maintain a robust compliance and supervisory system. A more definitive and objective definition of "complex product" would assist Cambridge, as well as other firms and financial professionals across the industry, to structure a system that meets and addresses FINRA and SEC expectations and concerns in advance of direct regulatory involvement.

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[8] RN-12-03 at 5.
[9] *Id.* at 3.

Cambridge appreciates the opportunity to offer comments on this topic. Cambridge would be happy to discuss further any of the comments or recommendations outlined in this letter.

Respectfully submitted,

Seth A. Miller
General Counsel
Executive Vice President, Chief Risk Officer