



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

May 9, 2022

Re: FINRA Regulatory Notice 22-08 (the "Notice")

Dear Ms. Mitchell:

ETF Managers Group, LLC ("ETFMG") appreciates the opportunity to comment on the Notice.¹ ETFMG commends the Financial Industry Regulatory Authority ("FINRA") for reminding members of their current regulatory obligations. However, ETFMG is concerned that FINRA is considering a series of measures that could prevent or restrict self-directed investors from buying a broad range of public securities designated, potentially inconsistently, as "complex products."²

These measures, if adopted, would undermine a core principle of the U.S. securities laws relating to investor choice, based on full and fair disclosures. We believe these measures have the potential to harm investors by restricting their access to many mutual funds and exchange-traded-funds registered with the SEC as investment companies under the Investment Company Act of 1940, as amended ("ETFs") and other similar investments. These investments provide important benefits, including, in many instances, tax efficiency and portfolio diversification. The vague and arbitrary standards in these measures have the potential to unfairly disadvantage investors. For these and other reasons we object to the restrictions on investors that FINRA is considering.

I. FINRA's Measures Disregard Certain Core Principles of Federal Securities Laws

Investors have been well-served by our disclosure-based regulatory system for almost 90 years. The foundations of this system are the principles of full and fair disclosure paired with investor choice. We are concerned that the questions FINRA poses in the Notice reflect a fundamental shift away from the current disclosure-based regime toward merit-based regulation. Specifically, the questions FINRA asks about imposing restrictions, limits or prevents investors' right to buy public securities in a manner which is contrary to the disclosure-based system that Congress established more than 80 years ago.

FINRA's role in our regulatory system is well established. FINRA is the self-regulatory organization for brokers and dealers. Its authority to regulate in this capacity is strictly limited to those areas delegated to it under the Securities Exchange Act of 1934 (the "Act"). The measures FINRA is considering appear to exceed this authority and contravene the organization's regulatory mandate under the Act. For almost 90 years U.S. securities laws have protected individual investors through a system based on full and fair disclosure. FINRA should not seek to upend the current disclosure-based system by imposing

¹ ETFMG is a leading provider of investment management services, primarily to thematic exchange-traded-funds ("ETFs"), including certain leverage and inverse ETFs. ETFMG submits this letter on its behalf and on behalf of our affiliated broker-dealer and FINRA member ETFMG Financial LLC.

² ETFMG has concerns about other aspects of the Notice but focuses on the measures described herein because of their significance.



restrictions on self-directed investors' right to buy public securities.

II. FINRA's Measures Have the Potential to Harm Investors

FINRA's measures could apply to many mutual funds, ETFs, and other investments that are sought after by investors and provide important benefits, including portfolio diversification and protection from downside risk.

The Notice contemplates requiring individual investors to pass tests of investment knowledge, satisfy minimum net worth requirements or be pre-approved by their broker based on vague standards. We are concerned that measures which introduce subjectivity, testing bias, and net worth requirements have the potential to arbitrarily disadvantage certain investors, including those from communities that have historically been denied access to the financial services sector.

FINRA's measures may lead brokerage firms to stop offering "complex" securities due to the vagueness, cost, and difficulty of implementation. Issuers may be less inclined to develop new and innovative products, depriving U.S. investors of opportunities and harming investors and the U.S. securities markets.

III. FINRA's Measures are Unnecessary

The Notice provides no evidence that investors do not understand the instruments in which they invest. Instead, the Notice cites as evidence enforcement cases brought against brokers for inappropriate recommendations.³ FINRA's unsupported belief that investors do not understand their investments cannot form the basis for new regulation and certainly cannot form the basis for imposing sweeping changes to our disclosure-based regulatory system that would make FINRA a merit-regulator.

Once again, we appreciate the opportunity to comment on the Notice. If you have any questions regarding our comment letter or would like additional information, please feel free to contact me directly.

Sincerely,

A handwritten signature in black ink that reads "Matt Bromberg".

Matthew Bromberg
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³ FINRA, Regulatory Notice 22-08, at 5.