

Via E-mail

May 9, 2022

Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, D.C. 20006-1506
pubcom@finra.org

Re: Regulatory Notice 22-08

Dear Ms. Mitchell:

GTS Securities, LLC (“GTS”) appreciates the opportunity to provide comments in response to Regulatory Notice 22-08 (the “Notice”) issued by the Financial Industry Regulatory Authority, Inc. (“FINRA”). GTS is a global electronic market making firm that provides liquidity in U.S. equities, exchange-traded funds (“ETFs”), equity options, derivatives, and foreign exchange. We provide a leading destination for ETF execution and liquidity in all asset classes of ETFs listed in the United States. Our experience reaches back to the inception of the ETF industry in the United States, and many of our ETF traders have over 20 years of trading and market experience.

In the Notice, FINRA expresses concern about increased retail access to complex products, particularly through self-directed accounts, and requests comment on potential additional requirements where retail investors wish to access these products. GTS appreciates FINRA’s historical and current focus on these issues, including the robust rules that are presently in place to achieve FINRA’s objective of investor education and protection. We believe that sensible regulation, investor education, and complete, easy-to-understand disclosures benefit retail investors accessing the products identified in the Notice and the ETF market as a whole.

Despite our support for prudent regulation in this space, GTS is concerned that the Notice sets forth ideas for potential rule changes that would have unintended material and adverse effects on these markets and investors. We commend FINRA for requesting comment through the Notice in advance of proposing any specific rules, which will assist FINRA in identifying these unintended consequences and incorporating feedback from interested parties in any future rulemakings. With that goal in mind, GTS provides the comments below based on our extensive experience with these products.

First, GTS is concerned that FINRA’s definition of “complex products” is both expansive and vague, and includes a variety of different products that have unique characteristics. Not only do these products contain features that are distinct from one another, but they also serve many different functions in a diversified portfolio. Any new regulation imposed on these products should be specifically tailored to their unique characteristics and the specific concerns that they may raise for investors. We believe that without first identifying individual products more concretely, specifying their features and uses, and clarifying the regulatory concerns they might raise, it would be impossible to implement an effective set of regulatory enhancements. Where the unique characteristics of a product and any attendant regulatory gaps are identified, carefully considered rules that are narrowly and appropriately tailored to the specific and unique risks identified may be appropriate.

Second, FINRA explores several approaches to rule changes for complex products, including, among others, account opening and approval requirements, tests of investor knowledge, restrictions on retail investors’ access based on factors such as net worth, and increased supervision and reassessments for retail accounts. Each of these changes would restrict retail investor access and curtail retail broker-dealers’ offerings of these products to reduce their own regulatory risk. The changes would thus severely limit investor choice and reduce retail investors’ opportunities to invest in valuable products that can help diversify a portfolio and hedge certain risks. Limiting retail investor access in this manner runs counter to the reasons that ETFs are brought to market in the first place—such as trading flexibility and liquidity, transparency, cost effectiveness including tax efficiencies, and efficient portfolio diversification. This type of dramatic restriction on investor choice should only be undertaken where a clear need specific to individual products has been identified, and where other less restrictive means of addressing regulatory concerns are not successful or available. GTS is concerned that the rule changes identified in the Notice do not meet this standard and as a result may unnecessarily constrain the ability of individual investors to make the investment decisions that comport with their own risk tolerances and financial goals.

Third, FINRA’s suggested actions would deviate significantly from regulators’ long-standing disclosure-based regime and would impose an undue burden on competition.¹ This disclosure-based system is a bedrock of the federal securities laws because it ensures both the protection of investors and freedom of those investors to make their own independent investment decisions. Straying from this principle risks inviting merit-based regulation where the regulatory community interposes its own perspectives on the appropriateness of certain investments for individuals rather than letting those investors use their own fully informed judgments. Merit-based regulation also inevitably leads to the regulatory selection of winners and losers, to the detriment of free and fair competitive markets. A central tenet of federal securities regulation is that investors

¹ Note that exchange-traded products are registered with the U.S. Securities and Exchange Commission (the “Commission”) before they are able to be sold to any investors, including retail investors. The Commission has a long history of successfully working to ensure that these disclosures provide information material to investors’ decisions.

benefit most from the ability to make informed decisions, rather than having limited choices and limited information available to them. GTS believes that any new regulation over complex products should focus on identifying any gaps in disclosure with the goal of helping investors make more informed decisions rather than FINRA making those investment decisions for them.

The challenges of regulating complex financial products—and the unintended consequences of overly restrictive regulations—are not new. Take, for example, Singapore’s recent experience with complex products regulation for retail investors. Rules like those suggested by FINRA were implemented by the Monetary Authority of Singapore (“MAS”) following the global financial crisis, including investor knowledge and experience tests and other distribution restrictions on broad categories of products including ETFs.² In 2015, amid prolonged reduced retail participation,³ MAS set about reversing course and rolling back its restrictions on ETFs to allow broader retail access.⁴ In November 2021, MAS proposed relaxing its rules further.⁵

Contrast Singapore’s ETF markets with the U.S. markets. Where Singapore’s ETF markets have been hamstrung for years by these additional restrictions, U.S. ETF and ETP markets are leading global hubs with global clients, reaching \$7.21 trillion in 2021⁶ out of a global ETF and ETP industry that reached \$10.27 trillion USD in 2021.⁷ While Singapore lamented declining retail participation in its markets, U.S. retail investors currently benefit from historically low costs and increased access to investment opportunities. GTS believes that blanket restrictions on retail access to substantial swaths of products labeled “complex” would harm U.S. markets, competition, and capital formation and would jeopardize the global market dominance of the United States as a destination for retail investors, as investors seek out markets with greater freedom of choice and lower barriers to entry.

Despite our concerns with the Notice, GTS broadly supports an empirical, data-led approach to notice-and-comment rulemaking in this space to the extent that it can be used to arm investors with appropriate information to make their investment decisions. Such an approach

² See MAS Media Release, *MAS Requires Intermediaries to Assess Investment Knowledge and Experience of Retail Customers*, July 28, 2011, <https://www.mas.gov.sg/news/media-releases/2011/mas-requires-intermediaries-to-assess-investment-knowledge-and-experience-of-retail-customers>.

³ See, e.g., Goh Eng Yeow, *Striking the right balance on regulations*, The Straits Times, July 7, 2014, <https://www.straitstimes.com/business/companies-markets/striking-the-right-balance-on-regulations>.

⁴ See MAS Media Release, *Easier Access to Simpler Funds for Retail Investors*, Apr. 29, 2015, <https://www.mas.gov.sg/news/media-releases/2015/easier-access-to-simpler-funds-for-retail-investors>.

⁵ See MAS Consultation Paper, *Proposed Changes to the Complex Products Regime*, Nov. 2021, <https://www.mas.gov.sg/-/media/MAS/News-and-Publications/Consultation-Paper---Proposed-Changes-to-the-Complex-Product-Regime.pdf>.

⁶ See ETFGI Press Release, *ETFGI reports the ETFs industry in the United States ended 2021 with record high assets of US\$7.21 trillion and record net inflows of US\$919.78 billion*, Jan. 17, 2022, <https://etfgi.com/news/press-releases/2022/01/etfgi-reports-etfs-industry-united-states-ended-2021-record-high-assets>.

⁷ See ETFGI Press Release, *ETFGI reports global ETFs industry ended 2021 with a record US\$10.27 trillion in assets and record net inflows of US\$1.29 trillion*, Jan. 25, 2022, <https://etfgi.com/news/press-releases/2022/01/etfgi-reports-global-etfs-industry-ended-2021-record-us1027-trillion>.

would necessarily include properly defined contours for individual “complex products,” an assessment of the unique uses and risks of such products, identification of specific gaps in disclosures or investor understanding related to the products, and a focus on investor education and risk transparency—in other words, plain English, easy-to-understand disclosures. A necessary part of any effective rulemaking process would also be the identification of empirical evidence of a problem, including the precise market complexities that FINRA seeks to regulate, coupled with a careful analysis of the costs and benefits of any proposed rule change tailored to the specific and unique features and risks of the individual products that FINRA wishes to characterize as complex. Although this approach is understandably more difficult than blanket prohibitions or restrictions, we believe that it will ultimately result in more informed investors and healthier markets.

GTS would welcome the opportunity to further discuss our comment letter and these issues with FINRA staff. Thank you for providing the industry with the opportunity to comment on the Notice.

Sincerely yours,

/s/ Reginald M. Browne

Reginald M. Browne
Principal
GTS Securities, LLC