May 13, 2025

Via Electronic Filing

Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1700 K Street, NW
Washington, DC 20006

Re: FINRA Regulatory Notice 25-05: Outside Activities Proposal

To Whom It May Concern:

The Investment Adviser Association (**IAA**)[1] appreciates the opportunity to comment on the Financial Industry Regulatory Authority's (**FINRA's**) Regulatory Notice 25-05 (**Proposal**). Among other things, the Proposal would require broker-dealer supervision, recordkeeping, and notification and approval of their associated persons' Unaffiliated IA Activity.[2] The IAA represents the interests of investment adviser firms registered with and subject to regulation by the Securities and Exchange Commission (**SEC**) under the Investment Advisers Act of 1940 (**Advisers Act**),[3] many of which will be directly and adversely affected by the Proposal.

We appreciate FINRA's retrospective review of and efforts to streamline its rules relating to the outside activities of broker-dealers' associated persons. We also share FINRA's concern

[1] The IAA is the leading organization dedicated to advancing the interests of fiduciary investment advisers. For more than 85 years, the IAA has been advocating for advisers before Congress and U.S. and global regulators, promoting best practices and providing education and resources to empower advisers to effectively serve their clients, the capital markets, and the U.S. economy. Our members range from global asset managers to the medium- and small-sized firms that make up the majority of our industry. Together, the IAA's member firms manage more than $35 trillion in assets for a wide variety of individual and institutional clients, including pension plans, trusts, mutual funds, private funds, endowments, foundations, and corporations. For more information, please visit www.investmentadviser.org.

[2] Regulatory Notice 25-05, *Outside Activities, FINRA Requests Comment on a Proposal to Reduce Unnecessary Burdens and Simplify Requirements Regarding Associated Persons' Outside Activities* (Mar. 14, 2025), available at https://www.finra.org/rules-guidance/notices/25-05. We use the term Unaffiliated IA Activity to refer to fiduciary investment adviser activity of investment adviser representatives (**IARs**) of unaffiliated investment advisers who are also associated persons of a broker-dealer. The Proposal, while narrower in that it would exclude affiliated outside investment adviser activity, is largely consistent with how FINRA interprets current Rule 3280. As discussed below, we think that this interpretation needs to be revisited as well.

[3] While IAA membership is also open to state-registered advisers, virtually all IAA members are registered with the SEC. Our comments thus focus on regulation of advisers under the Advisers Act, although they are equally applicable to state-registered advisers.

that there not be a regulatory vacuum in oversight of securities activities conducted away from the broker-dealer. There is no vacuum in regulatory oversight of investment advisers, however, as they are subject to a robust investor-protective statutory and regulatory framework overseen by the SEC (or the states for state-registered investment advisers). Oversight of these activities by broker-dealers is also unnecessary to achieve FINRA's policy objectives and, as we discuss below, is deeply problematic substantively and in its application. More importantly, FINRA lacks jurisdiction over investment advisers, whether or not they are affiliated with a broker-dealer, and has no authority to oversee their activities.

For these reasons, FINRA should withdraw those aspects of the Proposal that cover a broker-dealer's oversight of its associated persons' Unaffiliated IA Activities or, alternatively, exclude Unaffiliated IA Activity in the same manner as affiliated investment adviser activities are proposed to be excluded.[4] FINRA should also revisit its current interpretation of Rule 3280, being mindful that that interpretation did not go through a formal notice-and-comment rulemaking process and is not consistent with more recent SEC rules and interpretations. At a minimum, and in consultation with SEC staff, FINRA should consider whether a more appropriate approach to recognizing and respecting the separate, legitimate, and robust regulatory regime of investment advisers could be proposed.

FINRA lacks authority to oversee the activities of investment advisers as contemplated by the Proposal and FINRA's interpretation of current Rule 3280.

Investment advisers play a critically important role in helping more than 56 million clients meet their financial investment goals.[5] They act as fiduciaries to their clients, subject to the robust principles-based and investor-protective framework of the Advisers Act. Importantly, the core businesses of investment advisers and broker-dealers are markedly different. The SEC has stated that both investment advisers and broker-dealers "play an important role in our capital markets and our economy more broadly," but they have "different types of relationships with investors, offer different services, and have different compensation models."[6] They are also subject to different statutory and regulatory regimes. Broker-dealers are regulated under the Securities Exchange Act of 1934 (**Exchange Act**) and FINRA rules and examination, while

[4] We see no basis for treating Unaffiliated IA Activity differently from affiliated outside investment adviser activity.

[5] For a profile of the SEC investment adviser industry, see the *Investment Adviser Industry Snapshot 2024* analyzing Form ADV data for 2024, available at https://www.investmentadviser.org/wp-content/uploads/2024/06/Snapshot2024_FINAL.pdf. The IAA 2025 Adviser Industry Snapshot will be released shortly.

[6] *Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, 84 Fed. Reg. 33669 (July 12, 2019) (**Fiduciary Interpretation**), available at https://www.govinfo.gov/content/pkg/FR-2019-07-12/pdf/2019-12208.pdf. *See also Regulation Best Interest: The Broker-Dealer Standard of Conduct*, 84 Fed. Reg. 33318 (July 12, 2019) (**Reg BI**), available at https://www.govinfo.gov/content/pkg/FR-2019-07-12/pdf/2019-12164.pdf. The SEC adopted Form CRS (Client/Customer Relationship Summary) in 2019 because of these differences, requiring that investment advisers and broker-dealers make clear to investors the capacity in which they are acting. *Form CRS Relationship Summary; Amendments to Form ADV*, 84 Fed. Reg. 33492 (July 12, 2019) (**Form CRS**), available at https://www.govinfo.gov/content/pkg/FR-2019-07-12/pdf/2019-12376.pdf.

investment advisers are subject to the Advisers Act (or state statutes) and the SEC's (or the states') rules and examination.[7] Indeed, broker-dealers may not engage in investment advisory services without registering as an investment adviser unless those services are "solely incidental" to their brokerage services. Notably, with narrow exceptions, broker-dealers also may not provide discretionary advice to their customers.[8]

While FINRA appropriately recognizes these distinctions and its lack of authority over investment advisers,[9] the Proposal contradicts this recognition. By requiring broker-dealers to supervise, keep records of, and obtain notice of and approve outside securities transactions of its associated persons engaged in Unaffiliated IA activity, the Proposal oversteps FINRA's authority and it should either be withdrawn or all outside investment adviser activity, whether affiliated or not, should be excluded.

FINRA's interpretation of current Rule 3280 is flawed for the same reason and should be revisited. The SEC approved Rule 3280 in 1985. The adopting release notes that "The Commission believes that the rule would be consistent with the [Exchange] Act's requirement that persons engaging in securities transactions must be associated with a broker-dealer, if they have not themselves registered as a broker-dealer."[10] The release appears to contemplate that

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[7] *See, e.g., SEC Staff Study on Investment Advisers and Broker-Dealers as Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection* Act (Jan. 2011) at A-7 ("Generally, FINRA's authority is limited to enforcing compliance by its members and their associated persons with the Exchange Act and rules thereunder, MSRB rules, and FINRA rules." [footnote omitted]), available at https://www.sec.gov/news/studies/2011/913studyfinal.pdf. In addition, SEC Chairman Paul Atkins has opposed FINRA's assuming a regulatory role over investment advisers. *Statement by The Honorable Paul S. Atkins before the United States Senate Committee on Banking, Housing, and Urban Affairs On Enhancing Investor Protection After The Financial Crisis* (July 12, 2011), available at https://www.banking.senate.gov/imo/media/doc/AtkinsTestimony71211.pdf.

[8] *See Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer Exclusion From the Definition of Investment Adviser*, 84 Fed. Reg. 33681 (July 12, 2019) (**Solely Incidental Interpretation**), available at https://www.govinfo.gov/content/pkg/FR-2019-07-12/pdf/2019-12209.pdf. Together, we refer to the Fiduciary Interpretation, Reg BI, Form CRS, and the Solely Incidental Interpretation as the **Standards of Conduct Rulemaking Package**.

[9] *See* Proposal at 12 ("While they at times engage in similar activities, BDs and IAs also provide distinct services and employ different fee structures." FINRA "regulates broker-dealers, while the SEC and the states regulate IAs."); Regulatory Notice 18-08, *Outside Activities, FINRA Requests Comment on Proposed New Rule Governing Outside Business Activities and Private Securities Transactions* (Feb. 26, 2018), at 16, n.22 ("investment advisers registered with the SEC are overseen by the SEC and subject to the obligations of the [Advisers Act] and the regulations and rules promulgated thereunder. Other investment advisers are subject to state registration systems, many of which have requirements similar to the Advisers Act."), available at https://www.finra.org/rules-guidance/notices/18-08. *See also Testimony of Stephen Luparello, Interim CEO of FINRA, before the Committee on Banking, Housing, and Urban Affairs* (Jan. 27, 2009) ("FINRA is not authorized to enforce compliance with the Investment Advisers Act. Authority to enforce that Act is granted solely to the SEC and to the states. … FINRA's authority, as noted above, does not extend to writing rules for, examining for or enforcing compliance with the Investment Advisers Act..."), available at https://www.finra.org/media-center/speeches-testimony/testimony-committee-banking-housing-and-urban-affairs.

[10] *SEC Rel. No. 34-22617* (Nov. 18, 1985) (1985 WL 663474).

"securities transactions" encompass activities that would require broker-dealer licensing and not activities that are outside of FINRA's regulatory reach.

Not until years after approval of Rule 3280 did FINRA begin interpreting the rule to cover investment adviser activity.[11] It "clarified" the applicability of Rule 3280 to investment advisers and investment adviser activity through two Notices to Members in the 1990s without approval by the SEC of this expansive view of activity subject to supervision under the Exchange Act. As FINRA continues with its retrospective review, we urge it to recognize that it cannot extend its own jurisdiction through clarification of its rules and should also be mindful of the fact that the SEC has more recently articulated clear views on the distinct regulatory regimes for broker-dealers and investment advisers.[12]

The Proposal and FINRA's interpretation of current Rule 3280 are flawed substantively and in their application.

We appreciate FINRA's policy concerns to ensure there are no regulatory or supervisory gaps in investor protection. However, the Proposal and current Rule 3280 are also flawed substantively and in their application. Broker-dealers are simply not in a position to effectively oversee Unaffiliated IA Activity, nor is it appropriate to require them to do so. It is also inappropriate for FINRA to seek to impose limits on the activities of an unaffiliated investment adviser and its IARs on the basis of limits on the disconnected activities of a third-party broker-dealer.[13]

Investment advisers manage advisory accounts, including client separately managed accounts and fund portfolios, on an ongoing basis. They act as fiduciaries to their clients pursuant to an advisory contract that lays out, among other things, the scope of the relationship and the client's investment objectives.[14] An investment adviser is subject to ongoing duties of loyalty and care and is required at all times to act in its client's best interest within the scope of the advisory relationship. A broker-dealer's relationship with its customer, on the other hand, is transaction-based and any duty owed to the customer is in connection with a specific transaction. Broker-dealers are not parties to an investment adviser's fiduciary relationship with its clients. They are not in a position to assess the suitability of an investment for a particular client or the appropriateness of an investment adviser's determination that an investment or series of investments is in a client's best interest.

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[11] NASD Notice to Members 94-44 (May 1994) and Notice to Members 96-33 (May 1996).

[12] *See, e.g.,* SEC's Standards of Conduct Rulemaking Package. We appreciate FINRA's efforts in connection with its retrospective review of its rules begun in 2017. In our view, although still too broad, FINRA's 2018 proposed amendments to Rule 3280, which would have eliminated broker-dealers' supervisory and recordkeeping obligations for outside investment adviser activities, reflected a more balanced approach than the current Proposal.

[13] *See* Notice to Members 96-33 at FAQs 3-4.

[14] Fiduciary Interpretation.

Broker-dealers also are not in a position to evaluate the unaffiliated investment adviser's management of its conflicts of interest. In fact, we are concerned that broker-dealer oversight could create additional conflicts that would be difficult for investment advisers to mitigate and that could be inconsistent with an investment adviser's duty of care. For example, if a broker-dealer only approved transactions for securities offered on its platform, the investment adviser would not be allowed to consider other available investments that might be better for its clients.

In addition, the Proposal is untenable from a client data and privacy perspective. Clients have an expectation of confidentiality in their relationship with their investment adviser. Clients of unaffiliated investment advisers whose transactions are executed away from a particular broker-dealer do not enter into and have not necessarily agreed to share their confidential information with that broker-dealer. This includes, for example, their account and transaction information and information about their financial situation and investment objectives.

Broker-dealers also do not – and do not have an automatic right to – have a view into an unaffiliated investment adviser's business, whether it be its client lists, investment strategies, best-execution determinations (*i.e.*, selection of clearing or executing brokers), policies and procedures, or proprietary or other confidential information.

Investment advisers have an obligation to safeguard much of this information. For instance, they must adopt written policies and procedures to safeguard their clients' records and information under their fiduciary duty, Regulation S-P, and state regulations. They must also establish and enforce policies and procedures reasonably designed to prevent the misuse of material, non-public information under Advisers Act Section 204A. Requiring that broker-dealers have access to an investment adviser's confidential information (including its client records) unreasonably exposes clients, investment advisers, and the broker-dealers gaining access to increased risks from cybersecurity and privacy breaches.

IAA recommendations.

For the reasons discussed above, FINRA should withdraw those aspects of the Proposal that cover a broker-dealer's oversight of Unaffiliated IA Activity. FINRA should also hold Rule 3280 as applied to investment advisers in abeyance and consult with the SEC staff on the appropriate bounds of FINRA oversight of its members' associated persons' outside investment adviser activities.

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We appreciate your consideration of our comments on this important issue. Please do not hesitate to contact the undersigned at (202) 293-4222 if we can be of further assistance.

Respectfully Submitted,

/s/ Gail C. Bernstein
Gail C. Bernstein
General Counsel and Head of Public Policy

/s/ Monique S. Botkin
Monique S. Botkin
Associate General Counsel

cc: The Honorable Paul S. Atkins, Chairman, SEC
The Honorable Hester M. Peirce, Commissioner, SEC
The Honorable Caroline A. Crenshaw, Commissioner, SEC
The Honorable Mark T. Uyeda, Commissioner, SEC
Natasha Vij Greiner, Director, Division of Investment Management, SEC