

May 9, 2022

Via Electronic Filing

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

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

Dear Ms. Mitchell:

The Investment Adviser Association (**IAA**)¹ appreciates the opportunity to comment on the Financial Industry Regulatory Authority, Inc. (**FINRA**) regulatory notice on complex products and options.² FINRA is soliciting comment on (i) effective practices that FINRA members have developed for complex products and options, particularly when retail investors are involved; and (ii) whether the current regulatory framework, which was adopted at a time when the majority of individuals accessed financial products through financial professionals, rather than through self-directed platforms, is appropriately tailored to address current concerns raised by complex products and options.

Our members are investment advisers registered with the Securities and Exchange Commission (**SEC**) under the Investment Advisers Act of 1940 (**Advisers Act**) or with the states, as appropriate, and as such our comments are limited to responding to the Notice to the extent it asks about or could be intended to apply to investment advisers. Specifically, the Notice asks two questions that are addressed directly to potential regulation of investment advisers:

Should comparable standards apply to other investment intermediaries, such as investment advisers or insurance agencies, that provide access to or recommend to individual customers transactions in complex products? (Complex Products, Question 7.d)

¹ The IAA is the leading organization dedicated to advancing the interests of investment advisers. For more than 80 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. 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 *Complex Products and Options*, Regulatory Notice 22-08 (Mar. 8, 2022), available at <https://www.finra.org/sites/default/files/2022-03/Regulatory-Notice-22-08.pdf> (**Notice**).

Should comparable standards apply to other investment intermediaries, such as investment advisers or insurance agencies, that provide access to or recommend to individual customers transactions in options? (Options, Question 3)

The IAA supports FINRA's goal to protect retail investors. FINRA's authority, however, is limited to the oversight of broker-dealers and their associated persons. FINRA has no authority over investment advisers and may not adopt rules or publish guidance with respect to, or conduct examinations of, investment advisers. We thus strongly object to these questions and any implication that FINRA has the authority to consider applying broker-dealer standards to investment advisers. We respectfully request that FINRA refrain from proposing rules or issuing guidance statements that purport to apply to investment advisers, directly or indirectly.

FINRA lacks jurisdiction over investment advisers, which are regulated by the SEC or the states.

The federal securities laws clearly delineate the regulation of investment advisers and broker-dealers. Investment advisers are subject to the principles-based fiduciary-duty regime of the Advisers Act or state securities regulation,³ while broker-dealers are subject to the Securities Exchange Act of 1934 (**Exchange Act**) and FINRA rules. FINRA's limited jurisdiction as established by Congress dates back to the Maloney Act of 1938,⁴ which amended the Exchange Act to establish the self-regulatory organization (SRO) structure pursuant to which FINRA now operates. FINRA may not attempt to do indirectly what Congress has not authorized it to do directly.⁵

Simply put, it is up to the SEC and the states – and not FINRA – to determine whether to propose sales practices rules for investment advisers.⁶ To the extent FINRA's posing questions about the applicability of standards to advisers implies otherwise, it is wrong.

³ We do not address specific state regulation in this letter but our points about FINRA's limited jurisdiction are equally applicable to state-registered advisers.

⁴ See *An Act to provide for the establishment of a mechanism of regulation among over-the-counter brokers and dealers* (June 25, 1938), available at https://www.sechistorical.org/collection/papers/1930/1938_0625_MaloneyAct.pdf.

⁵ We note that FINRA also lacks jurisdiction over investment companies, investors, and issuers and, while we do not address these issues in this letter, we question whether FINRA has the statutory authority to impose limitations on investors' ability to access the public markets, which are also regulated by the SEC.

⁶ As the Notice recognizes, the SEC proposed – but did not adopt – sales practices rules related to retail investor transactions in leveraged/inverse investment vehicles. See *Use of Derivatives by Registered Investment Companies and Business Development Companies; Required Due Diligence by Broker-Dealers and Registered Investment Advisers Regarding Retail Customers' Transactions in Certain Leveraged/Inverse Investment Vehicles*, 85 Fed. Reg. 4446 (Jan. 24, 2020), available at <https://www.govinfo.gov/content/pkg/FR-2020-01-24/pdf/2020-00040.pdf>.

The IAA opposed the proposal as inconsistent with advisers' principles-based fiduciary duty under the Advisers Act. See IAA Letter to the SEC, *Use of Derivatives by Registered Investment Companies and Business Development Companies; Required Due Diligence by Broker-Dealers and Registered Investment Advisers Regarding Retail Customers' Transactions in Certain Leveraged/Inverse Investment Vehicles* (Apr. 30, 2020), available at https://investmentadviser.org/wp-content/uploads/2021/10/April_30_2020_-

It would be inappropriate for FINRA to attempt to substitute its judgment for an adviser's fiduciary judgment about what is in its client's best interest.

To the extent that FINRA is asking whether it should consider sales practices rules for broker-dealers in connection with trades they effect for an adviser's client, we would strongly oppose such a requirement. Retail investors retain investment advisers to make investments on their behalf as fiduciaries and rely on investment advisers' expertise and judgment to act in their best interest. When an investment adviser invests its retail client in a complex – or indeed any – product, the adviser is required to have determined that the investment is in the best interest of that client, with whom it has an adviser-client relationship.⁷ We do not believe it would be appropriate for FINRA to substitute its judgment, or to require broker-dealers to substitute their judgment, for that of an investment adviser. It is important to remember that all investments carry some degree of risk, whether FINRA designates them as complex or not. It is the investment adviser with the ongoing fiduciary relationship with the client – and not the broker-dealer – that is in the best position to weigh the risks of an investment in light of its clients' investment objectives and risk profile and to determine what is in that client's best interest.

We believe that the well-established principles-based Advisers Act fiduciary duty and disclosure framework appropriately address the risks described in the Notice. Attempting to apply prescriptive sales practices standards to investment advisers with respect to complex products or options, or indeed any investment – whether directly or through broker-dealers – would be inconsistent with the Advisers Act and outside of FINRA's jurisdiction.

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[IAA Letter on Derivatives and Sales Practice Proposal.pdf](#). Should the SEC propose sales practices rules for investment advisers in the future, we will engage with the SEC to provide feedback. *See* SEC Chair Gary Gensler, *Statement on Complex Exchange-Traded Products* (Oct. 4, 2021), available at <https://www.sec.gov/news/public-statement/gensler-statement-complex-exchange-traded-products-100421> (directing SEC staff to study the risks of complex ETPs and to present recommendations for potential SEC rulemaking to address those risks).

⁷ Advisers' fiduciary duty provides effective investor protection by requiring advisers to act in the best interest of their clients at all times and in all aspects of their advisory relationship (*see Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, 84 Fed. Reg. 33669 (July 12, 2019), available at <https://www.govinfo.gov/content/pkg/FR-2019-07-12/pdf/2019-12208.pdf>).

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We appreciate FINRA's consideration of our comments on the Notice and would be happy to provide any additional information that may be helpful. Please contact the undersigned or Associate General Counsel Laura Grossman at (202) 293-4222 if we can be of further assistance.

Respectfully,

/s/ Gail C. Bernstein

Gail C. Bernstein
General Counsel