From:	Susan Truesdale
To:	Comments, Public
Subject:	Fwd: FINRA Regulatory Notice 22-08 - Response
Date:	Monday, May 9, 2022 3:54:45 PM

Ms. Marcia E. Asquith, Executive Vice President

Financial Industry Regulatory Authority, Inc.

1735 K Street, NW

Washington, DC 20006-1500

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

Dear Ms. Asquith:

The National Association of Active Investment Managers (NAAIM) appreciates the opportunity to comment on the Notice. NAAIM is a non-profit trade group of nearly 200 registered investment advisor firms that collectively manage more than $35 billion in assets. NAAIM member firms provide active money management services to their clients to produce favorable risk-adjusted returns as an alternative to passive, buy-and-hold investment strategies. Our members tend to be early adopters of products that enable us to reduce risk in client portfolios. Many of these innovative products fall under the vague category of "complex."

In reviewing the background provided in the Financial Industry Regulatory Authority ("FINRA") Regulatory Notice 22-08, we are struck by how much FINRA already has in place to assure disclosure of the risks of investments and to require that FINRA members assess the suitability of products based on their knowledge of the client. This disclosure-based process clearly serves the interests of the investor while allowing advisors to offer products that diversify and strengthen an investor's portfolio.

As we understand from the Notice, a key element of FINRA's concern is:

For example, if a product has features or payout structures that would be confusing to retail investors,

or if it performs in unexpected ways in various market or economic conditions, investors may not fully understand the attendant risks. Moreover, depending on how a complex product is structured, some may have built-in statutory protections while others may not, and this may not be clear to the investor.[10] *Although complex products do not always translate into more investment risk, their complexity may confuse investors who may not adequately understand their features.*

NAAIM is deeply concerned that FINRA is considering a series of measures that could limit a broad range of public securities designated as "complex products" based on the perceived inability of investors to understand the risks of the products. Ironically, less than four years ago, the securities industry was struggling to provide *greater* access to sophisticated ("complex") products to individual investors, fearing that their use had been restricted to the point that only wealthy individuals had access to the most profitable products. The thought at that time was to provide improved disclosure.

In trying to protect the more naïve or inexperienced self-directed investor, FINRA risks implementing a one-size fits all solution that once again restricts the more innovative and useful financial products to only the super wealthy.

If complexity of products is sufficient to limit their use, then one would expect the complexity of the U.S. tax code sufficient to limit its use as well. Walking a client through the process of initiating *substantially equal periodic payments* from an IRA covers 17 pages of IRS instructions. Complexity is a reality that all investors deal with in a great many aspects of their lives.

Complexity is a part of every investing decision.

Successful investing is complex. Very few active investors are naïve or unaware of the risk of investing. Today's investor has unprecedented access to educational information on complex products and their risks. Furthermore, the disclaimers FINRA members are required to include in our marketing materials reflect this reality: *All investing involves the risk of loss.*

No one can ever fully gauge every risk that can arise in even the “simplest” investment. At least with complex products, there is information related to the risks of the structure of the products that can help investors make educated decisions.

One cannot legislate or regulate immorality, greed or overconfidence.

While FINRA’s desire to provide protections for less knowledgeable investors is admirable, there will always be unscrupulous individuals who see no reason why they should not prey on others. FINRA is a critical line of defense against these individuals. Even so, there are also common human failings that cannot be legislated out of existence by making certain products unavailable.

What is essential is that the core principle of U.S. securities laws – investor choice based on full and fair disclosures – be maintained. ***Restricting investor access to dozens of popular mutual funds, ETFs and other investments that provide important benefits, including portfolio protection and diversification, has the potential to harm individual investors, without benefiting the vast majority.***

Investors – not regulators – should make their own investment decisions.

We are concerned that the questions FINRA poses in the Notice reflect a fundamental shift away from the current disclosure-based system toward merit-based regulation. Specifically, the questions FINRA asks about imposing restrictions, limits or gates on investors’ right to buy public securities suggest an approach that is contrary to the disclosure-based approach 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 example, the rules of an SRO authorized under Section 15A of the Act are required to be designed to "remove impediments to and perfect the mechanism of a free and open market and a national market system." They must not be "designed to permit unfair discrimination between customers, issuers, broker, or dealers…" Section 15A(b)(6).

The measures under consideration would violate both of these mandates – by preventing or restricting individual investors' right to purchase public securities and by introducing arbitrary and potentially biased measures, such as testing, net worth and other requirements, that could unfairly disadvantage certain investors.

As the SEC has stated:

> "The federal securities laws…are based on a simple and straightforward concept: everyone should be treated fairly and have access to certain facts about investments and those who sell them. We require public companies, fund and asset managers, investment professionals and other market participants to regularly disclose significant financial and other information so investors have the timely, accurate and complete information they need to make confident and informed decisions about when or where to invest."1

For almost 90 years U.S. securities laws have protected individual investors through a system based on full and fair disclosure. 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 underserved communities that have historically been denied access to the financial services sector.

In addition, FINRA's proposed measures may lead brokerage firms to stop offering "complex" securities due to the vagueness of the rule, as well as the 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.

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*.2 An unsupported belief that investors do not understand their investments should not form the basis for new regulation and certainly should not form the basis for imposing sweeping changes to our disclosure-based regulatory system to make investing "merit-based."

In summary, we are deeply concerned that the proposed measures appear to be misguided, unnecessary, outside of FINRA's established authority, and have the potential to cause unintended consequences that may harm investors, businesses, and markets alike.

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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 Ryan Redfern, President, National Association of Active Investment Managers.

1 What We Do | SEC.gov [sec.gov]

2 FINRA, Regulatory Notice 22-08, at 5.

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