

May 30, 2014

Via email to: pubcom@finra.org

Ms. Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: FINRA's **Regulatory Notice 14-14** Request for Comment
On the Effectiveness and Efficiency of its Communications With the Public Rules
("RN 14-14")

Dear Ms. Asquith:

The Investment Program Association ("**IPA**")¹ respectfully submits this letter in response to the request for comment by the Financial Industry Regulatory Authority ("**FINRA**") on RN 14-14 (Request for comment regarding the effectiveness and efficiency of FINRA's rules relating to communications with the public).

Background

FINRA has issued RN 14-14 in order to conduct a retrospective review of the effectiveness and efficiency of its communications Rules. Our intent is to provide comments we believe will improve, enhance, and modernize this Rule set.

IPA Position

The IPA applauds FINRA in its continued efforts to keep current with the ever-changing environment in which its rules exist, are obeyed by FINRA members, and enforced by FINRA in routine examination of FINRA members. We believe that there are several

¹ Formed in 1985, the IPA provides the direct investment industry with effective national leadership, and today is the leading advocate for the inclusion of direct investments in a diversified investment portfolio. IPA members include direct investment product sponsors, FINRA member broker-dealer firms, and direct investment service providers.

areas in which modernization of the rules will facilitate compliance while permitting FINRA members to conduct business in today's environment and, most importantly, protect investors. Topics to be addressed in this letter include:

- I. The timing of review comments by FINRA staff to pre-use communications pursuant to FINRA Rule 2210(c)(2);
- II. The need for expedited review;
- III. The need for clarity and consistency in the review of written communications;
- IV. The need to reduce the time and expense of redrafting communications approved by FINRA;
- V. The need for communications rules that foster clarity and transparency for investors as intended; and,
- VI. Additional Considerations.

Analysis

I. The timing of review comments by FINRA staff to pre-use communications pursuant to FINRA Rule 2210(c)(2)

While not required to file communications 10 days prior to first use, many IPA members report that, as a matter of best practice, they indeed file prior to first use. Among those who do, the predominate experience is that FINRA has been unable to respond within the allotted 10 days prior to first use. We recognize that the sheer volume of offering material to be reviewed can be overwhelming. The IPA strongly believes that this challenge can be effectively solved, not by modification of the Rules alone, but by either: (i) adding staff to mirror the volume and/or (ii) exploring ways to increase the efficiency and timeliness of file processing. The IPA would like to offer to help explore solutions in the area of greater efficiencies. There are known sources that are working to address similar issues that arise from product complexities and inconsistencies that could help streamline the review process.

II. The need for expedited review

Many IPA members have observed that expedited review is available to some issuers but not others. The IPA seeks FINRA clarification of the distinction. Further, once the process is clarified, we would like to offer our help to develop alternative and/or supplemental methods to create greater efficiencies and thereby avoid the denial of an expedited review. One such area could be in the context of additional reviews. If, for example, the review for a product requires an additional review, then perhaps the answer is to provide an alternative *expedited* review.

III. The need for clarity and consistency in the review of written communications

The IPA respectfully requests that any modifications to the current Rules relating to communications with the public provide for greater consistency in the application and interpretation of such Rules. We see two situations that have become problematic over the years.

First, different regulators will often review the same communication with different results. For instance, there are times when the SEC reviews a communication with little or no substantive comments, but FINRA's review of that same communication may result in as many as two-dozen comments. Our view is not that one review is lacking in thoroughness or the other overly critical. We are merely saying that we would like to see more consistency. There have even been instances in which revisions required by one regulator have been diametrically opposed by another regulator. This disparity in reviews applying the same rules creates uncertainty and strains valuable resources of the regulatory community, the issuers, and broker-dealers alike. The IPA suggests the following industry solution for your consideration:

The IPA believes a FINRA automated filing process is in place to help facilitate the submission of offering and marketing communications, however, we believe the comment process remains un-automated. To advance consistency and efficiency in the comment process, the IPA suggests that an enhancement to an existing IPA member's platform could provide the ability for FINRA and SEC reviewers to enter their respective comments within a particular platform thereby facilitating the sharing by other FINRA and SEC reviewers together with the key sponsor contact on a "real-time" basis. These comments could be organized in such a way to allow auditors to filter by key comments/concerns so each could see what the other reviewers may have elected to do given similar content/situations (again by sector, structure, etc.). The infrastructure and platform which exists today provides its subscribers with: (i) offering information (PPM/prospectus; supplements, marketing materials, subscription agreements, 10Ks and

10Qs. The platform provides a program summary on the offering and a summary on key performance metrics on public Non-Traded REITs and BDCs), offering-level education and documentation; and (ii) a streamlined process to connect all parties (i.e. Broker-Dealers, Alternative Investment Product Sponsors, and their firm members). This platform could be expanded to help facilitate FINRA’s education and review process on Alternative Investments. Platform development enhancements would need to be established to provide Regulatory Agency access to the platform and to help facilitate these increased efficiencies in the review process.

Second, often an advertising or other communication piece, which has been cleared by one regulatory body on one occasion, has been found lacking upon a subsequent review by that same regulatory body. While we acknowledge the regulatory challenge, the impact on the issuer is significant and makes it difficult to be consistently compliant. For investors, this results in a lack of clarity and inhibits transparency. Rule modifications should take into account the potential for unintended opaqueness rather than increased transparency.

In the relatively new area of Non-Traded BDCs, the IPA enthusiastically makes its written education modules available to FINRA staff to help foster a deeper understanding of the distinctions between REITs and BDCs. Performance metrics, expenses and loads, and the application of NAV are typical points of confusion between these two products. We look forward to continued discussions in this area in addition to those that have already taken place between IPA members and FINRA.

IV. The need to reduce the time and expense of redrafting communications approved by FINRA

An Issuer’s need to redraft public communications previously approved by FINRA due to a “new” review of those same materials is problematic for the industry. The cost, expense, management effort, etc., in having to reprint brochures and other communication pieces – once approved but now the subject of “new changes” – is daunting. An issuer is often left not knowing what to do from one communication to the next. This uncertainty in the marketplace works an injustice to FINRA (in providing consistent guidance), and the end user investor who is left trying to understand conflicting disclosures from one advertisement to the next.

Amendments to the Rules should take into consideration the goal of FINRA staff being able to apply the Rules consistently and with relative uniformity across various issuers and products, and within a particular issuer’s structure. We believe that by amending the Rules to provide a clear roadmap for all stakeholders, FINRA will also increase the

efficiency of its staff and minimize the pressure to expand its personnel as discussed above.

V. The need for communications rules that foster clarity and transparency for investors as intended

- a) Inconsistency of examiner comments. Issuers are concerned with the inconsistency of examiner comments during a multi-stage review process. For example, a portion of a marketing brochure may not be "flagged" in a Round 1 comment letter from FINRA, but then is flagged in subsequent re-filings, even though the content was unchanged.
- b) Capitalization rates. Issuers would like further guidance on FINRA's preferred methodology for calculating capitalization rates for use in marketing material.
- c) Varying disclosures. Issuers believe that some simple marketing pieces (e.g., seminar invitations) require a potentially confusing amount of disclosure language.
- d) Photography Rules. Photography rules for Non-Listed REITs in the early stage of development may be too restrictive. The clearest way to demonstrate the type of assets that will be included in a fund is to use examples of assets from previous programs; however, current restrictions permit no more than 2-3 images be used. Issuers believe there should be reduced restrictions on photography, as long as properties being depicted have proper disclosure and are reflective of the intended investment objectives of the Fund.
- e) Press Releases. Press release rules are confusing and often inconsistent. Given today's media landscape and the flow of information, there could be less restrictive limits placed on press releases from the Fund sponsor. Sponsors should be accountable for the accuracy of information contained within press releases regardless of the source of the release (i.e. public comments).
- f) General Advertisement Rules. General advertisement rules are sometimes too restrictive. Sponsors should be able to advertise their products within a range of media outlets. Because these products can only be purchased through a financial advisor, it should be acceptable for the issuer to garner interest in a variety of mediums.

VII. Additional Considerations

We strongly agree with the Securities Industry and Financial Markets Association (“SIFMA”) in its letter to FINRA dated May 23, 2014 (the “SIFMA Letter”), that FINRA should “explore ways to make its staff-level guidance about its rules more consistent and transparent”. Specifically, the use of FAQ’s as currently utilized by the Securities and Exchange Commission (the “SEC”), is an excellent avenue by which FINRA could communicate with industry on a real time basis. This would be particularly helpful in instances such as the current status of NASD Notice to Members 99-55, which is more fully described in the SIFMA Letter. (See SIFMA Letter pages 3-4, Section I.C.)

Further we agree with SIFMA Letter that “public appearances” should constitute a fourth category of communications under revised FINRA Rule 2210 in order to better define what constitutes “public appearances” in the context of Rule 2210. (See SIFMA Letter, Page 4, Part II.A.1.). In the same context we agree with SIFMA’s proposal regarding “one click away” regarding certain information. We ask for greater clarity on this topic. (See SIFMA Letter, Page 4, Section II A.2.)

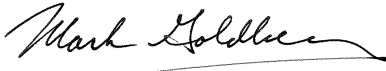
The IPA believes that guidance is needed regarding the relationship between FINRA’s new supervision rule (see Regulatory Notice 14-10) as it relates to the rules set addressed in RN 14-14. See SIFMA Letter, Page 9,B.2. (See SIMFA Letter, Page 9, Section B.2)

Finally, the IPA supports SIFMA’s position regarding the need for a “layered approach” to addressed in RN 14-14. By using the “layered approach” investors will be encouraged to read documents in electronic format, which will help keep current communications to a more reasonable length. (See SIFMA Letter, Pages 9-10, Section II.C.)

Conclusion

We submit our observations, comments and recommendations, as well as our several offers to assist further in these regards, in an effort to modernize and make more useful the current Rule set for which FINRA seeks industry comment. Thank you for this opportunity.

Respectfully submitted,



Mark Goldberg
Chairman of the Board of Directors

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Martin A. Hewitt,
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