INVESTMENT COMPANY INSTITUTE

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July 19, 2012

Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-9303

Re: FINRA Proposal to Increase Fees for Review of Advertising Material Filed with FINRA (File No. SR-FINRA-2012-028)

Dear Ms. Murphy:

The Investment Company Institute[1] appreciates the opportunity to comment on the Financial Industry Regulatory Authority's ("FINRA") proposal to increase the fees it charges for review of advertisements, sales literature, and other such material filed with or submitted to FINRA's Advertising Regulation Department.[2]

We oppose the proposed fee increases, and urge the Securities and Exchange Commission ("Commission" or "SEC") to suspend the rule change and institute proceedings to disapprove FINRA's proposal.[3] The proposed changes will substantially increase the costs associated with advertising for Institute members. Moreover, we do not believe FINRA has set forth a justifiable basis for such an increase. These points are discussed in more detail below. We also suggest modifications to the filings

[1] The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of $12.9 trillion and serve over 90 million shareholders.

[2] *See* FINRA Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Adjust Fees for Review of Advertising Material Filed with FINRA, 77 Fed. Reg. 38692 (June 28, 2012) ("Notice").

[3] Section 19(b)(3)(C) of the Securities Exchange Act of 1934 (the "Exchange Act") permits the Commission to temporarily suspend a proposed rule change by a self-regulatory organization that takes effect upon filing "if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title." The Commission must then institute proceedings to determine whether the proposed rule should be approved or disapproved. *See* Section 19(b)(2)(B) of the Exchange Act.

program and associated fee structure that could make the filing and review process more cost-efficient for both FINRA and its members.

Impact of the Fee Increases

FINRA's proposal would increase filing fees for the review of advertisements, sales literature, and other such material by an estimated 20 to 25 percent.[4] This represents a substantial fee increase for Institute members. By contrast, when FINRA (then the National Association of Securities Dealers, or NASD) last raised its advertising filing fees in 2005, it raised only the minimum fees for printed material and video or audio, but not the charges for expedited review, so the aggregate effect on filing costs was far smaller.[5] As discussed further below, despite best efforts to curb costs by minimizing expedited filings, many Institute members find it necessary as a business matter to request expedited review. The $100 per-filing increase for these filings, along with a doubling of the per-page cost for pages in excess of 10, is particularly problematic.

The impact of the proposed fee increase may be compounded by recent changes to FINRA's rules governing communications with the public.[6] These rule changes reorganize the categories of communications and, in doing so, appear to broaden the universe of materials that will have to be filed with FINRA. As a result of these rule changes, Institute members are predicting increases to their filing budgets , and therefore to FINRA's revenues, even absent the proposed fee increases.

FINRA's Inadequate Justification for the Fee Increases

The Notice purports to explain the purpose of and basis for the proposed fee increases. We believe these justifications are inadequate and, in some cases, illogical. For example, FINRA notes that its costs to administer the filings program has risen because the volume of filings has increased substantially – 19 percent for regular filings and 29 percent for expedited ones – since the last fee increase in 2005. But given that the fees apply *per filing,* with a surcharge for lengthier materials*,* these additional filings have resulted in FINRA's revenues increasing by approximately the same proportion. Thus, the increased volume does not explain the need for an increase in the per-filing cost. Indeed, if

[4] The minimum fees for regular filings and audio or video media would increase by 25 percent, with no change for pages in excess of 10; the minimum fee for expedited filings would increase by 20 percent with a 100 percent increase for pages in excess of 10. Our members estimate that, taken together, these changes would result in a 20 to 25 percent increase in their overall advertising filing costs.

[5] *See* Notice of Filing and Immediate Effectiveness of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Amendments to Section 13 of Schedule A to the NASD By-Laws (Review Charge for Advertisement, Sales Literature, and Other such Material Filed with or Submitted to NASD), 70 Fed. Reg. 4169 (Jan. 28, 2005).

[6] *See* FINRA Regulatory Notice 12-29, Communications with the Public, June 2012. The rule changes become effective on February 4, 2013.

anything we would expect to see increased efficiencies or economies of scale as a result this volume, leading to a *lower* cost to review each filing.

FINRA further indicates that since 2004 it has upgraded its technology and hired additional staff to maintain the program's effectiveness and ensure reasonable turnaround times, particularly given firms' increased use of technology to submit filings. This, likewise, is not a logical justification for fee increases. Technology should represent a one-time cost that *improves* a program's efficiency and cost-effectiveness. If FINRA is seeking to recoup the costs of technology (a justification not set forth in the Notice), a permanent, 20 to 25 percent fee increase seems extremely high. Further, as noted above, we would expect that the proportional increase in revenues associated with additional filings, including the additional filings that will result from the recently adopted rule change, would enable FINRA to hire additional staff to review those filings.

A more plausible explanation for the fee increase appears to be not the increased costs associated with the advertising filing program, but rather FINRA's overall budget shortfall, which was caused in part by declining overall regulatory fees and also by a decline in FINRA's investment returns.[7] Indeed, the Notice states that "[t]he proposed review fee also contributes to the general funding of FINRA's overall regulatory program and serves to ensure that FINRA is sufficiently capitalized to meet its regulatory responsibilities."[8]

We do not believe it is appropriate for members that participate in the filings program to subsidize the costs of FINRA's *other* regulatory efforts. More importantly, this approach is not consistent with statutory obligations. The Exchange Act requires that FINRA's rules "provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system which the association operates or controls."[9] While it may be true, as the Notice asserts, that "the proposed fee is equitably allocated among all members that file or submit advertisements, sales literature, and other such material,"[10] to the extent such fees are used to subsidize "FINRA's overall regulatory program," they are certainly not equitably allocated among all users of the overall program.

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[7] *See* Letter from the Chairman and CEO, 2011 Year in Review and Annual Report, available at http://www.finra.org/web/groups/corporate/@corp/@about/@ar/documents/corporate/p127312.pdf at 5, ("However, the broader economic downturn continues to negatively impact FINRA's funding, resulting in a loss for fiscal year 2011. Since the financial crisis, revenue from regulatory fees is down 10 percent—by nearly $50 million—compared to 2008 levels. While this is due primarily to declining industry revenues and transaction volumes, FINRA's investment returns are also lower than prior years given a more conservative investment allocation policy and overall market returns.")

[8] Notice at 4.

[9] Section 15A(b)(5).

[10] Notice at 4.

SEC rules clearly place the burden on FINRA to demonstrate that its proposal is in fact consistent with the Exchange Act:

> "[T]he self-regulatory organization must explain why the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder… A mere assertion that the proposed rule change is consistent with those requirements… is not sufficient. Instead, the description of the proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding."[11]

FINRA has not met this burden. As noted above, the use of the review fees to subsidize FINRA's overall regulatory program is inconsistent with Exchange Act requirements. Further, the Notice provides virtually no detail as to the purpose, operation, or effect of the fee increases, but instead simply states that the increases are necessary because of increased filings and technology upgrades. In the absence of sufficient justification for a 20 to 25 percent fee increase, the SEC should suspend, and ultimately disapprove, FINRA's proposal.

Suggested Modifications to the Filings Program

Regardless of whether the SEC suspends and/or ultimately disapproves the proposed fee increases, we recommend that FINRA consider the following modifications to the filings program and associated fee structure. These changes would make the filing and review process more cost-efficient for both FINRA and its members.

First, FINRA should consider establishing a guaranteed turnaround time such as 30 days for regular, non-expedited filings. This may seem counterintuitive as an attempt to reduce costs, but we believe doing so could reduce the number of expedited filings, which are presumably more resource-intensive because of the guaranteed turnaround time.[12] Institute members often file for expedited review even when they do not need a three-day turnaround, because they need their review completed by a date certain under the terms of their contracts with distribution platforms. If members could be guaranteed a completed review even within 30 days, they would likely make more filings in advance and file for expedited review less frequently.

In addition, FINRA could establish an intermediate level of review, with a longer but guaranteed turnaround time, at an intermediate price. For example, FINRA could accept filings with a

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[11] 17 C.F.R. §201.700(b)(3) ("Initiation of proceedings for SRO proposed rule changes," setting forth the standards under which the SEC should determine whether a proposed rule change should be approved or disapproved). *See also* Rule 19b-4(g) under the Exchange Act.

[12] The disproportionate fee increases for expedited filings further suggest that FINRA is seeking to reduce this type of filing.

guaranteed turnaround time of five days at a price of $250 per filing. Such an approach would likely draw filings that include quarter-end data and analysis, which are frequently filed on an expedited basis because members wish to use them more quickly than regular review typically permits. Thus, this approach would also reduce the number of three-day expedited filings.

Another method of reducing the overall number of filings, including expedited ones, is to revisit FINRA's approach to re-filing. We offer two suggestions in this regard. First, FINRA should commit to conducting a thorough review of each submission upon the first filing. Some Institute members have reported that, when they re-file a submission after addressing comments, they frequently receive new comments on material that has not changed since the first review, necessitating another filing (and another filing fee). If FINRA staff consistently made all substantive comments on the first review, submissions would typically be re-filed only once, if at all.

Second, by offering "conditional" clean comment letters when comments are minor and objectively verifiable, FINRA could render it unnecessary for firms to re-file submissions to obtain a "clean" comment letter.[13] For example, members often re-file a submission after responding to such minor comments as bolding or italicizing certain language. In such cases, FINRA could state in its initial comment letter that the submission "appears to be consistent with applicable standards, *provided that*" the enumerated minor changes are made. In conjunction with this approach, we would urge FINRA to provide guidance, perhaps through a regulatory notice, clarifying that another FINRA member may use such sales material without principal pre-use approval if it can reasonably determine that the creator of the material has made the changes required by the "conditional" letter.[14]

Finally, FINRA should consider modifying its fee structure or filing process for certain types of short communications that are used in electronic media. For example, many funds use "banner ads" on the internet, post on Facebook, and "tweet" on Twitter. These communications are extremely limited in size and should not be cumbersome for FINRA staff to review. We recommend that FINRA either 1) permit these types of communications to be filed in a batch so that multiple communications are reviewed as a single filing with a single filing fee,[15] or 2) substantially reduce the fees associated with review of each such communication. Such a change would be consistent with the goal of allocating costs more equitably across users of the filings program.

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[13] A "clean" comment letter is one that states that the material "appears to be consistent with applicable standards." Such letters are typically required by third party fund distributors so that they may utilize sales material in reliance on the exemption from principal pre-use approval requirements set forth in NASD Rule 2210(b)(1)(D).

[14] Such guidance would state that the exemption set forth in NASD Rule 2210(b)(1)(D), and preserved in its successor, FINRA Rule 2210(b)(1)(C) (which will become effective on February 4, 2013), will apply in this situation.

[15] We understand senior FINRA staff have indicated publicly that member firms have been permitted to file all the tweets for a single day as one filing with one fee. We recommend that FINRA expand this approach to encompass similar short postings, and issue written guidance to members clarifying its policy.

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The Institute appreciates the SEC's attention to our comments. If you have any questions, or would like to discuss any of the matters in this letter, please contact me at 202/218-3563 or Mara Shreck at 202/326-5923.

Sincerely,

/s/ Dorothy Donohue

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Deputy General Counsel – Securities Regulation

cc: Thomas Selman, Executive Vice President
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