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NATO PARLIMENTARY ASSEMBLY

May 20, 2024

Mr. Robert W. Cook
President & Chief Executive Officer
Financial Industry Regulatory Authority
1735 K Street NW
Washington, D.C. 20006

Dear Mr. Cook:

The Financial Industry Regulatory Authority ("FINRA") has recently been the subject of scrutiny, including from the House Financial Services Committee, regarding, the propriety of its enforcement activities and its role as the plan processor for the Consolidated Audit Trail ("CAT"), among other things.[1] I write to express my concerns about another troubling trend at FINRA—its near complete deference to Securities and Exchange Commission ("SEC") Chair Gary Gensler on several of his radical, costly, and (in some cases) duplicative policy initiatives that threaten to upend the brokerage industry and today's favorable market environment for retail investors.

As a self-regulatory organization ("SRO") for the securities industry, FINRA can play an important role in the development of appropriate regulatory policy, both by using its own authorities and working alongside the SEC to promote the interests of the investing public *and* the securities industry. However, over the past three years, FINRA has stood idly by as Chair Gensler has advanced policies that threaten to harm market participants, including broker-dealers and their customers.

For example, FINRA has had a Best Execution rule on its books for decades, which its staff has decades of experience enforcing. There is no evidence that the rule—or FINRA's ability to enforce it—is inadequate. Still, without adequate justification, the SEC proposed its own Best Execution Rule.

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[1] *See* House Financial Services Subcommittee Chairman Ann Wagner, "Examining the Agenda of Regulators, SROs, and Standards-Setters for Accounting, Auditing" (Dec. 13, 2023), https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=409078 ("I and many of my colleagues are concerned that FINRA has strayed far from its original purpose. It has devolved into an overzealous and unaccountable quasi-governmental entity that looks and acts a lot more like the SEC than the member-driven SRO that Congress originally established. As an SRO, we would also expect to see increased formal engagement from FINRA on issues critical to the brokerage industry. These include but are not limited to: the SEC's proposed Regulation Best Interest, a rule which FINRA has had on its books and effectively enforced for decades and the so-called predictive data analytics rule. *See also Alpine Securities Corp. v. FINRA*, No. 1:23-cv-01506-BAH (D.C. Cir. July 5, 2023), *available at:* https://www.cadc.uscourts.gov/internet/orders.nsf/5EBC88B3F77E7F82852589E30054610D/%24file/23-5129LDSN2.pdf.

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Rather than highlighting clear problems with this duplicative and burdensome proposal, FINRA submitted a two-page comment letter concluding that it "will take appropriate steps to address . . . concerns by adjusting our best execution rules and guidance accordingly."[2] In doing so, FINRA appears to have expressly acquiesced to Chair Gensler's unnecessary and harmful regulatory approach.

Additionally, although the SEC and FINRA already have rules in place governing broker-dealers' activities and communications with their customers, Chair Gensler has decided to propose yet another rule imposing what is effectively a heightened fiduciary duty on broker-dealers whenever they use any technology to communicate with their customers. The SEC's so-called "predictive data analytics" ("PDA") proposal would redefine "conflict of interest" and require brokerages to "eliminate" or "neutralize," rather than disclose, all potential conflicts in any investor interaction that involves technology, even when no recommendation or personalized investment advice is offered.[3] Retail investors, Members of Congress, state treasurers, academics, broker-dealers, investment advisers, industry associations, and other commenters have widely criticized this rule, pointing out that it would likely stifle innovation and hurt investors. Recognizing clear problems with the rule, even Chair Gensler has stated that he asked SEC staff to consider seeking further comment on, or modifications to, the rule.[4] However, FINRA has neither provided meaningful, formal public input on the proposal, nor has it submitted a comment letter explaining whether a new rule is necessary in light of existing FINRA and SEC rules.

Equally as concerning, FINRA has actively supported SEC proposals that have been widely criticized as overreaching and harmful to market participants, including its own members. For example, FINRA submitted a comment letter in support of the SEC's "dealer definition" proposal, which was met with overwhelming opposition from investors, broker-dealers, asset managers, investment advisers, and even academics and lawmakers on both sides of the aisle.[5] Indeed, the SEC's misguided final rule is now subject to two litigation challenges.

It is troubling that FINRA has allowed the SEC to run roughshod over the securities industry and American investors without providing meaningful feedback on several damaging rulemaking initiatives and the illegal CAT surveillance program.

Please respond to the following questions and informational requests by June 20th, 2024:

1. Please describe the process at FINRA for submitting comment letters to the SEC on rulemakings and other policy matters.

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[2] Letter from Marcia E. Asquith to Vanessa Countryman, Regulation Best Execution (Release No. 34-96496; File No. S7-32-22) (Feb. 7, 2023), https://www.sec.gov/comments/s7-32-22/s73222-20156788-324933.pdf.

[3] Press Release: SEC Proposes New Requirements to Address Risks to Investors From Conflicts of Interest Associated With the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers. July 26, 2023. *See https://www.sec.gov/news/press-release/2023-140.*

[4] Statement of Chair Gensler, "Jack Bogle, Haystacks, and Putting the Interest of the Clients First", Prepared Remarks Before the 2024 Conference on Emerging Trends in Asset Management (May 16, 2024), *available at* https://www.sec.gov/news/speech/gensler-etam-051624.

[5] Letter from Marcia E. Asquith to Vanessa Countryman, "Comment letter on Securities Exchange Act Release No. 94524 – Further Definition of "As a Part of a Regular Business" in the Definition of Dealer and Government Securities Dealer" *See* https://www.finra.org/sites/default/files/2022-06/FINRA-Comment-Letter-06-23-22-SEC-Dealer-Definition.pdf.

2. Why has FINRA declined to submit comment letters on the SEC's order competition proposal, PDA proposal, and other SEC rules (proposed or adopted) that apply to broker-dealers?

3. Does FINRA consult with its board and members on SEC rulemakings? If so, does FINRA convey that feedback in writing to the SEC? If not, why not?

4. Please describe in detail FINRA's concerns with the PDA proposal and proposed Regulation Best Execution rule. If in the alternative, FINRA is generally supportive of these rules, please provide rationales as to why and whether FINRA's industry and public members agree with these determinations as well as internal pushback it has received.

Sincerely,

Ann Wagner
Chairman
Subcommittee on Capital Markets
House Committee on Financial Services