July 14, 2017

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

Re: Regulatory Notice 17-14: FINRA Rules Impacting Capital Formation

Dear Ms. Piorko Mitchell,

I am writing to you today on behalf of the Third-Party Marketer's Association ("3PM" or "Association") to express the thoughts and concerns of our association's members based on the draft provisions proposed in FINRA Regulatory Notice 17-14. While it is our goal to respond to requests for comments in a manner beneficial to the majority of 3PM's members, it should be noted that the views of the commentators involved in preparing this response may not be representative of the views of the entirety of the 3PM membership or our industry group in general.

3PM believes that the FINRA360 initiation is a prudent step to ensure that regulations remain relevant in a changing environment. We applaud the steps FINRA is taking in this regard to turn the microscope inward. As capital raising agents for private funds, commonly referred to as Placement Agents or Third-Party Marketers, the precision and efficacy of the rules impacting capital formation are very important to our members and to the growth of our industry. Placement agents / third party marketers are a critical component of the industry, providing small investment firms with the ability to raise capital and diversify their client base and subsequently their revenue streams. In general, these small investment management organizations lack the resources and opportunities of the industry's largest investment management firms. It is the existence of placement agents / third party marketers that has allowed small investment firms to grow and thrive and eventually compete with their larger brethren. Given this backdrop, we appreciate the opportunity to be heard in regard to the issues outlined in RN 17-14 as well as some not mentioned in the Notice which we will address below.

While 3PM's members operate under a varied set of business models, approximately two-thirds of the Association's 3PM members engage in the business of referring private offerings to institutional investors. It is for this subset of our membership for which we will be commenting to this Regulatory Notice.

General Comments Regarding Rulemaking

Given the complex nature of the financial industry and the fact that many constituents of this industry are governed by multiple regulators, 3PM believes that there are a few basic tenets that FINRA should keep in mind when introducing new rules and or amending existing ones.

- ***Provide Definitions for Defined Terms***

  First, given that regulation often crosses several regulatory authorities, 3PM believes that it is essential that FINRA include definitions of defined terms in the footnotes of the actual rule text as well as in the Regulatory Notices issued for new rules and amendments to existing ones. While having a defined term will help individuals better understand FINRA's rulemaking, we believe this step is even more critical when it comes to terms that are defined by the SEC or another regulatory body.

  As an example, FINRA's Rule 5123 – Private Placement of Securities describes the filing requirements for private placement memorandums. The Rule goes on to define private placements that are exempt from the requirements of the Rule. Exemption 1 (J) states that accredited investors described in Securities Act Rule 501 (a)(1), (2), (3) or (7).

  At first a reader may believe that all private placements sold to accredited investors are exempt from filing. Review of Securities Act Rule 501 (a) shows us that only offerings sold to Accredited Investors that are *entities* are exempt from the filing requirements. If an offering is made to Accredited Investors who are natural persons, there is a private placement memorandum filing requirement.

  While FINRA does cite the parts of the Securities Act Rule that are exempt, much of the industry believes that the term Accredited Investor includes an individual with income that exceeds $200,000 for two of the past years or an individual with a net worth greater than $1 million.

  Furthermore, as most firms in our industry are small, these firms must either interpret the rules internally or hire expensive legal and compliance support. Simply providing clear and consistent definitions and placing them in the footnotes where they are utilized would provide significant clarity and efficiency.

  The omission of a definition in this case has led to the following:

  - Firms that have read the rule and assumed that all offerings to accredited investors are exempt

- Firms must take the time to research what the rule is referring to which means going back to the Securities Act and reviewing the full definition of an Accredited Investor

While large firms with full-time compliance staffs may not find issue with this, small firms whose CCOs wear multiple hats, need a more time efficient way to understand the rules they must abide. Simply including definitions in the footnotes of the Rule would help small firms to be better able to comply with the rules they must follow.

Furthermore, while FINRA does provide links to their own rules when viewing Rule text electronically, it would also be helpful to include hyperlinks to definitions of SEC Rules as well. This would also help to facilitate the true understanding of a rule and help to make compliance more efficient and effective.

- ***Codify "No Action" Letters***

When reviewing some of FINRA's rules, the entire scope of the requirements does not become clear unless one reads the No-Action letters associated with the rule. The Communication with the Public Rule (FINRA Rule 2210) is a perfect example of this.

It is our belief that when trying to comply with a rule, that FINRA members should be able to understand such requirements simply by reading the particular rule. This however is not the case.

As such, any requirements pertaining to a specific rule should be codified into that body of the rule. At a minimum, each rule should contain a list of applicable No-Action Letters that should be reviewed or could be relevant to the comprehensive understanding of that rule. This action would serve to eliminate confusion as to what the specific requirements of a rule are and would help to eliminate non-compliance by omission from firms that are unaware of the requirements contained in No Action Letters, and have unknowingly misinterpreted the totality of the rule. We believe that this further complicates a rule as important as the Communications with the Public Rule and leads to non-compliance by some firms.

Streamlining the rule set would go a long way in promoting consistency across the industry and allow for universal adherence to rules, that in general, have been promulgated to protect investors.

- ***Provide Guidance and Interpretations***

3PM's members are constantly seeking better guidance and clearer interpretations of the language written in the industry's rule sets. This is an inevitable result of rules being written to apply broadly to the constituents of a regulator or business activity. Very often our members struggle to try to understand how a rule applies to our business model. This exercise can be equated with trying to fit a square peg in a round hole.

In general, it would be helpful if FINRA and other regulators could provide more guidance when new rules are issued or existing rules are amended as to how a rule applies specifically to a particular business model. Identifying an internal resource at FINRA, who could work with our industry when developing rules applicable to capital raising or issuing guidance would also be a helpful step. Typically, most of the guidance provided is extremely broad. This leaves significant room for speculation and varied opinions as to what is expected from members.

In this regard, we believe that FINRA should follow the lead of the MSRB that has recently issued guidance to Municipal Advisor Solicitors, recognizing that while some rules are easily applied to our industry, given the intricacies of our business model, sometime specific guidance is required.

Furthermore, we believe that it would be beneficial to all interested parties for regulators to include examples of the application of specific rules to a variety of business activities to facilitate interpretation of the rule. In addition, all rules should include references to any relevant No Action Letters that exist. This would assist members in understanding the full implications of the rule.

3PM has also chosen to reply to some of the specific questions to which FINRA requested comment. These responses are included below.

5. Are there other FINRA rules not identified above that impact the capital-raising process? If so what has been your experience with these rules?

Effective and compliant communication is at the crux of everything our members do. It is at the core of the capital raising process. As such, we do not believe a letter regarding the capital formation process would be complete without comment on Rule 2210.

The Communication with the Public Rule is a relatively new rule in the FINRA rule book. Since undergoing a major revision in 2012, the rule has received several updates and has undergone a "retrospective rule review". While we appreciate FINRA's attempt to get the rule "right", we firmly believe that room for improvement remains.

<u>Content Standards</u>

Rule 2210 (d) 1 (A) states that "All member communications must be based on principles of fair dealing and good faith, must be fair and balanced, and must provide a sound basis for evaluating the facts regarding any particular security or type of security, industry, or service. No member may omit any material fact or qualification if the omission, considering the context of the material presented, would cause the communications to be misleading."

While a "full disclosure" may be required when working with retail investors, we would argue that this is one other section of the Communication with the Public rule that should be segregated with different treatment of "retail" and institutional investors.

When working with Institutional investors, our members work either with staff members, generally referred to as research analysts, whose role is to evaluate investments on behalf of their employer or with professional consultants who make their living evaluating private fund investments on behalf of their clients. As such, the professionals we are offering product to are extremely knowledgeable about the investments they review.

Given this level of sophistication, it is not appropriate to provide the same disclosure to an experienced professional as to a lay person with little to no investment experience. Section (E) of Rule 2210 (d) 1 includes language that "Members must consider the nature of the audience to which the communication will be directed and must provide details and explanation appropriate to the audience." We would argue that this should be interpreted to mean that in some cases it is appropriate to remove some basic language that would not be "appropriate" to provide to an institutional investor. This however, is not what has been conveyed by the Advertising Department of FINRA.

Compliance with this section of the rule, requires marketing materials to contain disclosures which are "fair and balanced" and "may not omit any material fact." As a result, it is not uncommon to see disclosures that range in length from 2-6 pages for a one-page document. We believe that this is not the right course of action when dealing with an institutional investor for the following reasons:

- Most people seeing a long disclosure will immediately skip the disclosure and jump right into the materials being presented. This causes these potential investors to miss important and relevant information hidden in the middle of pages of unnecessary words, doing the opposite of what a disclosure is supposed to do.

- Much of the information contained in a lengthy disclosure is a regurgitation of information contained in the PPM which an institutional investor will review in depth if considering an investment in the issue. Cluttering marketing material with this information only distracts from creating interest in the security at hand and remaining focused on the key information about the offering.

- Institutional investors are investment professionals which are required to have the requisite experience necessary to deal with the types of investments they evaluate, as such many of the basic risk information contained in the PPM as well as in the disclosure is information which they already are aware of and serves no purpose.

While our members are not averse to providing important and relevant disclosures, we believe the current approach is burdensome and provides little if any benefit to potential institutional investors. Given this we believe that the rule should be further reviewed to differentiate between investor types for the general content standards of this rule.

Given there is no definition of "fair and balanced", we believe that FINRA's interpretation of this term should also be revised to consider the prior knowledge and sophistication of an institutional investors and member firms should be permitted to either reference or link to the PPM as appropriate.

Rule 2210 (d) 1 (F) deals with projected performance. Please note that the information provided below contains summary information from 3PM's comment letter in response to RN 17-06 which has been attached to this comment letter in its entirety.

FINRA Rule 2210 (d) 1 (F) provides that communications may not predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast. Regulatory Notice 17-06 goes on to state that "The general prohibition against performance projections is largely intended to protect ***retail*** investors from performance projections of individual investments, which often prove to be spurious, inaccurate or otherwise misleading".

RN 17-06 proposed an exception to this prohibition of projections for a hypothetical investment planning illustration. 3PM believes that the exception proposed by RN 17-06 is warranted, but requests further analysis to consider an exception to the prohibition of projections when offering private securities to institutional investors. 3PM believes that an exception of this nature is consistent with the spirit of the proposed amendment as well as with prevailing guidance.

3PMs exist, in part, to help level the playing field – i.e. to assist investment managers without internal sales and marketing resources to be able to compete with those that do, facilitate access to capital on a broader scale and to provide small managers and/or strategies newer to the market with access to a broader investor base. Our issue however, is that we ourselves are subject to an uneven playing field. Internal marketing teams at investment management firms do not fall under the purview of FINRA regulations.

Regulation that creates inconsistency, or provides one group with an advantage over another is harmful to 3PMs. It is also harmful to our investment manager clients, institutional investors and their constituents which include: pensioners, grant recipients, universities, charitable organizations, etc.

Should the unlevel playing field persist, 3PMs eventually will be forced to choose between exiting businesses that require more resources for a substantially lower probability of earning revenues or putting up with the disadvantages created by the regulation that is supposed to promote a fair market place for all. If investment managers who relied on 3PMs were to lose access to our services, taking many small and mid-sized managers out of consideration by institutions, the largest and most well-funded investment management firms who can afford in house resources and sizeable infrastructures would hold a monopoly on asset gathering.

To an extent this is already the case, with larger investment managers holding a disproportionate share of institutional assets.

What we find most interesting about projected performance, is that it is not prohibited in Rule 221 of the CAB rule-set. While CAB communications are to institutional investors only, we see no reason why Rule 2210 cannot incorporate the same approach when materials are being presented to institutional investors only. It seems counter-intuitive that a member must formally “opt-in” to the CAB ruleset to be able to utilize this rule. Furthermore, as discussed below, there are some legitimate reasons, why more of 3PM’s members have not become part of the CAB ruleset.

8. **As currently designed, are the eligibility requirements for the CAB rules over or under inclusive in any respect? What changes, if any, to these requirements should be considered? Are the requirements applicable to CABs appropriately tailored to their business activities? Should any changes to these requirements be considered?**

   3PM has been very vocal throughout the initiation of the CAB Ruleset and has participated not only by writing letters in response to the request for comments but has also worked closely with a variety of FINRA’s staff to provide insight to our business model as well as to the rules that primarily impact our business activities.

   For your reference, we have attached 3PM’s previous responses to requests for comment for RN 14-09 and SR-FINRA-2015-054.

   The CAB ruleset should be a great opportunity for small member firms that fit the CAB definition to alleviate some of the regulatory burden facing them by addressing some of the more onerous rules and requirements that are not relevant to our business practices. It is, however, our opinion that there are still some fundamental issues with CAB that either prevent our members from converting to a CAB or concern from our members that the ruleset does not provide enough relief to justify the change.

   We believe that the rule set falls short in the following ways:

   - Several of 3PM’s members that fall under CAB, are also registered with the MSRB as a Municipal Advisors (“MA”). While the CAB ruleset does offer some relief to these firms, many of the areas where relief has been granted has been reversed by the MSRB’s rules for MAs. An example of one such rule is business continuity. While the new CAB ruleset removed this

this requirement for firms opting into the CAB constituency, the MSRB has made BCP a requirement of MAs, reversing any relief provided by CAB. There are other such instances that exist and we would be happy to discuss this with FINRA in more detail.

At one point, members of 3PM addresses this issue with the MSRB and were told that because MAs were fiduciaries, while broker dealers were not, the MSRB would not consider any relaxation of their rules for MAs who were also CABs under FINRA.

Recently however, the MSRB published guidance for Solicitor Municipal Advisors ("SMAs") which clarified the point that SMAs are not fiduciaries. Given this clarification, we believe the timing is right for FINRA to approach the MSRB on this issue and to assess whether the MSRB may be open for extending some of the regulatory relief provided by CAB to SMAs.

- Several of our members have been told by FINRA that if they sponsor other placement agents or third-party marketers under their firm's membership that they are ineligible to convert to the CAB ruleset. We find this stance to be inconsistent with the original purpose of CAB.

  While we understand that if a CAB were to sponsor a firm that engages in business activities outside of the scope of CAB that the firm would be ineligible to convert to CAB. We do not however, understand why if a CAB firm were to sponsor other CAB firms who meet the ruleset's definition, why such a firm would be ineligible to be a CAB.

  3PM requests clarification on this point and would appreciate some direction to the area in the ruleset that outlines these rules.

- As discussed in several of the comment letters, from 3PM as well as other industry constituents, we do not believe that the rule-set went far enough in alleviating the regulatory burden for members of the CAB universe. While we understand that many of the rules we are referring to are outside of FINRA's purview, these rules are still extremely burdensome from both a financial and resources perspective. As such, we would like to ask FINRA to assist the CAB constituency in discussions with outside authorities to assist us in eliminating irrelevant requirements regardless of where they are initiated. We also thing that there are still some areas within FINRA's control where additional relief can be granted. The items below list both FINRA rules as well as other agency rules that need to be re-evaluated within the context of CAB:

  FINRA Rules:

  - ***Communications with the Public*** - 3PM proposes that FINRA revise Rule 2210 and specifically the general content standards to meet the realities of representing private issuers. Proposed modifications should include a realistic approach to setting fair and balanced content standards for communications and marketing materials as well as an expansion of the exemptive provisions for our new definition of "**Qualified Investors**", especially those that are professional allocators or use the services of investment consultants.

- ***Suitability -*** 3PM is generally in agreement with Rule 211, however, we still believe that the rule as proposed fails by requiring the suitability analyses to be performed before any recommendation is made. While we agree that a CAB must reasonably believe that an investment is suitable for an investor before making a recommendation, we believe that the rule does not recognize that the process of diligence in our business is ongoing, in many cases can take several months to several years before an investment decision is made, and often does not, and should not, conclude until the deal is closed. We believe incorporation of this process is essential to Investor protections, and to the success of the rulemaking regime for CABs. We continue to believe that Rule 211 should emphasize this point and encourage RRs to periodically review their suitability analysis throughout the offering process, but no less frequently than once before the subscription agreement or relevant contract is signed and due diligence is as complete as it can be at that particular time. While this approach should apply to all recommendations, it is especially relevant in the case of the offering of private placements and other complex products.

  Most 3PMs are raising capital for Reg. D products and do so by approaching an "agent" who represents the institutional investor looking to allocate capital. As such, most of the communication that takes place is between the "agent" and the 3PM. It is not unusual for there to be little or no communication between the 3PM and the end investor. Given this, there is often some information regarding the institutional investor which may not be obtainable due to this construct. 3PMs are not making recommendations in the traditional definition of the term, and therefore, as an example, will not have insight into the overall composition of the institutional investor's portfolio – as a retail broker would have over one of their accounts. Accordingly, we believe the rules should address some type of minimum compliance that would be appropriate in these situations. We further suggest that a demonstrable best efforts basis may be a satisfactory alternative in such instances.

- ***Supplemental Focus Information -*** 3PM does not agree with FINRA proposal to subject CABs to FINRA Rule 452. While we understand that FINRA does not have the authority to set net capital rules, we do believe that FINRA does have the ability to improve the information requests made in the SSOI. 3PM also believes that the information FINRA receives from these forms are inaccurate due to the wide array of methods, timelines and fee structures applicable to CABs offering private placements.

The SSOI was clearly written under the assumption that there is consistency in the method, timeframe and fee structures that applies to both private placements and publicly traded securities. This is simply an inaccurate assumption. When FINRA was made aware of the inaccuracies, the response was that they understood the shortcomings of the reports, and it was suggested that firms use their best efforts to interpret the questions. While 3PM is not against enhanced reporting for gleaning new insights in to a firm's financial condition, we do not believe that it is acceptable for FINRA to issue reporting requirements that do not apply to a constituency or that may distort the findings because of the interpretation of an unclearly written question. As such we think that FINRA should revisit the SSOI requirements for CABs in their current form and consider requesting appropriate information from our constituency. To accomplish this task, we suggest convening a working committee of CABs to help write appropriate questions that accurately reflect our business model.

- ***Required Registrations -*** 3PM proposes that FINRA waive the Series 99 examination requirement for small firms who have a registered principal assigned to the covered functions outlined in the rule. We believe that the requirements of Rule 1230 should only apply to unregistered individuals handling any of the covered functions outlined.

Non-FINRA Rules:

- ***AML*** - 3PM recognizes that all financial institutions play an important role in the detection and prevention of money laundering. While we believe that extending the independent test requirement from annually to bi-annually is appropriate for LCFBs, we also suggest that FINRA consider amending the Customer ID Program (CIP) requirements to conform to the business of a LCFB. Specifically, 3PM recommends that LCFB's should be required to implement a CIP as follows:
    - For all Issuers and Intermediaries with which the LCFB does business
    - For all Investors when there is no Intermediary involved.

- ***PCAOB Audits*** - The rule requiring PCAOB audits was initially intended to cover firms working with public entities, not small, broker dealers like those that are covered by the CAB rule set. Furthermore, the PCAOB interim inspection program findings simply are not relevant to CABs, and would therefore would not be found

- ***SIPC fees*** - In SIPC's own words, their mission directly relates to protecting customer assets. CAB firms do not include any broker or dealer that carries or maintains customer accounts, holds or handles customers' funds or securities, accepts orders from customers to purchase or sell securities as a principal or as an agent for the customer". As such, CABs are continually paying assessments on their revenues in to the SIPC fund to protect investors that will never require coverage from such an event from a CAB. This rule is not properly aligned with the business of CABs and creates significant expenses to CABs without providing any tangible benefit. CABs are paying into a fund that reimburses investors for somebody else's wrongdoing which is an unfair practice.

Thank you for the opportunity to share our thoughts with you regarding this proposal. Please feel free to reach out to me at (585) 364-3065 or by email at donna.dimaria@tesseracapital.com should you have any questions or require additional information pertaining to the proposed amendments to the Communication with the Public rule.

Regards,

<<Donna DiMaria>>

Donna DiMaria
Third Party Marketers Association
Chairman of the Board of Directors and
Chair of the 3PM Regulatory Committee

About the Third-Party Marketer's Association (3PM)

3PM is an association of independent, global outsourced sales and marketing firms that support the alternative and traditional investment management industry worldwide.

3PM Members are properly registered and licensed organizations consisting of experienced sales and marketing professionals who come together to establish and encourage best practices, share knowledge and resources, enhance professional standards, build industry awareness and generally support the growth and development of professional outsourced investment management marketing.

Members of 3PM benefit from:

- Regulatory Advocacy
- Best Practices and Compliance
- Industry Recognition and Awareness
- Manager Introductions
- Educational Programs
- Online Presence
- Conferences and Networking
- Service Provider Discounts

3PM began in 1998 with seven member-firms. Today, the Association has more than 35 member organizations, as well as significant number of prominent firms that support 3PMs and participate in the Association as 3PPs, Industry Associates, Member Benefit Providers, Media Partners and Association Partners.

A typical 3PM member-firm consists of two to five highly experienced investment management marketing executives with, on-average, more than 10 years' experience selling financial products in the institutional and/or retail distribution channels. The Association's members run the gamut in products they represent. Members work with traditional separate account managers covering strategies such as domestic and international equity, as well as fixed income. In the alternative arena, members represent fund products such as mutual funds, hedge funds, private equity, fund of funds and real estate. Some firms' business is comprised of both types of product offerings. Most 3PM's members are currently registered with FINRA or affiliated with a broker-dealer that is a member of FINRA.

For more information on 3PM or its members, please visit www.3pm.org.