INVESTMENT COMPANY INSTITUTE

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July 9, 2019

Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: *Covered Investment Fund Research Reports (File No. S7-11-18)*

Dear Mr. Fields:

The Investment Company Institute[1] supports the SEC's covered investment fund research report proposal,[2] which would facilitate broker-dealers publishing research reports about mutual funds, ETFs, registered closed-end funds, and business development companies (BDCs).[3] The proposal would do so by extending the safe harbor currently available to broker dealers' research reports about operating companies to research reports about funds. This initiative, if carefully executed, will put operating company and fund research reports on more equal regulatory footing and provide investors with another useful source of information about funds.

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[1] The Investment Company Institute (ICI) is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's members manage total assets of US$22.0 trillion in the United States, serving more than 100 million US shareholders, and US$7.6 trillion in assets in other jurisdictions. ICI carries out its international work through ICI Global, with offices in London, Hong Kong, and Washington, DC.

[2] *Covered Investment Fund Research Reports*, SEC Release No. 33-10498, 83 Fed. Reg. 26788 (June 8, 2018)("Proposing Release"), available at www.gpo.gov/fdsys/pkg/FR-2018-06-08/pdf/2018-11497.pdf.

[3] While the proposal also would extend the safe harbor to other pooled investment vehicles, our comments are limited to mutual funds, ETFs, registered closed-end funds, and BDCs (hereinafter referred to as "funds").

I. Background and Executive Summary

Rule 139 under the Securities Act currently provides a safe harbor for the publication or distribution of broker-dealer research reports concerning one or more issuers.[4] This safe harbor currently is not available for a broker-dealer's research reports pertaining to funds or their securities.

The Fair Access to Investment Research Act of 2017 ("FAIR Act") directs the SEC to amend its rules to extend the current safe harbor available under Rule 139 to a "covered investment fund research report."[5] To fulfill this statutory mandate, the SEC has proposed Rule 139b, which would establish a safe harbor for unaffiliated broker-dealers' publication or distribution of covered investment fund research reports.

The proposed rule is modeled after, and generally tracks, Rule 139.[6] While we support the SEC's general approach of seeking overall regulatory parity between operating companies and funds, we urge the SEC to tailor Rule 139b to account for differences between these issuers. In three critical respects, proposed Rule 139b imposes conditions in ways that will severely undermine broker-dealers' ability to produce fund research reports.

First, *no* broker-dealer would be permitted to publish research reports about small funds (*i.e.*, those with less than $75 million in market value) or new funds (*i.e.*, those that have not been subject to the SEC's filing requirements for at least 12 calendar months). The SEC estimates that this size threshold

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[4] Rule 139 includes conditions that, if satisfied, provide that a broker-dealer's publication or distribution of a research report about an issuer will be deemed for purposes of Sections 2(a)(10) and 5(c) of the Securities Act not to constitute an offer for sale or offer to sell a security that is the subject of an offering pursuant to a registration statement, even if the broker-dealer is participating or may participate in the registered offering of the issuer's securities. Therefore, a broker-dealer's publication or distribution of a research report in reliance on Rule 139 would not be deemed to constitute an offer that otherwise could be a non-conforming prospectus in violation of Section 5 of the Securities Act.

[5] The statute defines "covered investment fund" to include registered investment companies, business development companies, and certain commodity- or currency-based trusts or funds. The statute defines "covered investment fund research report" as "a research report published or distributed by a broker or dealer about a covered investment fund or any securities issued by the covered investment fund, but does not include a research report to the extent that the research report is published or distributed by the covered investment fund or any affiliate of the covered investment fund, or any research report published or distributed by any broker or dealer that is an investment adviser (or an affiliated person of an investment adviser) for the covered investment fund."

[6] The SEC also proposed (i) new Rule 24b-4 under the Investment Company Act, which would exclude a covered investment fund research report from the Investment Company Act's Section 24(b) filing requirements, except to the extent that such report is otherwise *not* subject to the content standards in self-regulatory organization (SRO) rules related to research reports, and (ii) a conforming amendment to Rule 101 of Regulation M. We have no comments on those parts of the proposal.

would eliminate approximately one-third of all covered investment funds (and over 40 percent of ETFs, exchange-traded products, and BDCs) from this coverage.

Second, most broker-dealers will be hard-pressed to establish that they publish fund research reports "in the regular course" of their business, a necessary condition to rely on the safe harbor.

Third, some of the conditions that the SEC would impose on fund industry reports are predicated on concerns about "market conditioning" (or "gun-jumping") that are inapt for funds.

We offer recommendations below for crafting these conditions in ways that would further advance Congress's intent of fostering fund research and analysis. Specifically, final Rule 139b:

- should not exclude new and small funds from research report coverage;

- should not require that broker-dealers publish fund research reports "in the regular course" of their business—instead, broker-dealers should adopt and implement policies and procedures reasonably designed to achieve compliance with Rule 139b and any related rules; and

- should not impose overbroad market conditioning-influenced conditions—instead, any conditions should apply only to funds or their shares prior to effectiveness of their registration.

We conclude by addressing other key questions posed in the Proposing Release, expressing our support for (i) the sufficiency of the proposed rule's provisions for mitigating potential conflicts of interest, and (ii) requiring standardized presentation of fund-specific performance information in any research report relying on the safe harbor.

II. Comments on Proposed Rule 139b

In this section, we recommend changes to the proposed rule's conditions related to: (i) the reporting history and size of funds covered in fund-specific research reports; (ii) broker-dealer qualification; and (iii) industry reports.

A. The Proposed Reporting History and Size Requirements Are Unnecessary for Funds

With respect to fund-specific research reports, the fund covered in the report (i) must have been subject to relevant requirements under the Investment Company Act and/or the Exchange Act to file certain periodic reports for at least 12 calendar months prior to a broker-dealer's reliance on the rule, and must have timely filed all required reports for the immediately preceding 12 months, and (ii) must satisfy a

minimum public market value requirement.[7] The SEC imposes similar limitations on issuers under Rule 139.

The purpose of the reporting history requirement—to ensure the presence of "a sufficiently broad market following for the issuer's securities and, consequently, an adequate mix of information to inform investors as to material risks"[8]—serves no useful regulatory purpose for fund-specific research reports. Funds themselves—new or old—have detailed and comprehensive regulatory filing and disclosure obligations that substantially differ from, and in some areas exceed, those applicable to operating companies. A typical operating company files a Form 10-K, three Form 10-Qs, and a proxy statement each year. After filing its initial registration statement (consisting of a prospectus, statement of additional information, and other information, and including detailed risk information), a typical fund soon thereafter commences a rigorous, frequent, and ongoing series of filings each year, including semi-annual shareholder reports, monthly Form N-PORT filings (which will be publicly available on a quarterly basis), amendments to its registration statement, annual Form N-CEN filings, and a proxy statement.[9] These required filings and disclosures provide investors with a wealth of information about funds, including their material risks. Broker-dealer research reports about new funds therefore would not exist in an information vacuum. These reports would at most be a complementary source of third-party information, even shortly after a fund's launch.

The proposed $75 million minimum market value requirement is meant "to protect investors by excluding research reports on covered investment funds with a relatively small amount of total assets, and hence a limited market following."[10] The SEC's rationale is that it has historically used "public float as an approximate measure of a security's market following, through which the market absorbs information that is reflected in the price of the security."[11]

The rationale about the connection between market information and pricing is inapt for funds, especially those that price and redeem their shares at (or trade on the secondary market at or near) net asset value (NAV). The share price of these funds is a function of the underlying value of their

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[7] Specifically, the aggregate market value of a covered investment fund, or the net asset value in the case of a registered open-end investment company (other than an ETF), must equal or exceed the aggregate market value required by General Instruction I.B.1 to Form S-3, net of the value of shares held by affiliates. This amount is currently $75 million.

[8] Proposing Release at 26795.

[9] Not all of these filing requirements apply to all funds. Open-end funds require annual amendments to their registration statements, and closed-end funds issue annual proxy statements. The Form N-CEN and Form N-PORT filing requirements begin for larger entities in 2018 and 2019, respectively.

[10] Proposing Release at 26796.

[11] Proposing Release at 26796.

portfolio holdings. And, as explained above, research reports would be just one of many sources of fund information.

Moreover, this threshold would remove a significant number of funds from potential broker-dealer coverage. The SEC estimates that this threshold would eliminate approximately one-third of all covered investment funds (and over 40 percent of ETFs, exchange-traded products, and BDCs) from coverage.[12] The FAIR Act's intent is to "allow[ ] investors to access that very useful and needed information [*e.g.*, broker-dealer ETF research] in this rapidly growing and occasionally complex market of choices."[13] Limitations on the universe of funds about which broker-dealers can issue reports would frustrate this purpose.

Indeed, reports about new and small funds could be most beneficial to investors, precisely because investors may have little or no familiarity with them. The proposed rule's disparate treatment of new and small funds thus could hamper their prospects for growth. Newer and smaller funds often face headwinds in the marketplace (*e.g.*, intermediaries managing their fund lineups using criteria such as minimum fund sizes and operating histories), and the SEC should avoid adopting any provisions that may unintentionally exacerbate these trends or create barriers to entry in the fund industry.[14] Of course, these limitations also would harm well-established fund complexes, which also periodically launch new funds that take time to accumulate assets.

Instead of imposing these separate history[15] and size limitations, the proposed "covered investment fund" definition alone should suffice for establishing the universe of funds about which a broker-dealer may publish fund-specific research reports. The definition requires a fund to have an effective SEC registration statement. Once a fund satisfies this registration requirement—at which time it may offer its shares and market itself—an unaffiliated broker-dealer should be permitted to publish a research report about it under Rule 139b.

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[12] Proposing Release at 26819.

[13] 163 Cong. Rec. H7547-02 (Sept. 27, 2017).

[14] *See, e.g.*, Owen Walker, *Funds 'snowball' means big firms can only get bigger*, Financial Times (June 9, 2018), available at www.ft.com/content/1611bea8-68d3-11e8-b6eb-4acfcfb08c11.

[15] We also do not believe that an unaffiliated broker-dealer would be well-positioned to know whether a fund has timely filed all relevant SEC filings over the past 12 months, particularly given that not all filings (*e.g.*, most Form N-PORT filings) will be publicly available.

B. The SEC Should Replace the "Regular-Course-of-Business" Conditions with Compliance-Oriented Conditions

The safe harbor for both fund-specific and industry reports is further conditioned on a broker-dealer's publication or distribution of research reports "in the regular course of its business." "Regular-course-of-business" requirements are included in Rule 139 as well.

We believe the proposed "regular-course-of-business" conditions would be difficult for most broker-dealers to apply and satisfy in practice. We do not believe that very many unaffiliated broker-dealers currently issue fund research reports as the proposed rule contemplates.[16] Thus, assuming adoption of the rule as proposed, we do not believe that very many broker-dealers clearly could satisfy these "regular-course-of-business" conditions and avail themselves of the safe harbor. Even if the rule's key terms are read broadly to permit a broker-dealer to look to *any* of its research report activity (including that related to operating companies), this will be a hurdle that most broker-dealers cannot clear, based on their current practices. It would be at odds with Congress's policy intent to severely limit the potential universe of broker-dealers capable of producing fund research reports, if the overarching aim is to increase the supply of these reports.

We agree, however, with part of the SEC's policy rationale for this "regular-course-of business" requirement, *i.e.*, the value of having "compliance structures in place, with relevant policies and procedures, governing their publication of research … ."[17] Therefore, we recommend that the SEC make compliance the focus of these conditions for both fund-specific and industry reports, by replacing the proposed "regular-course-of-business" conditions with requirements that broker-dealers adopt and implement policies and procedures reasonably designed to achieve compliance with Rule 139b and any related rules.[18] This recommended approach would make the safe harbor accessible to all broker-dealers

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[16] We also question the stated rationale for applying the regular course of business condition to fund research reports. The Proposing Release states, "We believe requiring that research reports be published or distributed in the regular course of a broker-dealer's business, consistent with the requirements of rule 139, could reduce the potential that covered investment fund research reports will be used to circumvent the prospectus requirements of the Securities Act. Moreover, we are concerned about certain potential consequences of broker-dealers' ability, under proposed rule 139b, to publish or distribute communications as research reports that have traditionally been viewed by the investing public as advertisements or sales material related to registered investment companies or business development companies." Proposing Release at 26797. We believe that the proposed rule's limitation of safe harbor protection to unaffiliated broker-dealers adequately addresses both concerns. *See infra*, note 27 and Section III.A.

[17] Proposing Release at 26797. *See also* Proposing Release at 26799.

[18] The Proposing Release asks whether the proposed rule should provide a "start-up" period to allow broker-dealers to establish a regular course of business of publishing research reports. While this would improve the proposal, it would be a less-than-optimal solution. We see no reason why a broker-dealer must *regularly* issue fund research reports to avail itself of the safe harbor.

willing to assume the necessary compliance obligations, and it is supported by the considerable regulatory framework to which broker-dealers already are subject. As the Proposing Release highlights in footnote 11, many of the research reports that broker-dealers would publish or distribute in reliance on Rule 139b would be covered by other regulatory requirements:

- SEC Regulation AC applies to "a written communication (including an electronic communication) that includes an analysis of a security or an issuer and provides information reasonably sufficient upon which to base an investment decision;"

- FINRA's research rules—Rule 2241 (regulating equity research reports) and Rule 2242 (regulating debt research reports)—would apply to research reports on many of the securities proposed to be covered by Rule 139b; and

- FINRA Rule 2210 (Communications with the Public) would apply to all research reports that would be covered by Rule 139b.

Furthermore, our recommended approach would eliminate other ambiguities within the proposed rule text.[19]

C. The SEC Should Eliminate Conditions on Industry Reports Predicated on Inapt "Market Conditioning" Concerns

The proposed rule includes a separate set of conditions for industry reports, and it contemplates a single industry report covering a larger number of funds. [20] Also, the safe harbor requires that analysis of any covered investment fund or its securities must not be given materially greater space or prominence in the publication than that given to any other fund or its securities (the "presentation requirement").[21]

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[19] These other ambiguities include what constitutes (i) "substantially continuous distribution" (for fund-specific and industry reports), and (ii) "similar information" in "similar reports" (for industry reports).

[20] These "content requirements" require industry research reports to either (i) include similar information about a substantial number of covered investment fund issuers of the same type (*e.g.*, money market fund, bond fund, balanced fund, etc.) or investment focus (*e.g.*, primarily invested in the same industry or sub-industry, or the same country or geographic region), *or* (ii) contain a comprehensive list of covered investment fund securities currently recommended by the broker-dealer.

[21] The proposed rule also contains (i) a reporting condition, *i.e.*, each covered investment fund included in an industry research report must be subject to the reporting requirements of the Investment Company Act or Exchange Act (as applicable), and (ii) a "regular-course-of-business" condition for industry reports, which we have addressed above.

We do not believe that these content and presentation conditions serve a useful regulatory purpose for fund industry research reports. In our view, the SEC has tracked current Rule 139 more closely than it must or should in crafting these conditions.

In discussing both of these requirements, the SEC points to "market conditioning" (or "gun-jumping") concerns.[22] The 1969 SEC staff report that was the precursor to Rule 139 stated, "There is a need for clearer standards to differentiate between helpful and informative publicity and publicity primarily designed to 'condition' the market in such a way that the disclosure in the prospectus would be rendered ineffective."[23] In its extensive discussion of gun jumping, the Wheat Report notes that "the problem is apt to arise primarily during the pre-filing period," and that "application of the 'gun jumping' doctrine to non-participants [in a securities offering] has, at best, a dubious legal basis."[24]

The Wheat Report did not address disclosures required by the Investment Company Act. Therefore, its policy considerations and those that underlie Rule 139 should not be applied indiscriminately to funds. The possibility of a broker-dealer or influential analyst "moving the market" may be very real for the securities of operating companies, but the possibility is remote-to-non-existent for shares of funds. The large majority of "covered investment funds" are continuously offered (*e.g.*, mutual funds, ETFs, and unlisted closed-end funds).[25] As discussed above, their share prices are a function of the underlying value of their portfolio holdings (ETF shares trading on the secondary market generally trade very close to their NAVs).

And, also as discussed above, broker-dealer research reports would represent only a small portion of fund information available to investors—after launch, these continuously-offered funds update their registration statements annually and make ongoing filings, most of which are publicly available.[26] Thus, funds are, and would continue to be, the primary source of fund information, and there is no real risk of third parties (including fund affiliates) "conditioning the market" after the registration of these funds

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[22] Proposing Release at 26799 and 26801.

[23] *Disclosure to Investors—A Reappraisal of Administrative policies under the '33 and '34 Acts* (March 1969)("Wheat Report"), available at www.sechistorical.org/museum/galleries/tbi/gogo_d.php. *See generally* Chapter 5 ("The 'Gun-Jumping' Problem").

[24] Wheat Report at 133 and 140.

[25] *See* Proposing Release at 26807. ("[T]he universe of covered investment funds is large. At the end of 2017, there were 11,924 such entities, including 9,564 mutual funds, 1,629 ETFs and ETPs, 596 closed-end funds, and 135 BDCs. The total public market value of covered investment funds exceeds $20 trillion. Of this total, $17 trillion is held through shares issued by open-end mutual funds, $3 trillion through shares of ETFs and ETPs, $317 billion through shares of closed-end funds, and $27 billion through shares of BDCs.")

[26] *See supra*, note 9 and accompanying text.

and their shares has taken effect.[27] Other substantive requirements already imposed on broker-dealers also militate against these concerns.[28]

Funds with share offerings that more closely resemble those of operating companies (*e.g.*, listed closed-end funds and BDCs) also have registration and ongoing filing and public disclosure obligations. These funds too are and would continue to be the primary source of fund information.

[27] The Proposing Release appears to recognize this. Footnote 119 cites concerns about gun jumping for "covered investment funds that are not in continuous distribution." It goes on to state, "For covered investment funds that are in continuous distribution, on the other hand, we understand the role of the conditions of rule 139b more generally as to help mitigate the risk that research reports could be used to circumvent the Securities Act's prospectus requirements."

The prospectus circumvention rationale is not compelling, and the Proposing Release itself offers a statement to the contrary: "We believe this [FAIR Act] exclusion [of reports published by funds or their affiliates] would prevent such persons from indirectly using the safe harbor to avoid the applicability of the Securities Act prospectus requirements and other provisions applicable to written offers by such persons." Proposing Release at 26791. Continuously-offered funds themselves are subject to registration under the Securities Act and the Investment Company Act, and update their registration statements at least annually. Fund advertisements and supplemental sales literature are subject to other substantive requirements (*see, e.g.*, Rule 482 under the Securities Act and Rule 34b-1 under the Investment Company Act). We believe it would be highly unlikely for funds and their affiliates to ask unaffiliated broker-dealers to issue fund-related research reports in an attempt to make an "end run" around their own Securities Act and Investment Company Act disclosure requirements. Citing Section 48(a) of the Investment Company Act, the Proposing Release states, "We believe that it would be inappropriate for any person covered by the affiliate exclusion, or for any person acting on its behalf, to publish or distribute a research report indirectly that the person could not publish or distribute directly under the proposed rule." This warning and the Proposing Release's related guidance should sufficiently deter any such scheme.

[28] *See* Proposing Release at n.11 and *infra*, note 33.

We therefore recommend that the SEC eliminate these industry report content[29] and presentation[30] requirements. The SEC could address any concerns about market conditioning and gun jumping much more effectively and narrowly, by prohibiting broker-dealers from issuing industry reports that include mention or discussion of funds or their shares prior to the effectiveness of their registration.

III. Other Key Questions from the Proposing Release

Below we address two important matters on which the Proposing Release solicits comment: (i) whether proposed Rule 139b sufficiently mitigates potential conflicts of interest, and (ii) whether the SEC should require standardized presentation and calculation of fund performance under the rule.

A. Mitigating Potential Conflicts of Interest

The proposed safe harbor would be available to a covered investment fund research report "by a broker or dealer that is not an investment adviser to the covered investment fund and is not an affiliated person of the investment adviser to the covered investment fund… ." The FAIR Act contains similar limiting language. Among other related questions, the Proposing Release asks whether the SEC should add restrictions or conditions to the safe harbor to further mitigate potential conflicts of interest.

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[29] Apart from our concerns about the underlying motivation, we believe that a broker-dealer should be free to analyze as few or as many funds within a fund industry report as it wishes. If a broker-dealer is required to include a "substantial number" of funds in any one report, it likely will lead to industry reports that offer less fund-specific analysis and are more survey-oriented. There is certainly a place for such reports, but the safe harbor should not limit other approaches to preparing multi-fund research reports (*e.g.*, those that may offer deep analysis of only a handful of funds). In the report, the broker-dealer could simply disclose how it arrived at the specific sub-set of funds included in the report (*e.g.*, the salient similarities of the funds, and/or the bases for any exclusions).

And if the SEC opts to keep the proposed rule's "comprehensive list" provision, the SEC should not prohibit those lists from including affiliated funds. If the list is truly "comprehensive," it should include *all* funds that the broker-dealer recommends. A broker-dealer's affiliated funds may help investors achieve their investment objectives, and excluding them could be detrimental to investors. To mitigate potential conflicts of interest, we recommend that this provision (i) require a broker-dealer to clearly identify which fund(s) on the list are affiliated, and (ii) limit the type of information included on the list that includes affiliated funds to factual information or instructions on where to find more research on a particular fund. We believe that the inclusion of affiliated funds in industry reports in this limited way would be consistent with the intent of the FAIR Act and the proposal.

[30] Apart from our concerns about the underlying motivation, we believe that the presentation requirement (which affects content as well) is unduly restrictive. In a multi-fund report, we see no reason why a broker-dealer should not be permitted to give more or less space or emphasis to particular funds included in the report. The proposed rule effectively requires a broker-dealer to decide between issuing a single-fund report or a multi-fund report in which all funds are given more or less equal space. We do not believe there is a sound policy basis for imposing this binary choice on broker-dealers.

We believe that the proposed rule's broad prohibitions on funds' and their affiliates' use of this safe harbor, the Proposing Release's related guidance,[31] and the other rules and regulations applicable to the reports, very effectively mitigate potential conflicts of interest. The requirements that broker-dealers be unaffiliated with the fund or its adviser in particular will help ensure that broker-dealers preparing fund research reports will have the requisite degree of independence from covered fund complexes, and that the reports will not become *de facto* fund-directed advertisements.[32] The Proposing Release notes that these research reports could be subject to additional substantive requirements under the federal securities laws and SRO rules,[33] and that all reports would remain subject to the antifraud provisions of the federal securities laws.[34] Also, the Proposing Release's economic analysis offers this practical assessment of the potential benefits and costs to an unaffiliated broker-dealer for producing conflicted and biased research, with which we agree:

> "[I]f a broker-dealer firm publishes biased research about a fund, some of the gains (*i.e.* compensation from sales of that fund) may accrue to other broker-dealer firms (*i.e.* other broker-dealer firms that distribute the same fund) while the costs of the action

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[31] *See* Proposing Release at 26791 and *supra*, note 27. We agree with the SEC that its entanglement theory is a "helpful guidepost" in establishing whether a fund research report may be deemed published or distributed by the fund. Proposing Release at n.39. However, the SEC should clarify in any adopting release that a fund or a fund affiliate could provide information or confirmation of certain factual matters in a research report prior to publication without running afoul of the entanglement theory and jeopardizing applicability of the safe harbor. Carefully circumscribed involvement from funds or fund affiliates could be helpful in ensuring the factual accuracy of any applicable research reports.

We do not agree that the SEC's adoption theory would be a helpful guidepost. For instance, an unaffiliated broker-dealer with no input from a fund or its affiliates could issue a positive research report about the fund, and the fund or its affiliates subsequently may wish to distribute it to investors. Notwithstanding this post-publication "adoption" of the research report by the fund complex, the report would be the independent product of the unaffiliated broker-dealer, and therefore should be entitled to safe harbor protection. We recommend that the SEC revise this guidance accordingly in any adopting release.

[32] *Cf.* Proposing Release at 26791 ("This second exclusion [*i.e.*, of research reports published or distributed by any broker or dealer that is an investment adviser (or an affiliated person of an investment adviser) for the covered investment fund] therefore helps to establish a certain level of independence in the activity of publishing and distributing covered investment fund research reports and therefore could help mitigate these potential conflicts of interest.")

[33] For example, FINRA Rule 2210 contains general content standards that apply broadly to member communications (including broker-dealer research reports). Among other things, it states, "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 in regard to any particular security or type of security, industry, or service. No member may omit any material fact or qualification if the omission, in light of the context of the material presented, would cause the communications to be misleading."

[34] *See, e.g.*, Proposing Release at n.37 and 26802.

> (*i.e.*, reputation costs, litigation risk, and risk of regulatory action) will be borne entirely by the broker-dealer firm that published the biased research."[35]

Accordingly, we believe that the proposed rule and related guidance and rules adequately mitigate potential conflicts of interest, and we do not support additional restrictions or conditions.

B. Presentation of Fund Performance Information

The proposed rule would not require that a broker-dealer present or calculate fund performance in any particular way. By contrast, Rules 482 and 34b-1 impose detailed performance presentation requirements on fund advertisements and supplemental sales literature, as do Forms N-1A and N-2 on funds' prospectuses and shareholder reports. Also, FINRA Rule 2210(d)(5) imposes detailed performance presentation requirements on "[r]etail communications and correspondence that present non-money market fund open-end management investment company performance data," and expressly requires that such materials disclose the standardized performance information mandated by Rules 482 and 34b-1. Rule 2210 thus would subject a substantial subset of fund research reports indirectly to the existing standardized performance presentation requirements. The Proposing Release asks several questions about the inclusion of performance information in fund research reports, including whether the SEC should incorporate the requirements of Rule 482 directly into Rule 139b.

We believe that the SEC should insist that, to the extent that broker-dealers include fund-specific performance information in their research reports, they do so in accordance with the applicable standardized fund requirements.[36] We agree with the SEC that investors tend to consider fund performance a significant factor in evaluating or comparing funds, and we believe that the standardized performance reporting requirements that the SEC has imposed on funds have served investors well. Discrepancies between what a broker-dealer may include in a research report, and what a fund may report or disclose about itself through its regulatory filings or advertisements, would risk confusing investors. If the SEC does not include these performance reporting requirements in the final rule, then the SEC instead should require broker-dealers to provide clear and prominent disclosure whenever fund-specific performance information is *not* presented in accordance with applicable fund standards. This would put investors on notice that the broker-dealer has diverged from standardized performance presentation requirements.

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[35] Proposing Release at n.267.

[36] For open-end funds, this would mean compliance with the applicable requirements of Rule 482; for closed-end funds, this would mean compliance with the applicable requirements of Form N-2.

If you have any questions, please contact me at (202) 326-5813, Dorothy Donohue at (202) 218-3563, or Matthew Thornton at (202) 371-5406.

Sincerely,

/s/ Susan Olson
General Counsel