

the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to 19(b)(3)(A) of the Act<sup>10</sup> and Rule 19b-4(f)(6)<sup>11</sup> thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change 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 the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2011-098 on the subject line.

##### *Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2011-098. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule

change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2011-098 and should be submitted on or before August 24, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>12</sup>

**Elizabeth M. Murphy,**  
*Secretary.*

[FR Doc. 2011-19612 Filed 8-2-11; 8:45 am]

**BILLING CODE 8011-01-P**

#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-64984; File No. SR-FINRA-2011-035]

#### **Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change To Adopt FINRA Rules 2210 (Communications With the Public), 2212 (Use of Investment Companies Rankings in Retail Communications), 2213 (Requirements for the Use of Bond Mutual Fund Volatility Ratings), 2214 (Requirements for the Use of Investment Analysis Tools), 2215 (Communications With the Public Regarding Security Futures), and 2216 (Communications With the Public About Collateralized Mortgage Obligations (CMOs)) in the Consolidated FINRA Rulebook**

July 28, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on July 14, 2011, Financial Industry Regulatory

Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### **I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

FINRA is proposing to adopt NASD Rules 2210 and 2211 and NASD Interpretive Materials 2210-1 and 2210-3 through 2210-8 as FINRA Rules 2210 and 2212 through 2216, and to delete paragraphs (a)(1), (i), (j) and (l) of Incorporated NYSE Rule 472, Incorporated NYSE Rule Supplementary Material 472.10(1), (3), (4) and (5), and 472.90, and Incorporated NYSE Rule Interpretations 472/01 and 472/03 through 472/11. The proposed rule change would renumber NASD Rules 2210 and 2211 and NASD Interpretive Materials 2210-1 and 2210-4 as FINRA Rule 2210, NASD Interpretive Material 2210-3 as FINRA Rule 2212, NASD Interpretive Material 2210-5 as FINRA Rule 2213, NASD Interpretive Material 2210-6 as FINRA Rule 2214, NASD Interpretive Material 2210-7 as FINRA Rule 2215, and NASD Interpretive Material 2210-8 as FINRA Rule 2216.

The text of the proposed rule change is available on FINRA's Web site at <http://www.finra.org>, at the principal office of FINRA and at the Commission's Public Reference Room.

#### **II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

##### *A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

###### **1. Purpose**

As part of the process of developing a new consolidated rulebook ("Consolidated FINRA Rulebook"),<sup>3</sup>

<sup>3</sup> The current FINRA rulebook consists of (1) FINRA Rules; (2) NASD Rules; and (3) rules

<sup>10</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>11</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. NASDAQ has satisfied this requirement.

<sup>12</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

FINRA is proposing to adopt NASD Rules 2210 and 2211 and NASD Interpretive Materials 2210-1 and 2210-3 through 2210-8 as FINRA Rules 2210 and 2212 through 2216, and to delete paragraphs (a)(1), (i), (j) and (l) of Incorporated NYSE Rule 472, Incorporated NYSE Rule Supplementary Material 472.10(1), (3), (4) and (5), and 472.90, and Incorporated NYSE Rule Interpretations 472/01 and 472/03 through 472/11.

#### Current Rules Governing Communications With the Public

NASD Rules 2210 and 2211, and the Interpretive Materials that follow Rule 2210, generally govern all FINRA members' communications with the public. Incorporated NYSE Rule 472 governs communications with the public of members that also are members of the New York Stock Exchange.

NASD Rule 2210 divides communications into six separate categories, as follows:

> *Advertisement* generally includes written (including electronic) retail communications that do not have a limited audience, such as newspaper, magazine, television and radio advertisements, billboards and Web sites.

> *Sales literature* generally includes written (including electronic) retail communications that have a more targeted audience, such as brochures, performance reports, telemarketing scripts, seminar scripts and form letters.

> *Correspondence* includes written letters, electronic mail, instant messages and market letters sent to: (i) One or more existing retail customers; and (ii) fewer than 25 prospective retail customers within a 30 calendar-day period.

> *Institutional sales material* includes communications that are distributed or made available only to institutional investors. NASD Rule 2211 defines the term "institutional investor" generally to include registered investment companies, insurance companies, banks, registered broker-dealers, registered investment advisers, certain retirement plans, governmental

entities, and individual investors and other entities with at least \$50 million in assets.

> *Independently prepared reprint* includes reprints of articles from independent publications, as well as reports published by independent research firms.

> *Public appearance* includes unscripted participation in live events, such as interviews, seminars and call-in television and radio shows.

These definitions are important because the principal approval, filing and content standards apply differently to each category. For example, members generally must have a principal approve all advertisements, sales literature and independently prepared reprints prior to use. This pre-use approval requirement does not apply to: (1) Institutional sales material or (2) correspondence, unless it is sent to 25 or more existing retail customers within a 30 calendar-day period and includes an investment recommendation or promotes a product or service of the member. While such communications do not require principal pre-use approval, members still must establish and maintain policies and procedures to supervise them for compliance with applicable standards.

Members must file with the FINRA Advertising Regulation Department ("Department") for review certain advertisements and sales literature. For example, advertisements and sales literature concerning investment companies, variable insurance products and public direct participation programs, and advertisements concerning government securities, must be filed within 10 business days of first use, but members are not required to file independently prepared reprints, correspondence or institutional sales material. The filing requirements also differ based on the member using the material and its content.

Members that previously have not filed advertisements with the Department must file all advertisements at least 10 business days prior to first use for a one-year period following the date the first advertisement was filed. Additionally, under NASD Rule 2210 and related Interpretive Materials, all members must file advertisements concerning collateralized mortgage obligations ("CMOs") and security futures, and advertisements and sales literature concerning registered investment companies that include unpublished or self-created rankings or performance comparisons, at least 10 business days prior to first use, and must withhold them from publication

until any changes specified by the Department have been made.

Incorporated NYSE Rule 472 requires an "allied member, supervisory analyst or qualified person" to approve prior to use each advertisement, sales literature or other similar type of communication.<sup>4</sup> The NYSE Rule 472 definitions of "advertisement" and "sales literature" are similar to those used in NASD Rule 2210.

The communications rules include both general and specific content standards. Certain general standards apply to all communications, such as requirements that communications be fair and balanced, and provide a sound basis for evaluating the facts in regard to any particular security, industry or service, and prohibitions on omitting material facts whose absence would make the communication misleading. More particular content standards apply to specific issues or securities.

#### Proposed Rule Change

##### Reorganization of Rules

The proposed rule change would create a new FINRA Rule 2210 that would encompass, subject to certain changes, the provisions of current NASD Rules 2210 and 2211, NASD Interpretive Materials 2210-1 and 2210-4, and the provisions of Incorporated NYSE Rule 472 that do not pertain to research analysts and research reports. Each of the other Interpretive Materials that follow NASD Rule 2210 would receive its own FINRA rule number and would adopt the same communication categories used in FINRA Rule 2210.<sup>5</sup>

##### Communication Categories

The proposed rule change would reduce the number of current communication categories from six to three, as follows:

> *Institutional communication* would include communications that fall within the current definition of "institutional sales material" under NASD Rule 2211(a)(2): Written (including electronic) communications that are distributed or made available only to institutional investors. "Institutional investor" generally would have the same definition as under NASD Rule 2211(a)(3).<sup>6</sup>

<sup>4</sup> NYSE Rule 472(a)(1).

<sup>5</sup> Proposed FINRA Rule 2211 (Communications with the Public About Variable Insurance Products), which would replace NASD Interpretive Material 2210-2, is the subject of a separate proposed rule change. See Securities Exchange Act Release No. 61107 (December 3, 2009), 74 FR 65180 (December 9, 2009) (Notice of Filing File No. SR-FINRA-2009-070).

<sup>6</sup> FINRA has modified the definition of "institutional investor" in proposed FINRA Rule

incorporated from NYSE ("Incorporated NYSE Rules") (together, the NASD Rules and Incorporated NYSE Rules are referred to as the "Transitional Rulebook"). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE ("Dual Members"). The FINRA Rules apply to all FINRA members, unless such rules have a more limited application by their terms. For more information about the rulebook consolidation process, see *Information Notice*, March 12, 2008 (Rulebook Consolidation Process).

> *Retail communication* would include any written (including electronic) communication that is distributed or made available to more than 25 retail investors within any 30 calendar-day period. "Retail investor" would include any person other than an institutional investor, regardless of whether the person has an account with the member.

> *Correspondence* would include any written (including electronic) communication that is distributed or made available to 25 or fewer retail investors within any 30 calendar-day period.

The proposal would eliminate the current definitions of "advertisement," "sales literature," "institutional sales material," "public appearance" and "independently prepared reprint" in NASD Rule 2210, as well as all of the definitions in NASD Rule 2211.<sup>7</sup> The proposal also would eliminate the definitions of "communication," "advertisement," "market letter" and "sales literature" in Incorporated NYSE Rule 472.

Communications that currently qualify as advertisements and sales literature generally would fall under the definition of "retail communication." In addition, to the extent that a member distributed or made available a communication that currently qualifies as an independently prepared reprint to more than 25 retail investors within a 30 calendar-day period, the communication also would fall under the definition of "retail communication." Communications that currently qualify as "institutional sales material" would fall within the definition of "institutional communication." Some communications that currently qualify as "correspondence" would continue to

2210 to clarify that the term includes multiple employee benefit plans and multiple qualified plans offered to employees of the same employer, provided that the plans in the aggregate have at least 100 participants. FINRA also has added a Supplementary Material to clarify that a member's internal written (including electronic) communications that are intended to educate or train registered persons about the products or services offered by a member are considered institutional communications pursuant to paragraph (a)(3) of proposed FINRA Rule 2210. See proposed FINRA Rule 2210.01. Accordingly, such internal communications are subject to both the provisions of proposed FINRA Rule 2210 and NASD Rule 3010(d) (Review of Transactions and Correspondence). See also Securities Exchange Act Release No. 64736 (June 23, 2011), 76 FR 38245 (June 29, 2011) (Notice of Filing File No. SR-FINRA-2011-028) (proposing, among other things, to adopt NASD Rule 3010(d) as FINRA Rule 3110(b)(4), subject to certain changes).

<sup>7</sup> NASD Rule 2211 currently defines the terms "correspondence," "institutional sales material," "institutional investor," "existing retail customer," "prospective retail customer" and "market letter."

fall within that definition. However, communications sent to more than 25 retail investors within a 30 calendar-day period in all cases would be considered retail communications.<sup>8</sup>

Although the proposal would eliminate the terms "public appearance" and "independently prepared reprint," as discussed below, the proposal would retain with respect to these communication categories much of the substance of the exceptions from the filing requirements and limited application of the content standards.

#### Approval, Review and Recordkeeping Requirements

Currently NASD Rule 2210(b)(1)(A) requires a registered principal of the member to approve each advertisement, item of sales literature and independently prepared reprint before the earlier of its use or filing with the Department. Proposed FINRA Rule 2210(b)(1)(A) would require an appropriately qualified registered principal of the member to approve each retail communication before the earlier of its use or filing with the Department. The principal registration required to approve particular communications would depend upon the permissible activities for each principal registration category.<sup>9</sup> The proposed rule change would eliminate Incorporated NYSE Rule 472(a)(1), which requires an

<sup>8</sup> The definition of "correspondence" in NASD Rule 2211 currently includes market letters as well as written letters and electronic mail messages that are sent to one or more existing retail customers and fewer than 25 prospective retail customers within a 30 calendar-day period. "Market letter" is defined to include any communication excepted from the definition of "research report" pursuant to NASD Rule 2711(a)(9)(A). See NASD Rule 2211(a)(5). FINRA revised the definition of "correspondence" to include market letters in February 2009 in order to allow members to send market letters to traders and other investors who base their decisions on timely market analysis without having to have a principal approve them in advance. Previously, members were required to approve market letters prior to use. See *Regulatory Notice* 09-10 (February 2009). Proposed FINRA Rule 2210 would continue to allow members to send retail communications that are excepted from the definition of "research report" pursuant to NASD Rule 2711(a)(9)(A) without having a registered principal approve the communication prior to use, provided that a member supervises and reviews such communications in the same manner as correspondence. See proposed FINRA Rule 2210(b)(1)(D).

<sup>9</sup> Currently NASD Rule 1022(g) permits a General Securities Sales Supervisor to approve sales literature as defined in NASD Rule 2210, but does not permit persons within this category to approve advertisements. FINRA separately sought comment on a proposal that would amend the General Securities Sales Supervisor registration category to remove the restriction on approving advertisements, and to permit persons within this registration category to approve retail communications as defined in proposed FINRA Rule 2210. See *Regulatory Notice* 09-70 (December 2009).

"allied member, supervisory analyst, or qualified person" to approve in advance each advertisement, sales literature or other similar type of communication by an NYSE member firm.<sup>10</sup>

NASD Rule 2210(b)(1)(B) permits a Series 16 supervisory analyst approved pursuant to Incorporated NYSE Rule 344 to approve research reports on debt and equity securities.<sup>11</sup> Proposed FINRA Rule 2210(b)(1)(B) would continue this provision without substantive change.<sup>12</sup>

NASD Rule 2210(b)(1)(D) provides an exception from the principal approval requirements of NASD Rule 2210(b)(1)(A) for an advertisement, item of sales literature, or independently prepared reprint, if at the time that a member intends to publish or distribute it: (i) another member has filed it with the Department and has received a letter from the Department stating that it appears to be consistent with applicable standards; and (ii) the member using the communication in reliance on this exception has not materially altered it and will not use it in a manner that is inconsistent with the conditions of the Department's letter. Proposed FINRA Rule 2210(b)(1)(C) would preserve this exception for retail communications.

Proposed FINRA Rule 2210(b)(1)(D) would except from the principal approval requirements of proposed FINRA Rule 2210(b)(1)(A) three additional categories of retail communications, provided that the member supervises and reviews such communications in the same manner as required for supervising and reviewing correspondence pursuant to NASD Rule 3010(d). These communications include: (i) Any retail communication that is excepted from the definition of "research report" pursuant to NASD Rule 2711(a)(9)(A); (ii) any retail communication that is posted on an online interactive electronic forum; and (iii) any retail communication that does not make any financial or investment

<sup>10</sup> The term "allied member" was largely deleted from the Incorporated NYSE Rules in 2008, and thus is not being carried over as part of proposed FINRA Rule 2210(b)(1)(A). See *Regulatory Notice* 08-64 (October 2008).

<sup>11</sup> FINRA separately sought comment on a proposal that would adopt a stand-alone permissive registration category for Supervisory Analysts. See *Regulatory Notice* 09-70 (December 2009).

<sup>12</sup> NASD Rule 2210(b)(1)(C) currently requires a registered principal qualified to supervise security futures activities to approve each advertisement or item of sales literature concerning security futures. This requirement would continue going forward with respect to retail communications concerning security futures. Nevertheless, this provision is being eliminated as redundant given the requirement under proposed FINRA Rule 2210(b)(1)(A) that an appropriately qualified principal approve each retail communication.

recommendation or otherwise promote a product or service of the member.

The first category generally carries forward a current exception from the principal pre-use approval requirements for market letters.<sup>13</sup> The second category codifies a current interpretation of the rules governing communications with the public that allows members to supervise communications posted on interactive electronic forums in the same manner as is required for supervising correspondence.<sup>14</sup> The third category broadens a current principal pre-use approval exception for correspondence that is sent to 25 or more existing retail customers within any 30 calendar-day period and that does not make any financial or investment recommendation or otherwise promote a product or service of the member.<sup>15</sup> Unlike the current principal pre-use approval exception, this exception would apply to all retail communications.<sup>16</sup>

Proposed FINRA Rule 2210(b)(1)(E) would allow FINRA, pursuant to the FINRA Rule 9600 Series, to grant an exemption from the principal approval requirements of paragraph (b)(1)(A) for good cause shown after taking into consideration all relevant factors, provided that the exemption is consistent with the purposes of FINRA Rule 2210, the protection of investors, and the public interest.

Proposed FINRA Rule 2210(b)(1)(F) would provide that, notwithstanding any other provision of FINRA Rule 2210, a registered principal must approve a communication prior to the member filing it with the Department. Currently NASD Rule 2210(b)(1)(A) requires a principal to approve an advertisement, item of sales literature or independently prepared reprint before the earlier of its use or filing with the Department. Proposed FINRA 2210(b)(1)(F) is intended to clarify that

<sup>13</sup> See NASD Rules 2211(a)(1), (a)(5) and (b)(1)(A); see also *Regulatory Notice* 09–10 (February 2009).

<sup>14</sup> See *Regulatory Notice* 10–06 (January 2010).

<sup>15</sup> See NASD Rule 2211(b)(1)(A).

<sup>16</sup> Thus, the current rules require firms to make the determination of whether correspondence that is sent to 25 or more existing retail customers within a 30 calendar-day period requires principal pre-use approval because it makes a financial or investment recommendation or otherwise promotes a product or service of the member. FINRA would expect firms to apply the same analysis going forward regarding principal pre-use approval with respect to all retail communications. FINRA generally considers this exception to cover communications that are more administrative or informational in nature, such as communications that inform investors that their account statement is available online, or the date on which a security in an investor's portfolio is expected to pay a dividend. Communications that are intended to educate investors about products or services, however, do not fall within this exception.

an appropriately qualified principal must approve *any* communication that is filed with the Department, even if a communication otherwise would come under an exception to the principal approval requirements of proposed FINRA Rule 2210(b)(1)(A).

NASD Rule 2211(b)(1) and NASD Rule 3010(d) impose certain supervisory and review requirements with regard to a member's correspondence and institutional sales material.<sup>17</sup> Proposed FINRA Rules 2210(b)(2) and (3) generally would maintain the supervision and review standards for correspondence and institutional communications that are currently found in NASD Rules 2211 and 3010(d).

Currently NASD Rule 2210(b)(2) requires members to maintain all advertisements, sales literature and independently prepared reprints in a separate file for a period beginning on the date of first use and ending three years from the date of last use. The file must include: (i) A copy of the communication and the dates of first and last use; (ii) the name of the registered principal who approved the communication and the date approval was given, unless such approval was not required pursuant to NASD Rule 2210(b)(1)(D);<sup>18</sup> and (iii) for any communication for which principal approval was not required pursuant to NASD Rule 2210(b)(1)(D), the name of the member that filed the communication with the Department and a copy of the corresponding Department review letter. NASD Rule 2211(b)(2) requires members to maintain records of institutional sales material for a period of three years from the date of

<sup>17</sup> These rules require each member to establish written procedures that are appropriate to its business, size, structure and customers for the review by a registered principal of correspondence and institutional sales material. The procedures must be in writing and be designed to reasonably supervise each registered representative. Where such procedures do not require review of all such communications prior to use or distribution, they must include provision for the education and training of associated persons as to the member's procedures, documentation of such education and training, and surveillance and follow-up to ensure that such procedures are implemented and adhered to. Evidence of such implementation must be maintained and made available to FINRA upon request.

<sup>18</sup> As noted above, NASD Rule 2210(b)(1)(D) creates an exception from the principal approval requirements of NASD Rule 2210(b)(1)(A) for any advertisement, item of sales literature or independently prepared reprint if, at the time that a member intends to publish or distribute it: (i) Another member has filed it with the Department and has received a letter from the Department stating that it appears to be consistent with applicable standards; and (ii) the member using it in reliance on this exception has not materially altered it and will not use it in a manner that is inconsistent with the conditions of the Department's letter.

last use, including the name of the person who prepared each such communication. NASD Rules 3010(d)(3)<sup>19</sup> and 3110(a)<sup>20</sup> require members to retain correspondence of registered representatives as prescribed by SEA Rule 17a–4.

Proposed FINRA Rule 2210(b)(4)(A) would set forth the record-keeping requirements for retail and institutional communications; generally, these requirements would mirror current record-keeping requirements. This provision incorporates by reference the record-keeping format, medium and retention period requirements of SEA Rule 17a–4.<sup>21</sup>

Proposed FINRA Rule 2210(b)(4)(A) specifies that such records would have to include:

- A copy of the communication and the dates of first and (if applicable) last use;
- The name of any registered principal who approved the communication and the date that approval was given;
- In the case of a retail communication or institutional communication that is not approved prior to first use by a registered principal, the name of the person who prepared or distributed the communication;<sup>22</sup>

<sup>19</sup> FINRA is proposing to adopt NASD Rule 3010(d)(3) as FINRA Rule 3110.11 (Retention of Correspondence and Internal Communications), subject to certain changes, in the Consolidated FINRA Rulebook. See Securities Exchange Act Release No. 64736 (June 23, 2011), 76 FR 38245 (June 29, 2011) (Notice of Filing File No. SR–FINRA–2011–028 (Proposed Rule Change to Adopt the Consolidated FINRA Supervision Rules)).

<sup>20</sup> The SEC has approved the adoption of the general recordkeeping requirements of NASD Rule 3110(a) as FINRA Rule 4511, subject to certain changes. FINRA Rule 4511 becomes effective on December 5, 2011. See Securities Exchange Act Release No. 63784 (January 27, 2011), 76 FR 5850 (February 2, 2011) (Order Approving File No. SR–FINRA–2010–052); *Regulatory Notice* 11–19 (April 2011).

<sup>21</sup> SEA Rule 17a–4(b) requires broker-dealers to preserve certain records for a period of not less than three years, the first two in an easily accessible place. Among these records, pursuant to SEA Rule 17a–4(b)(4), are “[o]riginals of all communications received and copies of all communications sent (and any approvals thereof) by the member, broker or dealer (including inter-office memoranda and communications) relating to its business as such, including all communications which are subject to rules of a self-regulatory organization of which the member, broker or dealer is a member regarding communications with the public. As used in this paragraph (b)(4), the term communications includes sales scripts.” SEA Rule 17a–4(f) permits broker-dealers to maintain and preserve these records on “micrographic media” or by means of “electronic storage media,” as defined in the rule and subject to a number of conditions.

<sup>22</sup> To the extent clerical staff is employed in the preparation or distribution of the communication, the records should include the name of the person

- Information concerning the source of any statistical table, chart, graph or other illustration used in the communication; and
- For retail communications that rely on the exception under proposed FINRA Rule 2210(b)(1)(C), the name of the member that filed the retail communication with the Department and a copy of the Department's review letter.

Proposed FINRA Rule 2210(b)(4)(B) cross-references NASD Rules 3010(d)(3)<sup>23</sup> and 3110(a)<sup>24</sup> with respect to correspondence record-keeping requirements.

#### Filing Requirements and Review Procedures

Proposed FINRA Rule 2210(c) generally incorporates the filing requirements in NASD Rule 2210(c), subject to certain changes.

NASD Rule 2210(c)(5)(A) currently requires a member that previously has not filed advertisements with the Department or another self-regulatory organization to file its initial advertisement with the Department at least 10 business days prior to use. This filing requirement continues for a year after the initial filing. Proposed FINRA Rule 2210(c)(1)(A) would trigger the new member one-year filing requirement beginning on the date reflected in the Central Registration Depository (CRD®) system that the firm's FINRA membership became effective, rather than on the date a member first files an advertisement with the Department. Although proposed FINRA Rule 2210 no longer defines the term "advertisement," this new member filing requirement would only apply to retail communications that currently fall under the "advertisement" definition, such as generally accessible Web sites, print media communications, and television and radio commercials.

NASD Rule 2210(c)(5)(B) currently authorizes the Department to require a member to file all of its advertisements and/or sales literature, or the portion of the member's material relating to specific types or classes of securities or services, with the Department at least 10 business days prior to use, if the Department determines that the member has departed from NASD Rule 2210's standards. Proposed FINRA Rule 2210(c)(1)(B) would carry forward this authority and apply it to all of a member's communications (rather than just advertisements or sales literature).

on whose behalf the communication was prepared or distributed.

<sup>23</sup> See *supra* note 18.

<sup>24</sup> See *supra* note 19.

NASD Rule 2210(c)(4) currently requires members to file certain communications at least 10 business days prior to first use and to withhold them from use until any changes specified by the Department have been made. These communications include advertisements and sales literature for certain registered investment companies that include self-created rankings, advertisements concerning CMOs, and advertisements concerning security futures.

Proposed FINRA Rule 2210(c)(2) would revise the categories of communications that fall within this pre-use filing requirement. These include retail communications concerning any registered investment company that include self-created rankings, retail communications concerning security futures, and retail communications that include bond mutual fund volatility ratings. The requirement to file retail communications concerning security futures prior to first use would not apply to: (i) Retail communications that are submitted to another self-regulatory organization having comparable standards pertaining to such communications, and (ii) retail communications in which the only reference to security futures is contained in a listing of the services of a member.

Proposed FINRA Rule 2210(c)(3) would revise the categories of communications that must be filed within 10 business days of first use or publication. Similar to NASD Rule 2210(c)(2), proposed FINRA Rule 2210(c)(3) would require retail communications concerning registered investment companies and public direct participation programs to be filed within 10 business days of first use. However, the proposal for the first time would require that *all* retail communications concerning closed-end registered investment companies be filed with FINRA. Currently NASD Rule 2210 requires members to file within 10 business days of first use advertisements and sales literature concerning closed-end funds that are distributed during the fund's initial public offering ("IPO") period, as well as all advertisements and sales literature concerning continuously offered (interval) closed-end funds.<sup>25</sup> The proposed filing requirement also would apply to retail communications that are distributed after a closed-end fund's IPO period. FINRA believes that investors deserve the same protections concerning retail communications about

closed-end funds that are distributed after the IPO period as those that are distributed during the IPO period.

Proposed FINRA Rule 2210(c)(3)(C) would require members to file within 10 business days of first use all retail communications concerning government securities. Currently this requirement only applies to advertisements concerning such securities.<sup>26</sup> Consistent with current requirements, proposed FINRA Rule 2210(c)(3)(D) would require members to file within 10 business days of first use templates for written reports produced by, or retail communications concerning an investment analysis tool, as such term is defined in proposed FINRA Rule 2214.<sup>27</sup>

Proposed FINRA Rule 2210(c)(3)(E) would require members to file within 10 business days of first use retail communications concerning CMOs that are registered under the Securities Act of 1933 ("Securities Act"). Currently members are required only to file advertisements concerning CMOs, but must file them at least 10 business days prior to first use.<sup>28</sup>

Under proposed FINRA Rule 2210(c)(3)(F), members would have to file within 10 business days of first use all retail communications concerning any security that is registered under the Securities Act and that is derived from or based on a single security, a basket of securities, an index, a commodity, a debt issuance or a foreign currency, not included within the requirements of paragraphs (c)(1), (c)(2) or subparagraphs (A) through (E) of paragraph (c)(3). The purpose of this provision is to require the filing of retail communications concerning publicly offered structured products, such as exchange-traded notes or registered grantor trusts that currently are not required to be filed. This provision excludes retail communications that are already subject to a separate filing requirement found elsewhere in proposed paragraph (c), such as retail communications concerning registered investment companies or public direct participation programs.

Consistent with current rules, proposed FINRA Rule 2210(c)(4) provides that, if a member has filed a draft version or "story board" of a television or video retail communication pursuant to a filing requirement, then the member also must file the final filmed version within 10 business days of first use or broadcast.<sup>29</sup>

<sup>26</sup> See NASD Rule 2210(c)(2)(C).

<sup>27</sup> See NASD Rule 2210(c)(2)(D).

<sup>28</sup> See NASD Rule 2210(c)(4)(B).

<sup>29</sup> See NASD Rule 2210(c)(6).

<sup>25</sup> See "Ask the Analyst," *Regulatory & Compliance Alert* (Winter 1999) p. 13.

Proposed FINRA Rule 2210(c)(5) specifies that a member must provide with each filing the actual or anticipated date of first use, the name, title and CRD® number of the registered principal who approved the communication, and the date of approval. These requirements generally carry forward the current requirements of NASD Rule 2210(c)(1).

Proposed FINRA Rule 2210(c)(6) provides that each member's written communications may be subject to a spot-check procedure, and that members must submit requested material within the time frame specified by the Department. This provision is consistent with current rules.<sup>30</sup>

Proposed FINRA Rule 2210(c)(7) generally duplicates the current exclusions from the filing requirements under NASD Rule 2210(c)(8), with certain modifications. Proposed paragraph (c)(7)(A) would continue the current filing exclusion for retail communications that previously have been filed with the Department and that are to be used without material change.<sup>31</sup> Proposed paragraph (c)(7)(B) would add an exclusion for retail communications that are based on templates that were previously filed with the Department, the changes to which are limited to updates of more recent statistical or other non-narrative information.<sup>32</sup> Proposed paragraph (c)(7)(C) would exclude retail communications that do not make any financial or investment recommendation or otherwise promote a product or service of the member.<sup>33</sup>

Proposed paragraphs (c)(7)(D), (E), (G) and (H) would preserve for retail communications the current filing exclusions for advertisements and sales literature that do no more than identify a national securities exchange symbol of the member or identify a security for which the member is a registered market maker; advertisements and sales literature that do no more than identify the member or offer a specific security

<sup>30</sup> See NASD Rule 2210(c)(7).

<sup>31</sup> See NASD Rule 2210(c)(8)(A).

<sup>32</sup> This exclusion is based in part on an earlier staff interpretation concerning how NASD Rule 2210's approval, record-keeping and filing requirements apply to statistical updates contained in pre-existing templates. See Letter from Thomas M. Selman, NASD, to Forrest R. Foss, T. Rowe Price Associates, Inc., dated January 28, 2002. If a member changed the template's presentation in any material respect, however, this exclusion would not apply.

<sup>33</sup> This filing exception would have the same scope as the proposed exception from the principal pre-use approval requirements for retail communications that do not make any financial or investment recommendation or otherwise promote a product or service of the member. See proposed FINRA Rule 2210(b)(1)(D)(iii).

at a stated price; certain "tombstone" advertisements governed by Securities Act Rule 134 and press releases that are made available only to members of the media.<sup>34</sup>

Proposed paragraph (c)(7)(F) would modify the current filing exclusion for prospectuses and other documents that have been filed with the SEC or any state.<sup>35</sup> The current filing exclusion does not cover investment company omitting prospectuses published pursuant to Securities Act Rule 482. As modified, this filing exclusion also would not cover free writing prospectuses that are filed with the SEC pursuant to Securities Act Rule 433(d)(1)(ii).<sup>36</sup> As discussed in *Regulatory Notice* 10–52, FINRA is concerned that broadly disseminated free writing prospectuses present the same investor protection concerns as communications regulated by NASD Rules 2210 and 2211. Accordingly, FINRA interprets NASD Rules 2210 and 2211 to apply to free writing prospectuses distributed by a broker-dealer in a manner reasonably designed to lead to broad unrestricted dissemination.<sup>37</sup> This proposed modification would codify the guidance provided in that *Regulatory Notice*.

Proposed paragraph (c)(7)(I) would maintain the filing exclusion for reprints of independently prepared articles or reports currently found in NASD Rule 2210(c)(8)(H).<sup>38</sup>

Proposed paragraphs (c)(7)(J) and (K) would maintain the current filing exclusions for correspondence and institutional sales material.<sup>39</sup> Proposed paragraph (c)(7)(L) would exclude from filing communications that refer to types of investments solely as part of a listing of products or services offered by the member.<sup>40</sup>

<sup>34</sup> See NASD Rules 2210(c)(8)(C), (D), (F) and (G).

<sup>35</sup> See NASD Rule 2210(c)(8)(E).

<sup>36</sup> Securities Act Rule 433(d)(1)(ii) requires any offering participant, other than the issuer, to file with the SEC a free writing prospectus if it is used or referred to by such offering participant and distributed by or on behalf of such person in a manner reasonably designed to lead to its broad unrestricted dissemination.

<sup>37</sup> See *Regulatory Notice* 10–52 (October 2010).

<sup>38</sup> The filing exclusion for reprints of independently prepared articles or reports incorporates the conditions currently included in the definition of "independently prepared reprint." See NASD Rule 2210(a)(6)(A). This filing exclusion would also cover independently prepared investment company reports described in NASD Rule 2210(a)(6)(B).

<sup>39</sup> See NASD Rules 2210(c)(8)(I) and (J).

<sup>40</sup> NASD Rule 2210(c)(9) similarly excludes from the filing requirements material that refers to investment company securities, direct participation programs, or exempted securities solely as part of a listing of products or services offered by the member.

Proposed paragraph (c)(8) would provide that communications excluded from the filing requirements pursuant to paragraphs (c)(7)(H) through (K) would be deemed filed with FINRA for purposes of Section 24(b) of the Investment Company Act of 1940 and Rule 24b–3 thereunder. This provision is consistent with NASD Rule 2210(c)(8).

Proposed FINRA Rule 2210(c)(9)(A) would allow FINRA to exempt pursuant to the FINRA Rule 9600 Series, a member from the pre-use filing requirements of paragraph (c)(1)(A) for good cause shown.<sup>41</sup> Proposed paragraph (c)(9)(B) would allow FINRA to grant an exemption from the filing requirements of paragraph (c)(3) for good cause shown after taking into consideration all relevant factors, provided that the exemption is consistent with the purposes of Rule 2210, the protection of investors, and the public interest. Generally this relief would be limited to the same extent as in proposed paragraph (b)(1)(E), which would authorize FINRA to grant exemptive relief from the principal approval requirements in proposed FINRA Rule 2210(b)(1)(A) for retail communications, subject to the same standards.

#### Content Standards

Proposed FINRA Rule 2210(d) reorganizes but largely incorporates the current content standards applicable to communications with the public that are found in NASD Rule 2210(d), NASD IM–2210–1, NASD IM–2210–4 and Incorporated NYSE Rules 472(i) and (j), subject to certain changes. Content standards that currently apply to advertisements and sales literature generally would apply to retail communications.

Proposed FINRA Rule 2210(d)(1)(A) incorporates the current standards of NASD Rule 2210(d)(1)(A) without substantive change.

Proposed FINRA Rule 2210(d)(1)(B) incorporates the current standards of NASD Rule 2210(d)(1)(B) largely without change, except that it would expressly prohibit promissory statements or claims. The Department staff already interprets NASD Rule 2210(d)(1)(B) to prohibit promissory language in member communications, and Incorporated NYSE Rule 472(i) specifically prohibits promissory statements.

Proposed FINRA Rule 2210(d)(1)(C) incorporates the current standards of

<sup>41</sup> This provision is consistent with NASD Rule 2210(c)(10).

NASD Rule 2210(d)(1)(C) without change.

Proposed FINRA Rule 2210(d)(1)(D) generally incorporates the standards currently found in NASD IM-2210-1(1), with only minor, non-substantive changes.

Proposed FINRA Rule 2210(d)(1)(E) generally incorporates the standards currently found in NASD IM-2210-1(2), although in a more abbreviated fashion.

NASD Rule 2210(d)(1)(D) currently prohibits communications from predicting or projecting performance, implying that past performance will recur or making any exaggerated or unwarranted claim, opinion or forecast. This provision permits, however, a hypothetical illustration of mathematical principles, provided that it does not predict or project the performance of an investment or investment strategy.

Proposed FINRA Rule 2210(d)(1)(F) would carry forward the current prohibition of performance predictions and projections, as well as, the allowance for hypothetical illustrations of mathematical principles. The proposal also would clarify that FINRA allows two additional types of projections of performance in communications with the public that are not reflected in the text of NASD Rule 2210(d)(1)(D). First, FINRA allows projections of performance in reports produced by investment analyst tools that meet the requirements of NASD IM-2210-6.<sup>42</sup> Second, FINRA has permitted research reports on debt or equity securities to include price targets under certain circumstances.<sup>43</sup>

Accordingly, proposed FINRA Rule 2210(d)(1)(F) would clarify that it does not prohibit an investment analysis tool, or a written report produced by such a tool that meets the requirements of FINRA Rule 2214. Proposed FINRA Rule 2210(d)(1)(F) also would clarify that it does not prohibit a price target contained in a research report on debt or equity securities, provided that the price target has a reasonable basis, the report discloses the valuation methods used to determine the price target, and the price target is accompanied by disclosure concerning the risks that may impede achievement of the price target.<sup>44</sup>

Proposed FINRA Rule 2210(d)(2) incorporates the standards currently

found in NASD Rule 2210(d)(2)(B) without substantive change.

NASD Rule 2210(d)(2)(C) requires all advertisements and sales literature to: (i) prominently disclose the name of the member, and allows a fictional name by which the member is commonly recognized or which is required by any state or jurisdiction; (ii) reflect any relationship between the member and any non-member or individual who is also named in the communication; and (iii) if the communication includes other names, reflect which products and services are offered by the member. Proposed FINRA Rule 2210(d)(3) would apply these standards to correspondence as well as to retail communications. Members would be permitted to use the name under which a member's broker-dealer business is conducted as disclosed on the member's Form BD, as well as a fictional name by which a member is commonly recognized or which is required by any state or jurisdiction.

NASD IM-2210-1(5) specifies that in advertisements and sales literature, references to tax-free or tax-exempt income must indicate which income taxes apply, or which do not, unless income is free from all applicable taxes, and provides an example of income from an investment company investing in municipal bonds that is free from federal income tax but subject to state or local income taxes. Proposed FINRA Rule 2210(d)(4)(A) would carry forward this rule for all retail communications and correspondence.

NASD IM 2210-1(4) prohibits communications with the public from characterizing income or investment returns as tax-free or exempt from income tax when tax liability is merely postponed or deferred, such as when taxes are payable upon redemption. Proposed FINRA Rule 2210(d)(4)(B) would carry forward this prohibition for all communications.

Proposed FINRA Rule 2210(d)(4)(C) would add new language concerning comparative illustrations of the mathematical principles of tax-deferred versus taxable compounding.

First, the illustration would have to depict both the taxable investment and the tax-deferred investment using identical investment amounts and identical assumed gross investment rates of return, which may not exceed 10 percent per annum. Second, the illustration would have to use and identify actual federal income tax rates. Third, the illustration would be permitted (but not required) to reflect an actual state income tax rate, provided that the communication prominently discloses that the illustration is

applicable only to investors that reside in the identified state. Fourth, the tax rates used in the illustration that is intended for a target audience would have to reasonably reflect its tax bracket or brackets as well as the tax character of capital gains and ordinary income. Fifth, if the illustration covers an investment's payout period, the illustration would have to reflect the impact of taxes during this period. Sixth, the illustration could not assume an unreasonable period of tax deferral.

Seventh, the illustration would have to include the following disclosures, as applicable:

- The degree of risk in the investment's assumed rate of return, including a statement that the assumed rate of return is not guaranteed;
- The possible effects of investment losses on the relative advantage of the taxable versus tax-deferred investments;
- The extent to which tax rates on capital gains and dividends would affect the taxable investment's return;
- Its underlying assumptions;<sup>45</sup>
- The potential impact resulting from federal or state tax penalties (e.g., for early withdrawals or use on non-qualified expenses); and
- That an investor should consider his or her current and anticipated investment horizon and income tax bracket when making an investment decision, as the illustration may not reflect these factors.

Much of this language reflects previous guidance that FINRA has provided regarding tax-deferral illustrations.<sup>46</sup> By placing this rule language in proposed FINRA Rule 2210, FINRA is clarifying that these standards apply to any illustration of tax-deferred versus taxable compounding, regardless of whether it appears in a communication promoting variable insurance products or some other communication, such as one discussing the benefits of investing through a 401(k) retirement plan or individual retirement account. Of course, any communication concerning variable insurance products also must comply with standards specifically applicable to such communications.<sup>47</sup>

<sup>45</sup> These assumptions may include, for example, the age at which an investor may begin withdrawing funds from a tax-deferred account, the actual federal tax rates applied in the hypothetical taxable illustration, any state income tax rate applied in the illustration, and the charges associated with the hypothetical investment.

<sup>46</sup> See "NASD Reminds Members of Their Responsibilities Regarding Hypothetical Tax-Deferral Illustrations in Variable Annuity Illustrations," *NASD Member Alert* (May 10, 2004).

<sup>47</sup> See NASD IM-2210-2; see also Securities Exchange Act Release No. 61107 (December 3, 2009), 74 FR 65180 (December 9, 2009) (Notice of

<sup>42</sup> See NASD IM-2210-6 (Requirements for the Use of Investment Analysis Tools). NASD IM-2210-6 would be codified as FINRA Rule 2214 under the proposed rule change.

<sup>43</sup> See NASD Rule 2711(h)(7).

<sup>44</sup> These standards mirror those required for price targets contained in research reports on equity securities under NASD Rule 2711(h)(7).

NASD Rule 2210(d)(3) currently requires communications with the public, other than institutional sales material and public appearances, that present the performance of a non-money market mutual fund, to disclose the fund's maximum sales charge and operating expense ratio as set forth in the fund's current prospectus fee table. Proposed FINRA Rule 2210(d)(5) would maintain this standard for retail communications and correspondence.

NASD Rule 2210(d)(1)(E) currently provides that, if any testimonial in a communication with the public concerns a technical aspect of investing, the person making the testimonial must have the knowledge and experience to form a valid opinion. Proposed FINRA Rule 2210(d)(6)(A) carries forward this standard for communications.

NASD Rule 2210(d)(2)(A) requires any advertisement or sales literature that includes a testimonial concerning the investment advice or investment performance of a member or its products to prominently disclose: (i) The fact that the testimonial may not be representative of the experience of other customers; (ii) the fact that the testimonial is no guarantee of future performance or success; and (iii) if more than a nominal sum is paid, the fact that it is a paid testimonial. Proposed FINRA Rule 2210(d)(6)(B) carries forward these disclosure requirements for retail communications and correspondence, and requires disclosure regarding payment if more than \$100 in value (rather than a "nominal sum") is paid for the testimonial.

Proposed FINRA Rule 2210(d)(7) would revise in several ways the standards currently found in NASD IM-2210-1(6) applicable to communications that contain a recommendation.

First, the proposal would apply these standards to retail communications and public appearances. Currently the standards apply only to advertisements and sales literature.

Second, NASD IM-2210-1(6)(A) requires disclosure of certain specified conflicts of interest to the extent applicable. These disclosures include: (i) if the member was making a market in the recommended securities, or the underlying security if the recommended security is an option or security future, or that the member or associated person will sell to or buy from customers on a principal basis; (ii) if the member and/or its officers or partners have a

financial interest in the securities of the recommended issuer and the nature of the financial interest, unless the extent of the financial interest is nominal; and (iii) if the member was manager or co-manager of a public offering of any securities of the recommended issuer in the past 12 months. Proposed FINRA Rule 2210(d)(7)(A) would carry forward the first and third disclosures, but would modify the second disclosure to limit it to financial interests of the member or any associated person with the ability to influence the content of the communication, unless the extent of the financial interest is nominal. This change would substantially narrow the number of parties whose financial interests have to be disclosed, particularly for large members with numerous officers and partners.<sup>48</sup>

Proposed FINRA Rule 2210(d)(7)(B) would require a member to provide, or offer to furnish upon request, available investment information supporting the recommendation, and if the recommendation is for an equity security, to provide the price at the time the recommendation is made. This provision would carry forward the current requirements of NASD IM-2210-6(B).

Third, proposed FINRA Rule 2210(d)(7)(C) would amend the provisions governing communications that include past recommendations, which are currently found in NASD IM-2210-1(6)(C) and (D) and Incorporated NYSE Rule 472(j)(2). The new proposed standards mirror those found in Rule 206(4)-1(a)(2) under the Investment Advisers Act of 1940, which apply to investment adviser advertisements that contain past recommendations.<sup>49</sup>

Fourth, proposed FINRA Rule 2210(d)(7)(D) expressly would exclude from its coverage communications that meet the definition of "research report" or that are public appearances by a

<sup>48</sup> FINRA has found that the current rules governing disclosures of financial interests in connection with recommendations contained in advertisements and sales literature, which apply to financial interests of all officers and partners, do not lead to useful disclosure when a firm has a large number of officers or partners. See NASD IM-2210-1(6)(A)(ii).

<sup>49</sup> Proposed FINRA Rule 2210(d)(7)(C), like Rule 206(4)-1(a)(2), generally would prohibit retail communications from referring to past specific recommendations of the member that were or would have been profitable to any person. The rule would allow, however, a retail communication or correspondence to set out or offer to furnish a list of all recommendations as to the same type, kind, grade or classification of securities made by the member within the immediately preceding period of not less than one year. The list would have to provide certain information regarding each recommended security and include a prescribed cautionary legend warning investors not to assume that future recommendations will be profitable.

research analyst for purposes of NASD Rule 2711 and that include all of the applicable disclosures required by that rule. Proposed FINRA Rule 2210(d)(7)(D) also would exclude any communication that recommends only registered investment companies or variable insurance products.<sup>50</sup>

Currently, a "public appearance" is defined as "participation in a seminar, forum (including an interactive electronic forum), radio or television interview, or other public appearance or public speaking activity."<sup>51</sup> Public appearances are a separate category of communications within the broader term "communications with the public." As such, public appearances must meet the same standards that apply to all communications with the public, such as the requirements that they be fair and balanced and not include false or misleading statements. However, public appearances are not subject to the principal pre-use approval requirements of NASD Rule 2210(b)(1)(A), nor must a member file a public appearance with the Department.

In the interest of simplification, the term "public appearance" is no longer a separate communication category. Nevertheless, proposed FINRA Rule 2210(f) sets forth many of the same general standards that would apply to public appearances that exist currently. Public appearances would have to meet the general "fair and balanced" standards of proposed paragraph (d)(1). Unlike the current rules governing public appearances, the disclosure requirements applicable to recommendations in proposed paragraph (d)(7) also would apply if the public appearance included a recommendation of a security. The proposal also would require members to establish appropriate written policies and procedures to supervise public appearances, and makes clear that scripts, slides, handouts or other written (including electronic) materials used in connection with public appearances are

<sup>50</sup> FINRA is proposing to exclude communications that recommend only registered investment companies or variable insurance products because it believes that recommendations of these products do not raise the same kinds of conflicts of interest as recommendations of other types of securities, since they are pooled investment vehicles rather than securities of a single issuer. Nevertheless, there may be other types of sales-related conflicts of interest raised when members recommend such securities. FINRA has addressed these types of conflicts through its rules governing sales of these products. See NASD Rule 2830 (Investment Companies Securities) and FINRA Rule 2320 (Variable Contracts of an Insurance Company); see also Securities Exchange Act Release No. 64386 (May 3, 2011), 76 FR 26779 (May 9, 2011) (Notice of Filing File No. SR-FINRA-2011-018).

<sup>51</sup> NASD Rule 2210(a)(5).

considered communications for purposes of proposed FINRA Rule 2210.<sup>52</sup>

#### Use of Investment Company Rankings in Retail Communications

Proposed FINRA Rule 2212 would replace NASD IM-2210-3 with regard to standards applicable to the use of investment company rankings in communications. The standards generally would remain the same. FINRA has revised the standards applicable to investment company rankings for more than one class of an investment company with the same portfolio. Such rankings also must be accompanied by prominent disclosure of the fact that the investment companies or classes have different expense structures. The proposal would add a new paragraph (h) that would exclude from the proposed rule's coverage reprints or excerpts of articles or reports that are excluded from the Department's filing requirements pursuant to proposed FINRA Rule 2210(c)(7)(I).

#### Requirements for the Use of Bond Mutual Fund Volatility Ratings

Proposed FINRA Rule 2213 would replace NASD IM-2210-5 with regard to standards applicable to the use of bond mutual fund volatility ratings in communications. The standards would remain the same as in NASD IM-2210-5.

#### Requirements for the Use of Investment Analysis Tools

Proposed FINRA Rule 2214 would replace NASD IM-2210-6 with regard to standards applicable to the use of investment analysis tools. The standards generally would remain the same with some minor changes. Currently NASD IM-2210-6 requires a member that offers or intends to offer an investment analysis tool, within 10 days of first use, to provide the Department access to the tool and file with the Department any template for written reports produced by, or advertisements and sales literature concerning, the tool. Proposed FINRA Rule 2214(a) would require members to provide the Department with access to the tool and to file any template for written reports produced by, or any retail communication concerning, the tool within 10 *business* days of first use. This revision makes the access and filing requirement time frame consistent with other filing

requirements under proposed FINRA Rule 2210(c).

The proposal also would move some language that is currently contained either in NASD IM-2210-6's text or in footnotes to Supplementary Material that follows the Rule. Proposed Supplementary Material 2214.06 would provide that a retail communication that contains only an incidental reference to an investment analysis tool would not have to include the disclosures otherwise required for retail communications that advertise an investment analysis tool, and would not have to be filed with FINRA unless otherwise required by FINRA Rule 2210.<sup>53</sup> In addition, the Supplementary Material would provide that, if a retail communication refers to an investment analysis tool in more detail but does not provide access to the tool or the results generated by the tool, the communication would only have to include the disclosures required by paragraphs (c)(2) and (c)(4) of proposed Rule 2214. Proposed Supplementary Material 2214.07 provides additional detail regarding disclosure required by paragraph (c)(3) of Rule 2214. This language is currently found in footnote 4 to IM-2210-6. However, FINRA has added a specific requirement to disclose whether the investment analysis tool is limited to searching, analyzing or in any way favoring securities in which the member serves as an underwriter.

#### Communications With the Public Regarding Security Futures

Proposed FINRA Rule 2215 would replace NASD IM-2210-7 with regard to standards applicable to communications concerning security futures. Proposed FINRA Rule 2215 would revise the current standards in several respects.

First, portions of NASD IM-2210-7 apply only to advertisements. Proposed FINRA Rule 2215 would apply these provisions to all retail communications.

Second, NASD IM-2210-7(a)(1) requires members to submit all advertisements concerning security futures to the Department at least 10 days prior to use. Proposed FINRA Rule 2215(a)(1) would require members to submit all retail communications concerning security futures to the Department at least 10 *business* days prior to *first* use. Both the current and the proposed filing provisions would require a member to withhold the communication from publication or circulation until any changes specified by the Department have been made.

Third, the proposal would amend the provisions that require communications concerning security futures to be accompanied or preceded by the security futures risk disclosure document under certain circumstances.<sup>54</sup> As revised, a communication concerning security futures would have to be accompanied or preceded by the risk disclosure document if it contained the names of specific securities.

Fourth, proposed FINRA Rule 2214(b)(4)(D) would clarify that communications that contain the historical performance of security futures must disclose all relevant costs, which must be reflected in the performance.

#### Communications With the Public About Collateralized Mortgage Obligations

Proposed FINRA Rule 2216 would replace NASD IM-2210-8 with regard to standards applicable to retail communications concerning CMOs. The standards would remain the same as in IM-2210-8.

As noted above, FINRA will announce the implementation date of the proposed rule change in a *Regulatory Notice* to be published no later than 90 days following Commission approval. The implementation date will be no later than 365 days following Commission approval.

## 2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>55</sup> which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes that the proposed rule change will help ensure that investors are protected from potentially false or misleading communications with the public distributed by FINRA member firms.

### *B. Self-Regulatory Organization's Statement on Burden on Competition*

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

<sup>52</sup> The requirement to establish supervisory policies and procedures for public appearances is consistent with NASD Rule 3010(b) and Incorporated NYSE Rule 472(l).

<sup>53</sup> This provision is consistent with footnote 3 to NASD IM-2210-6.

<sup>54</sup> See NASD IM-2210-7(b).

<sup>55</sup> 15 U.S.C. 78o-3(b)(6).

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

In September 2009, FINRA published *Regulatory Notice* 09-55 (the "Notice", requesting comment on the rules as proposed therein (the "Notice proposal"). A copy of the *Notice* was filed with the Commission as Exhibit 2a. The comment period expired on November 20, 2009. FINRA received 23 comments in response to the *Notice*. A list of the commenters in response to the *Notice* was filed with the Commission as Exhibit 2b, and copies of the comment letters received in response to the *Notice* were filed with the Commission as Exhibit 2c.<sup>56</sup> The text of Exhibits 2a, 2b and 2c are available on FINRA's Web site at <http://www.finra.org>, at the principal office of FINRA and at the Commission's Public Reference Room. A summary of the comments and FINRA's response is provided below.

#### Communication Categories

##### Interactive Electronic Communications

Cornell, Cutter, PIABA, SIFMA, StockCross, Vanguard and Wells Fargo generally supported the proposed consolidation of the six current communication categories under NASD Rule 2210 into three categories under proposed FINRA Rule 2210(a). Fidelity and the ICI suggested that FINRA add a new separate communication category for "interactive electronic communications," which would include real-time interactive electronic communications made through social media Web sites, and that FINRA allow this communication to be supervised in a manner similar to the supervision of correspondence.

FINRA does not believe adding a fourth communication category for interactive electronic communication categories is necessary. However, as discussed below, FINRA has modified the principal review and approval requirements under proposed paragraph (b) to allow retail communications that are posted on online interactive electronic forums to be supervised in the same manner as correspondence.<sup>57</sup> FINRA believes that this modification of the principal review and approval requirements achieves the same result sought by Fidelity and the ICI.

##### Definition of Correspondence

The *Notice* proposal defined "correspondence" as any written

(including electronic) communication that is distributed or made available to 25 or fewer retail investors. The *Notice* proposal likewise defined "retail communication" as any written (including electronic) communication that is distributed or made available to more than 25 retail investors.

The proposed definition of "correspondence" generated a number of comments. The CAI, the ICI, TLGI, MBSC, NPHI, TD Ameritrade, Vanguard and WilmerHale objected to treating communications to more than 25 retail investors as retail communications rather than correspondence. These commenters argued that the 25-investor cutoff is arbitrary, and that given the challenges in monitoring whether a communication is limited to 25 or fewer recipients, members would be forced to treat all letters and emails as retail communications. These commenters recommended that FINRA revise the proposal to include within the definition of "correspondence" emails to existing retail customers, regardless of the number of recipients.

NASD Rule 2211(a)(1) defines "correspondence" as "any written letter or electronic mail message and any market letter distributed by a member to: (A) One or more of its existing retail customers; and (B) fewer than 25 prospective retail customers within any 30 calendar-day period." However, NASD Rule 2211 also requires a member to have a registered principal approve prior to use correspondence that is distributed to 25 or more existing retail customers within any 30 calendar-day period and makes any financial or investment recommendation or otherwise promotes a product or service of the member.<sup>58</sup>

FINRA is not revising the definition of "correspondence" to include e-mails or written letters to existing retail customers without limit as to the number of recipients. However, to address the concern raised by the commenters, FINRA has revised the proposed principal approval requirements to exclude communications to retail investors that do not make any financial or investment recommendation or otherwise promotes a product or service of the member.<sup>59</sup> This revision will continue to allow members to distribute non-promotional e-mails and other communications to retail investors without having a principal approve them prior to use.

Unlike the current definition of "correspondence" under NASD Rule 2211, the *Notice* proposal's definition of

"correspondence" did not reference a 30 calendar-day window within which to count the number of recipients. Cutter, the ICI, Morgan, SIFMA, WGSJ and WilmerHale all objected to the elimination of the 30 calendar-day period. In response to these comments, FINRA has revised the definition of "correspondence" to include written communications distributed or made available to 25 or fewer retail investors within any 30 calendar-day period. FINRA likewise has revised the definition of "retail communication" to include written communications that are distributed or made available to more than 25 retail investors within any 30 calendar-day period.

The current definition of "correspondence" includes "market letters," which are defined as "any written communication excepted from the definition of 'research report' pursuant to NASD Rule 2711(a)(9)(A)." <sup>60</sup> The *Notice* proposal's definition of "correspondence" did not include market letters. Forefield and Wells Fargo opposed the elimination of market letters from the definition of correspondence. These commenters requested that FINRA either revise the definition to include market letters, or provide an exception from the principal approval requirements for market letters.

In the interest of keeping the definition of "correspondence" as straightforward as possible, FINRA is not revising the definition to include market letters. However, FINRA has revised the principal approval requirements to allow members to supervise any retail communication that is excepted from the definition of "research report" pursuant to NASD Rule 2711(a)(9)(A) in the same manner as correspondence.<sup>61</sup> FINRA believes that the same rationale it used to provide members with more flexibility in supervising market letters continues to exist, and thus has made this change to the principal approval requirements.<sup>62</sup>

##### Definitions of Institutional Communication and Institutional Investor

The *Notice* proposal defined "institutional communication" as "any written (including electronic) communication that is distributed or made available only to institutional investors." TD Ameritrade commented that "or made available to" should be deleted from the definition and replaced

<sup>56</sup> See Exhibit 2b for a list of abbreviations assigned to commenters.

<sup>57</sup> See proposed FINRA Rule 2210(b)(1)(D)(ii).

<sup>58</sup> See NASD Rule 2211(b)(1)(A).

<sup>59</sup> See proposed FINRA Rule 2210(b)(1)(D)(iii).

<sup>60</sup> See NASD Rule 2211(a)(5).

<sup>61</sup> See proposed FINRA Rule 2210(b)(1)(D)(i).

<sup>62</sup> See *Notice to Members* 09-10 (February 2009).

with “intended for an audience of.” With this change, TD Ameritrade noted that members could post to Web sites that are intended for institutional investors without having to make it password-protected.

FINRA disagrees with this comment. If members were merely required to “intend” that a communication reach institutional investors, they could effectively distribute the communication to anyone simply by including a disclaimer regarding its intended audience. This rule change would make the distinction between institutional communications and retail communications virtually meaningless.

The *Notice* proposal defined “institutional investor” to include persons described in NASD Rule 3110(c)(4) (definition of “institutional account”), government entities and subdivisions, certain employee benefit and qualified plans that have at least 100 participants, members and their registered personnel, and persons acting on behalf of institutional investors. Fidelity requested that FINRA clarify that if an employer offers multiple employee benefit plans, the plans may be aggregated for purposes of calculating the number of participants. FINRA has revised the definition of “institutional investor” to allow aggregation of multiple plans offered by a single employer.

Fidelity, SIFMA and WilmerHale argued for expanding the definition of “institutional investor” to include non-retail entities with assets under \$50 million.<sup>63</sup> FINRA believes that the definition is already sufficiently broad, and that entities that have assets of less than \$50 million often require the same investor protections regarding sales material as a retail investor.

SIFMA and TD Ameritrade argued that the rule should make clear that if a member provides an institutional communication to another member, the first member is not responsible if the second member forwards the communication to retail investors. FINRA believes that, while one member generally is not responsible for the actions of another, such a determination will be subject to the facts and circumstances. Moreover, a member

<sup>63</sup> Under NASD Rule 3110(c)(4), a person who does not fall within one of the enumerated categories must have total assets of at least \$50 million to be considered an institutional account. The SEC recently approved the adoption of NASD Rule 3110(c)(4) as FINRA Rule 4512(c) without material change. See Securities Exchange Act Release No. 63784 (January 27, 2011), 76 FR 5850 (February 2, 2011) (Order Approving File No. SR-FINRA-2010-052). FINRA Rule 4512 becomes effective on December 5, 2011. See *Regulatory Notice* 11-19 (April 2011).

may not provide an institutional communication to another if the member has reason to believe that it will be forwarded to retail investors.

Accordingly, FINRA declines to make this change.

FINRA has added a Supplementary Material to FINRA Rule 2210 to clarify the extent to which a member’s internal communications would be considered institutional communications. The Supplementary Material provides that a member’s internal written (including electronic) communications that are intended to educate or train registered persons about the products or services offered by a member are considered institutional communications pursuant to paragraph (a)(3) of proposed FINRA Rule 2210. Accordingly, such internal communications are subject to both the provisions of proposed FINRA Rule 2210 and NASD Rule 3010(d).

#### Definition of Retail Communication

The *Notice* proposal defined “retail communication” as “any written (including electronic) communication that is distributed or made available to more than 25 retail investors.” “Retail investor” was defined as “any person other than an institutional investor.” Generally “retail communication” would include communications that currently fall under the definitions of “advertisement” and “sales literature.”

The CAI and NPHI both expressed concern that combining advertisements and sales literature into a single category might lead FINRA staff to apply the same standards to all retail communications regardless of the intended audience. These commenters recommended that FINRA provide guidance that it will continue to take into account the anticipated audience for a proposed retail communication when determining what disclosures and other content standards to apply.

FINRA notes that proposed FINRA Rule 2210(d)(1)(E) provides that “[m]embers must consider the nature of the audience to which the communication will be directed and must provide details and explanations appropriate to the audience.” While proposed FINRA Rule 2210’s content standards apply to all retail communications, the level of detail and explanation required for a particular retail communication will depend on the audience to which it is directed.

It may be unclear whether the definition of “retail investor” includes persons who are not customers of a member. Accordingly, FINRA has revised the definition to add at its end

“regardless of whether the person has an account with a member.”<sup>64</sup>

#### Approval and Recordkeeping Review and Approval of Retail Communications

FINRA Rule 2210(b)(1)(A) in the *Notice* proposal provided that “an appropriately qualified registered principal” must approve each retail communication before the earlier of its use or filing with the Department. SIFMA and Wells Fargo commented that the proposal should provide greater guidance as to which principal registration category is required to approve different categories of retail communications. FINRA believes that this issue is already addressed in the registration rules for principals and supervisors.<sup>65</sup> Accordingly, FINRA does not believe that it would be appropriate or useful to restate those rules’ provisions in the rules governing communications with the public.

In a similar vein, Morgan, SIFMA and WilmerHale requested clarification as to whether a Series 9/10 general securities sales supervisor would be permitted to review and approve retail communications and correspondence. Currently, Series 9/10 supervisors are qualified to review and approve correspondence and sales literature, but are not qualified to approve advertisements as defined in NASD Rule 2210.<sup>66</sup> While the scope of a Series 9/10 supervisor’s activities are not part of this rule proposal, FINRA notes that it has separately proposed to adopt new FINRA rules that would allow a general securities sales supervisor to approve both correspondence and retail communications.<sup>67</sup>

The ICI requested confirmation that the principal approval requirements do not apply to the updating of templates contained in retail communications. FINRA does not intend to revise its earlier interpretive position with regard to the updating of templates as stated in a 2002 interpretive letter to T. Rowe Price Associates, Inc.<sup>68</sup> Moreover, proposed paragraph (c)(7)(B) would add an exclusion from the filing

<sup>64</sup> As noted above, FINRA also revised the definition of “retail communication” to add at its end “within any 30 calendar-day period.”

<sup>65</sup> See NASD Rules 1020 *et seq.*

<sup>66</sup> See NASD Rule 1022(g)(2)(C)(iii).

<sup>67</sup> See *Regulatory Notice* 09-70 (December 2009), Attachment B (proposed FINRA Rule 1230(a)(10)) (eliminates current restriction on Series 9/10 supervisors approving advertisements).

<sup>68</sup> See Letter from Thomas M. Selman, NASD, to Forrest Foss, T. Rowe Price Associates Inc., dated January 28, 2002 (interpreting the approval, filing and recordkeeping requirements of NASD Rule 2210 as generally not applying to statistical updates contained in pre-existing templates).

requirements for retail communications that are based on templates that were previously filed with the Department, the changes to which are limited to updates of more recent statistical or other non-narrative information.

SIFMA recommended that FINRA reiterate its previous interpretive guidance regarding the supervision of electronic communications as set forth in *Regulatory Notice* 07–59.<sup>69</sup> FINRA is separately addressing the staff guidance contained in *Regulatory Notice* 07–59 regarding the supervision of electronic communications as part of its proposal to adopt new FINRA Rule 3110.<sup>70</sup>

The CAI, Cornell, Fidelity, the FSI, MBSC, NPHI, SIFMA, Vanguard, and WGSJ commented that FINRA should address the supervision requirements for social networking sites and include them in the revised proposal filed with the SEC. After *Regulatory Notice* 09–55 was published for comment, but before this filing with the SEC, FINRA published *Regulatory Notice* 10–06, which provides guidance on blogs and social networking Web sites.<sup>71</sup> Among other things, that *Notice* addressed the supervision of social media sites and specified that members may adopt supervisory procedures similar to those outlined for electronic correspondence in *Regulatory Notice* 07–59. FINRA is now codifying this guidance as part of proposed FINRA Rule 2210. Proposed paragraph (b)(1)(D)(ii) specifies that the requirements of paragraph (b)(1)(A), which require a principal to approve retail communications prior to use, will not apply to retail communications that are posted on an online interactive electronic forum, provided that the member supervises and reviews such communications in the same manner as required for supervising and reviewing correspondence pursuant to NASD Rule 3010(d).

In addition, given the rapid changes to technology used to communicate with customers, FINRA believes it will be useful going forward to have exemptive authority with regard to the principal pre-use approval requirements applicable to retail communications in certain circumstances. Accordingly, FINRA has added a new proposed paragraph (b)(1)(E) that would authorize FINRA to grant an exemption from the principal approval requirements of paragraph (b)(1)(A) for good cause shown and to the extent that such exemption is consistent with the

purposes of Rule 2210, the protection of investors, and the public interest.

#### Review and Approval of Research-Related Retail Communications

FINRA Rule 2210(b)(1)(B) in the *Notice* proposal provided that, “[w]ith respect to research reports on debt and equity securities, the requirements of paragraph (b)(1)(A) may be met by a Supervisory Analyst approved pursuant to NYSE Rule 344.” This language duplicated an identical provision in NASD Rule 2210(b)(1)(B). SIFMA and WilmerHale requested that FINRA clarify that a supervisory analyst also may review and approve research-related communications that are not research reports, such as market letters, research notes and economic analyses.

FINRA does not believe such a clarification is necessary. Proposed paragraph (b)(1)(D)(i) would except from the requirements of paragraph (b)(1)(A) any retail communication that is excepted from the definition of “research report” pursuant to NASD Rule 2711(a)(9)(A), provided that the member supervises and reviews such communications in the same manner as required for supervising and reviewing correspondence. NASD Rule 2711(a)(9)(A) excludes from the definition of “research report” a broad range of research-related communications, such as discussions of broad-based indices, commentaries on economic, political or market conditions, and certain other research-related communications.<sup>72</sup> By allowing firms to supervise and review these communications in the same manner as firms supervise and review correspondence, FINRA believes that firms will have sufficient flexibility to address the concerns raised by SIFMA and WilmerHale.

#### Administrative Communications

FINRA Rule 2210(b)(1)(D) in the *Notice* proposal excluded from the principal approval requirements of paragraph (b)(1)(A) “any retail communication that is solely administrative in nature.” The CAI, Cutter, Fidelity, the FSI, Invesco, the ICI, MBSC, Morgan and SIFMA noted that currently NASD Rule 2211 does not require principal pre-use approval of e-mails and written letters to existing retail customers (without limit) as long

as the communication does not make an investment recommendation or promote a product or service of the member.<sup>73</sup> These commenters argued that FINRA should make clear that these communications are included within the “solely administrative” exception. PIABA expressed concern that this exception could be used by members as a loophole to avoid principal review, and recommended that FINRA better define which communications fall within this exception.

In response to these comments, FINRA has revised paragraph (b)(1)(D) to eliminate the reference to “solely administrative” retail communications, and instead to exclude “any retail communication that does not make any financial or investment recommendation or otherwise promote a product or service of the member.” This language is currently used in NASD Rule 2211(b)(1)(A) with regard to the requirements for supervising correspondence that is sent to 25 or more existing retail clients, and thus maintains the same standard members face today with regard to such correspondence. In addition, FINRA believes the revised text better defines the scope of this exclusion. Members would still be required to supervise such retail communications in the same manner as required for supervising and reviewing correspondence pursuant to NASD Rule 3010(d).

FINRA is also adding a new paragraph (b)(1)(F) to clarify that, notwithstanding any other provision of proposed FINRA Rule 2210, an appropriately qualified principal must approve a communication prior to a member filing the communication with the Department.

#### Recordkeeping Requirements

FINRA Rule 2210(b)(4) in the *Notice* proposal set forth members’ recordkeeping obligations with respect to each communication category. Proposed paragraph (b)(4)(A)(ii) provided that, with respect to institutional communications, records must include “the name of the person who prepared or distributed the communication.” Fidelity, the ICI and MBSC supported the requirement to maintain records of the person who prepared a communication, but opposed a requirement to keep records of the person who distributed the communication, which they believed would be difficult to implement. TD Ameritrade recommended that members be required to keep records of the person who prepared an institutional

<sup>72</sup> Currently NASD Rule 2211(a)(1) includes within the definition of “correspondence” any “market letter.” “Market letter” is defined as any written communication excepted from the definition of “research report” pursuant to NASD Rule 2711(a)(9)(A). See NASD Rule 2211(a)(5). Thus, the proposal would allow members to continue to supervise market letters in the same manner as they supervise correspondence.

<sup>73</sup> See NASD Rule 2211(b)(1)(A).

<sup>69</sup> See *Regulatory Notice* 07–59 (December 2007).

<sup>70</sup> See Securities Exchange Act Release No. 64736 (June 23, 2011), 76 FR 38245 (June 29, 2011) (Notice of Filing File No. SR-FINRA-2011-028).

<sup>71</sup> See *Regulatory Notice* 10–06 (January 2010).

communication only where a registered principal has not approved it.

In response to these comments, FINRA has revised the recordkeeping provisions. As revised, a member's records must include the name of any registered principal who approved a communication and the date approval was given.<sup>74</sup> In the case of a retail communication or institutional communication that is not approved prior to first use by a registered principal, the records must include the name of the person who prepared or distributed the communication. Thus, a member would not have to keep records of the person who distributed a retail communication or institutional communication, if the records included either the registered principal who approved the communication, or the person who prepared the communication.

FINRA Rule 2210(b)(4)(A)(iv) in the *Notice* proposal required records to include "the source of any statistical table, chart, graph or other illustration used in the communication." Fidelity and the FSI requested that FINRA clarify what is required regarding sources of statistical tables or charts. For example, is it sufficient to have a citation to a study, or must a record include a copy of the study itself? In response to these comments, FINRA has revised proposed FINRA Rule 2210(b)(4)(A)(iv) to require "information concerning" the source of the table or chart. This revision reflects the current recordkeeping requirements for sources of statistical tables or charts.<sup>75</sup>

#### Filing Requirements

##### Filing Requirements for New Members and Certain Rule Violators

FINRA Rule 2210(c)(1)(A) in the *Notice* proposal required a new member to file with the Department all of its retail communications for a one-year period beginning on the effective date a member becomes registered with FINRA. This new member filing requirement differs from NASD Rule 2210(c)(5)(A), which applies only to advertisements and commences on the first date a new member files an advertisement with the Department. Proposed paragraph (c)(1)(B) provided that, if the Department determines that a member has departed from proposed FINRA Rule 2210's standards, it may require the member to file all or part of its communications at least 10 business days prior to use.

Cornell opposed the commencement date of the new member filing period,

arguing that this will decrease the time during which the Department will monitor a new member's communications. FINRA disagrees that the new filing period is insufficient. Members are still subject to a filing requirement during their first year of operation and are required to file certain retail communications thereafter. In addition, members are always subject to spot-check procedures. Nevertheless, to ensure that the starting date for this filing requirement is clear, FINRA has revised this provision to specify that the one-year filing period begins on the date reflected in the CRD<sup>®</sup> system as the date the firm's FINRA membership became effective.

WilmerHale opposed the breadth of this expanded filing requirement, which would cover communications that currently qualify as sales literature and thus do not have to be filed. WilmerHale argued that this expanded filing requirement would substantially hinder new firms' operations. SIFMA similarly argued that this filing requirement should exclude password-protected Web sites, since they are considered sales literature rather than advertisements under current rules.

FINRA recognizes that it may be burdensome for new firms to file all of their retail communications, including form letters and group e-mails sent to 25 or more retail investors within a 30 calendar-day period. Accordingly, FINRA has narrowed the scope of this filing requirement to cover only retail communications that are published or used in any electronic or other public media, including any generally accessible Web site, newspaper, magazine or other periodical, radio, television, telephone or audio recording, video display, signs or billboards, motion pictures or telephone directories (other than routine listings). This narrowing of the filing requirement would require new firms to file only retail communications that currently fall within the definition of "advertisement" under NASD Rule 2210, thus not changing the scope of this filing requirement as compared to current standards. The filing requirements of proposed paragraph (c)(1)(A) would not apply to password-protected Web sites.

Fidelity commented that FINRA should be required to delineate the administrative process that must be followed before it can impose a pre-use filing requirement on members that have violated the communications rules. FINRA believes that proposed paragraph (c)(1)(B) specifies the steps FINRA must take before it may impose this requirement. The paragraph states that the Department must notify the member

in writing of the types of communications to be filed and the length of time the requirement is to be in effect. The paragraph also states that any such filing requirement will take effect 21 calendar days after service of the written notice, during which time the member may request a hearing under FINRA Rules 9551 and 9559.

##### Retail Communications Concerning Structured Products

FINRA Rule 2210(c)(2)(B) in the *Notice* proposal required members to file at least 10 business days prior to use, retail communications concerning publicly offered CMOs, options, security futures, and any other publicly offered securities derived from or based on a single security, a basket of securities, an index, a commodity, a debt issuance or a foreign currency ("structured products"). These pre-use filing requirements would not apply to retail communications concerning options or security futures that are submitted to another self-regulatory organization having comparable standards, retail communications in which the only reference to options or security futures is contained in a listing of the member's services, and retail communications that are subject to a separate filing requirement in paragraph (c) of the proposed rule.

Cornell, the ICI, PIABA and Vanguard supported the pre-use filing requirement for retail communications concerning structured products. Fidelity commented that FINRA should list which products fall within this requirement, and clarify that investment company products do not fall within this requirement. Fidelity also recommended that this filing requirement exclude factual material about structured products, such as research reports and fact sheets, and that FINRA should allow a member to use retail communications that are filed with the Department if the member does not receive a response from FINRA within 10 business days.

Invesco and SIFMA commented that the proposal should be revised to eliminate the pre-use filing requirement for retail communications concerning structured products, and instead allow members to file such communications within 10 business days of first use. SIFMA also recommended that the reference to retail communications concerning options be stricken, since these communications are separately regulated under FINRA Rule 2220. In addition, SIFMA requested that FINRA exempt from this filing requirement retail communications concerning structured products for which there is a

<sup>74</sup> See proposed FINRA Rule 2210(b)(4)(A)(ii).

<sup>75</sup> See NASD Rule 2210(b)(2)(B).

registration exemption under the Securities Act.

StockCross argued that the pre-use filing requirement for retail communications concerning structured products will hinder business since often these products have a limited offering period. Wells Fargo suggested that retail investors will be put at a disadvantage relative to institutional investors since retail investors will not be able to receive sales material concerning structured products until after the member receives Department staff's comments to filed communications.

WilmerHale also opposed the pre-use filing requirement for retail communications concerning structured products. WilmerHale argued that the burdens on members will strongly outweigh any benefit to investors. For example, members would be prevented from sending group e-mails to clients reminding them that their options are in the money without first filing such an e-mail with FINRA at least 10 business days prior to transmission. WilmerHale and SIFMA both expressed concern that FINRA lacks the resources necessary to review such communications. WilmerHale also recommended that FINRA exclude all research from the requirements of proposed FINRA Rule 2210 and address any specific concerns under NASD Rule 2711.

In response to these comments, FINRA is revising the filing requirements for retail communications concerning options, CMOs and structured products. FINRA agrees that FINRA Rule 2220 separately imposes a filing requirement for advertisements and sales literature concerning options; accordingly, it is unnecessary to include a separate filing requirement for retail communications concerning options under proposed FINRA Rule 2210. Thus, the reference to retail communications concerning options has been deleted.

FINRA also agrees that there may be situations in which a pre-use filing requirement would prevent members from distributing time-sensitive retail communications concerning CMOs and structured products in a timely manner. Accordingly, FINRA has revised the proposal to permit members to file retail communications concerning CMOs and structured products within 10 business days of first use, instead of at least 10 business days prior to use.<sup>76</sup>

FINRA does not believe it is appropriate to attempt to list all products that are derived from or based

on a single security, a basket of securities, an index, a commodity, a debt issuance or a foreign currency. Members frequently develop new types of retail structured products that would not be included in any list that FINRA created today. Thus, FINRA believes that it is better to leave open the possibility that retail communications concerning new products also will fall under this filing requirement.

FINRA agrees that retail communications concerning registered investment companies are not subject to the filing requirement covering structured products communications, since they are already subject to a separate filing requirement under proposed paragraphs (c)(2)(A), (c)(2)(C) and (c)(3)(A). FINRA has added language to proposed paragraph (c)(3)(F) to make this more clear.

FINRA does not agree that retail communications that only present "factual information" about structured products should be excluded. Arguably all sales material is "factual," and the determination of which communications are not factual would be highly subjective. In addition, the proposal already excludes from filing retail communications whose only reference to investments is solely as part of a listing of products and services offered by the member.<sup>77</sup>

FINRA agrees that the filing requirement should not apply to retail communications concerning structured products that are not registered under the Securities Act. As a general matter, the filing requirements under NASD Rule 2210 do not apply to communications concerning privately placed securities, since typically these securities are not widely advertised. Accordingly, FINRA has added language to proposed paragraph (c)(3)(F) to clarify that the filing requirement only applies to retail communications concerning structured products that are registered under the Securities Act.

FINRA disagrees with the assertion that it lacks the resources to review retail communications concerning structured products. FINRA will ensure that the Department has the necessary staffing to review such material in a timely manner. Additionally, by allowing members to file such communications concurrent with use, this revision takes some of the time pressure off members that seek to distribute retail communications prior to receiving staff comments.

FINRA also disagrees that proposed FINRA Rule 2210 should not apply to research. While NASD Rule 2711 does

impose some content standards on research reports, it does not include the more general standards of proposed FINRA Rule 2210 that require communications to be fair and balanced. In addition, proposed FINRA Rule 2210 requires certain non-independent research, such as research prepared by a member or its affiliate on mutual funds or exchange-traded funds ("ETFs"), to be filed with the Department.

#### Retail Communications Concerning Closed-End Funds

FINRA Rule 2210(c)(3)(A) in the *Notice* proposal required members to file all retail communications concerning registered closed-end investment companies. Currently, FINRA only requires members to file such communications during a closed-end fund's IPO period.

Cornell, the ICI, PIABA and Vanguard supported this expanded filing requirement. The ICI requested that FINRA clarify that its rules only reach members that prepare closed-end fund communications, and not the fund itself or its adviser. The ICI also requested that FINRA clarify that a fund underwriter is not responsible for communications concerning a closed-end fund prepared by an unaffiliated member.

FINRA rules apply to communications used by FINRA member firms. While its rules do not apply to non-member firms, such as investment companies and investment advisers that are not registered as broker-dealers, they do apply to any communications used by a member, regardless of which entity prepared the communications. Generally, FINRA does not hold one member responsible for the actions of another member, but considers each case separately based on the facts and circumstances.

Wells Fargo opposed the requirement to file retail communications concerning closed-end funds after the IPO period has expired, arguing that trading closed-end funds on the secondary market does not raise the same concerns as during the IPO period. FINRA disagrees with this argument. FINRA currently requires members to file retail communications concerning other types of investment company securities that are traded on the secondary market, such as ETFs. In addition, FINRA believes that investor protection concerns can arise from any retail communication concerning a closed-end fund, regardless of when it is distributed.

<sup>76</sup> See proposed FINRA Rules 2210(c)(3)(E) and (F).

<sup>77</sup> See proposed FINRA Rule 2210(c)(7)(L).

### Filing Exclusions for Non-Material Changes and Templates

FINRA Rule 2210(c)(7)(A) in the *Notice* proposal excluded from the filing requirements of proposed paragraphs (c)(1) through (c)(4) “retail communications that previously have been filed and that are used without material change, including retail communications that are based on templates that were previously filed with the Department the changes to which are limited to updates of more recent statistical or other non-narrative information.” NASD Rule 2210(c)(8)(A) includes the same filing exclusion for previously filed advertisements and sales literature that are used without material change, but does not contain any express filing exclusion for templates.

The CAI, Fidelity, the ICI and MBSC expressed concern that proposed paragraph (c)(7)(A) would narrow the current filing exclusion for communications used without material change. By including the template filing exclusion in the same paragraph, these commenters feared that this filing exception would not allow non-material changes to narrative information. FINRA did not intend to narrow the current filing exclusion for retail communications that are used without material change. Accordingly, FINRA has separated the filing exclusion for previously filed retail communications that are used without material change from the exclusion for certain previously filed templates.<sup>78</sup>

### Filing Exclusion for Administrative Communications

FINRA Rule 2210(c)(1)(B) in the *Notice* proposal excluded from the filing requirements retail communications “that are solely administrative in nature.” This filing exclusion replaced a current exclusion for advertisements and sales literature “solely related to recruitment or changes in a member’s name, personnel, electronic or postal address, ownership, offices, business structure, officers or partners, telephone or teletype numbers, or concerning a merger with, or acquisition by, another member.”<sup>79</sup>

SIFMA requested that FINRA clarify that this exclusion covers generic documents or excerpts describing a member’s products or services, even if they reference a product subject to the filing requirements. Vanguard requested that this filing exclusion specifically reference the list of items that is

excluded under current rules. Wells Fargo argued that this exclusion should not be limited to the administrative items that are excluded under current rules.

SIFMA’s interpretation of this filing exclusion is broader than FINRA intended. However, FINRA acknowledges that “solely administrative in nature” may be unclear to some members. Accordingly, FINRA is revising this exclusion to cover retail communications that do not make any financial or investment recommendation or otherwise promote a product or service of the member. In this regard, the filing exclusion covers the same retail communications that are excepted from the principal approval requirements under proposed FINRA Rule 2210(b)(1)(D).

### Other Filing Exclusions

FINRA Rule 2210(c)(7)(G) of the *Notice* proposal excluded from the filing requirements reprints and excerpts of certain articles and reports produced by independent third parties. SIFMA requested that FINRA clarify whether that filing exclusion covered independent third-party research reports concerning registered investment companies, which are currently excluded from filing under NASD Rule 2210(c)(8)(H). FINRA does intend this filing exclusion also to cover independent research reports on registered investment companies which are excluded from filing under the current rules.

FINRA Rule 2210(c)(7)(J) of the *Notice* proposal excluded from the filing requirements communications that refer to investment company securities, direct participation programs or exempted securities solely as part of a listing of products or services offered by the member. TD Ameritrade requested that FINRA expand this exclusion to allow members to discuss the types of securities that can be traded through a member, to include general descriptions of these securities, to explain the functionality of online tools and trading platforms, and to present related fees and commissions, as long as no actual security is named. Cutter requested that this exclusion permit a listing of any type of investment a member offers, not just the securities described in the paragraph.

FINRA does not believe TD Ameritrade’s proposed expansion would be appropriate, since it would cover many types of retail communications that normally require review by Department staff. FINRA agrees, however, that a communication that refers to an investment solely as

part of a listing of a member’s products and services should be excluded from filing. FINRA has modified this filing exclusion accordingly.<sup>80</sup>

The *Notice* proposal would have eliminated a current filing exclusion for press releases that are made available only to members of the media.<sup>81</sup> The *Notice* proposal stated that FINRA staff found that members almost always post press releases on their Web sites, thus making them available to the general public, and making this filing exclusion inapplicable. Fidelity, the ICI and MBSC commented that members still rely on this filing exclusion, and thus objected to its elimination. Based on these representations, FINRA has reinstated the filing exclusion for press releases made available only to members of the media.<sup>82</sup>

In 2006, FINRA published an interpretive letter stating that free writing prospectuses are excluded from the provisions of NASD Rules 2210 and 2211.<sup>83</sup> Based on this 2006 letter, Morgan, SIFMA and WilmerHale requested that FINRA include a filing exclusion for free writing prospectuses. In October 2010, FINRA published a *Regulatory Notice* that withdrew, in part, the guidance provided in the 2006 interpretive letter.<sup>84</sup> In the 2010 *Notice*, FINRA stated that broadly disseminated free writing prospectuses present the same investor protection concerns as communications governed by NASD Rules 2210 and 2211. Accordingly, FINRA announced that it now interprets FINRA Rules 2210 and 2211 to apply to free writing prospectuses distributed by a broker-dealer in a manner reasonably designed to lead to broad unrestricted dissemination. Based on this new guidance, rather than exclude free writing prospectuses, FINRA is modifying the current filing exclusion for SEC-filed documents not to cover broadly disseminated free writing prospectuses filed with the SEC pursuant to Securities Act Rule 433(d)(1)(ii).<sup>85</sup> Thus, such free writing prospectuses must be filed with FINRA to the extent that they constitute a retail communication covered by another filing requirement (such as a free writing prospectus concerning a structured product registered under the Securities Act).

<sup>80</sup> See proposed FINRA Rule 2210(c)(7)(L).

<sup>81</sup> See NASD Rule 2210(c)(8)(G).

<sup>82</sup> See proposed FINRA Rule 2210(c)(7)(H).

<sup>83</sup> See Letter from Lisa C. Horrigan, Assistant General Counsel, NASD, to Eileen Ryan, Securities Industry Association, and Sarah Starkweather, The Bond Market Association, dated August 1, 2006.

<sup>84</sup> See *Regulatory Notice* 10–52 (October 2010).

<sup>85</sup> See proposed FINRA Rule 2210(c)(7)(F).

<sup>78</sup> See proposed FINRA Rules 2210(c)(7)(A) and (B).

<sup>79</sup> See NASD Rule 2210(c)(8)(B).

SIFMA recommended that FINRA add a filing exclusion for general investment pieces that discuss an investment strategy but do not recommend or promote a particular product or service of a member. FINRA has revised the proposal to exclude retail communications that do not make investment recommendations or promote a member's products or services. However, depending on the facts and circumstances, a retail communication that discusses investment strategies may in fact be making investment recommendations or promoting a member's products or services.

#### Filing Exemptions

NASD Rule 2210(c)(10) and FINRA Rule 2210(c)(9) of the *Notice* proposal permitted FINRA to exempt a member from the pre-use filing requirements of paragraph (c)(1)(A) for good cause shown. As discussed above, FINRA has revised the principal review and approval requirements to authorize FINRA to grant an exemption from the principal approval requirements of paragraph (b)(1)(A) for retail communications for good cause shown after taking into consideration all relevant factors, to the extent such exemption is consistent with the purposes of Rule 2210, the protection of investors, and the public interest. FINRA is similarly revising proposed paragraph (c)(9) to authorize FINRA to exempt a specific category of retail communications from the filing requirements under the same circumstances described with respect to the principal approval exemptive authority.

#### Other Filing Issues

NPHI requested that FINRA revise its filing requirements to be triggered off the date a registered principal approves a communication, rather than the date a member first uses the communication, since a member may not know the exact date of first use. FINRA disagrees with this recommendation since such a standard would allow members to delay filing a communication indefinitely until a principal approved it. Moreover, FINRA believes that it is important for members to keep records of when a communication is used.

T. Rowe commented that members should be allowed to file retail communications within 15 business days of first use, rather than 10 business days. FINRA disagrees with this recommendation since allowing members to file 15 business days after the date of first use would create too long a period between the first date a

member distributes its communication and the first date FINRA has an opportunity to review the communication.

Proposed FINRA Rule 2210(c)(3)(A) requires a member that files a retail communication that includes an investment company performance ranking or comparison to include a copy of the ranking or comparison used in the communication. T. Rowe recommended that members be allowed to submit one performance ranking backup document and refer to that document in future filings. FINRA does not agree with this comment, since Department staff need the ranking or comparison used in a retail communication when conducting their review, and reference to a ranking document contained in a prior filing would slow the process.

#### Content Standards

##### General Comments

FINRA Rule 2210(d)(1)(F) in the *Notice* proposal generally prohibited communications from predicting or projecting performance, but permitted a hypothetical illustration of mathematical principles as long as it does not predict or project performance. TD Ameritrade commented that this provision should be revised to permit examples of hypothetical transactions (such as the maximum gain or loss that would occur based on an assumed change in market price), as long as the assumptions are disclosed. FINRA does not believe the provisions should be changed in this regard. If a hypothetical example is an illustration of mathematical principles, it would be permitted. If, however, it is really a projection of performance of a particular investment, FINRA believes this practice should not be allowed.

FINRA does believe, however, that proposed paragraph (d)(1)(F) needs to be clarified to indicate the circumstances under which a projection of performance is permitted: in an investment analysis tool, or a written report produced by such a tool, as permitted under proposed FINRA Rule 2214, and a price target in a research report on debt or equity securities, subject to certain conditions. FINRA has revised proposed paragraph (d)(1)(F) to reflect these exceptions.

FINRA Rule 2210(d)(3)(B) in the *Notice* proposal required all retail communications and correspondence to reflect any relationship between the member and any non-member or individual who is also named. TD Ameritrade recommended that this provision be revised to require such a disclosure only where a relationship

exists. FINRA believes no change is necessary, since the paragraph requires a communication to "reflect any relationship between the member and any non-member or individual who is also named." If no relationship exists, no disclosure is required.

FINRA Rule 2210(d)(4)(C)(iii) in the *Notice* proposal provided that, in a comparative illustration of the mathematical principles of tax-deferred versus taxable compounding, the illustration may reflect an actual state income tax rate, provided that the communication is used only with investors that reside in the identified state. TD Ameritrade commented that this provision should be revised to allow the use of an actual state income tax rate as long as the material clearly discloses that the rate only applies to residents of a particular state. FINRA has revised this provision to allow illustrations to reflect an actual state income tax rate if it prominently discloses that the illustration is applicable only to investors that reside in the identified state.

FINRA also has revised the disclosure requirements in proposed FINRA Rule 2210(d)(4)(vii) for such comparative illustrations. Illustrations additionally must disclose the degree of risk in the investment's assumed rate of return, including a statement that the assumed rate of return is not guaranteed, and the possible effect of investment losses on the relative advantage of the taxable versus tax-deferred investments.

#### Disclosure of Expenses in Fund Performance Advertising

FINRA Rule 2210(d)(5) in the *Notice* proposal required retail communications that present non-money market fund performance data to disclose, among other things, the fund's maximum front-end or back-end sales charges and total annual fund operating expense ratio, gross of any fee waivers or expense reimbursements, as stated in the fee table of the fund's prospectus or annual report, whichever is more current. Currently NASD Rule 2210(d)(3) requires the sales charges and expense ratio simply to reflect the current prospectus, and not a fund's annual report.

Fidelity, the ICI and MBSC opposed the requirement to show the expense ratio from either the prospectus or annual report, whichever is more current. These commenters argued such a requirement would be too burdensome and confusing to investors. American Funds argued that a fund should be allowed to show current expenses based on a fund's annualized monthly expense ratio, and not have to refer to the

prospectus. Vanguard supported the proposed change, but recommended that the rule allow members to show the expense ratio from a fund's prospectus if it reflects the fund's reasonable expectation of the current year's expenses.

FINRA had made this proposed change based on earlier industry input that members should be allowed to show expenses from an annual report if it is more current than the prospectus. However, in light of comments received on the *Notice* proposal and the importance for expense disclosure to be comparable among funds, FINRA is retaining the standard reflected in NASD Rule 2210(d)(3), and requiring sales charges and expense ratios to reflect a fund's current prospectus.

The CAI requested confirmation that this disclosure requirement does not apply to the presentation of performance of an underlying investment option contained in a variable insurance product communication. FINRA agrees the provision does not apply to such communications.

FINRA Rule 2210(d)(5)(B) in the *Notice* proposal required a print advertisement to disclose standardized performance and expense-related information in a prominent text box. Fidelity, the ICI and MBSC requested confirmation that this requirement only applies to print advertisements and not other forms of retail communications, such as Web sites. The ICI and MBSC also recommended that FINRA eliminate the text box requirement and replace it with a prominence requirement applicable to all retail communications.

Consistent with its application of NASD Rule 2210(d)(3), FINRA confirms that the text box requirement only applies to print advertisements. FINRA disagrees however, with the recommendation to eliminate the text box requirement for print advertisements. FINRA created this requirement due to past abuses in which non-standardized performance was prominently displayed in print advertisements, while disclosures regarding standardized performance and expenses were placed in footnotes. FINRA believes that this requirement has helped to prevent this kind of misleading presentation since the rule was adopted.

#### *Recommendations*

FINRA Rule 2210(d)(7)(A) in the *Notice* proposal required retail communications, correspondence and public appearances to contain certain disclosures if the communication

included a recommendation of securities. The communication would have to disclose if the member was making a market in the security (or an underlying option or future), if the member or its associated person will sell or buy the security from customers on a principal basis, that the member or any associated person with the ability to influence the substance of the communication has a financial interest in the recommended security, and if the member was manager or co-manager of a public offering of any securities of the recommended issuer in the past 12 months.

Cornell and PIABA both opposed limiting disclosures of financial interests to the member and associated persons with the ability to influence the substance of the communication. These commenters felt the associated person standard was too narrow and vague. Fidelity recommended that the disclosure standard for associated persons should be limited to persons who are direct employees of the member or are registered with the member, and who are directly and materially involved in the preparation of the communication. Fidelity and Morgan commented that disclosure should not be required unless an employee has a direct and material financial interest in the recommended security. This would exclude small investments and investments through mutual funds.

Morgan, SIFMA and WilmerHale commented that it would be impossible for a member to track which associated persons have the ability to influence the substance of a communication, and that FINRA must provide more guidance as to which associated persons the disclosure requirements would apply. The FSI inquired as to whether the disclosure standard would apply to a supervisor of a registered representative who emails a securities recommendation to a customer. SIFMA commented that the disclosure requirement should be limited to the member and its officers and partners, and that the rule permit generic, non-specific disclosures regarding financial interests, market making and underwriting activities.

Morgan, SIFMA and WilmerHale commented that the provision not apply to correspondence. WilmerHale also urged that the proposed rule exclude retail communications and public appearances by research analysts, since these situations are already covered by NASD Rule 2711.

In response to these comments, FINRA has revised proposed paragraph (d)(7)(A). First, paragraph (d)(7)(A) no longer applies to correspondence. Given

that correspondence may not be delivered to more than 25 retail investors within a 30-calendar-day period, FINRA believes that it is not necessary to include the extensive disclosure required for retail communications in communications sent to a more limited audience.

Second, FINRA has added a requirement that a recommendation of securities have a reasonable basis. This requirement is consistent with NASD IM-2210-1(6)(A).

Third, FINRA has modified the requirement to disclose the financial interests of any associated person with the ability to influence the substance of the communication. Instead, the disclosure requirement will apply to any associated person with the ability to influence the "content" of the communication. While this modification is minor, FINRA believes that it will help clarify which associated persons must disclose their financial interests. FINRA continues to believe that persons who influence the content of a communication that includes a recommendation have a material conflict of interest that should be disclosed if the person also has a financial interest in the recommended security.

Fourth, the disclosure requirement excludes financial interests that are "nominal." This revision makes the rule consistent with the current disclosure requirements for advertisements and sales literature that include securities recommendations under NASD IM 2210-1(6)(A)(ii).

Fifth, FINRA has excluded from this disclosure requirement public appearances by research analysts, since they are already covered under NASD Rule 2711. The proposed language also excludes research reports for the same reason.

Proposed FINRA Rules 2210(d)(7)(C) revised the current disclosure requirements for communications that contain past specific recommendations.<sup>86</sup> The revised provisions more closely reflect the disclosure standards applicable to advertisements of investment advisers that contain past specific recommendations. Wells Fargo supported this change, but urged FINRA also to adopt the SEC's interpretations of the Investment Advisers Act regarding recommendations. While FINRA may look to past SEC interpretations of its rules for guidance, FINRA declines to adopt any of the SEC interpretations of the Investment Advisers Act regarding

<sup>86</sup> See NASD IM-2210-6(C) and (D).

recommendations for purposes of this filing.

#### Other Comments

Fidelity, the ICI and Vanguard requested clarification as to whether a member is responsible for content posted by third parties on a member's Web site. These commenters also recommended that FINRA develop interpretive guidance concerning the principles that members should follow when developing communications intended for customers' mobile electronic devices. For example, FINRA should address how members may meet various disclosure requirements, such as the requirement to disclose a member's name, fees, expenses and standardized performance information.

FINRA previously addressed the issue of third-party content in *Regulatory Notice* 10-06. FINRA also agrees that issues related to communications intended for mobile electronic devices is important and will consider further guidance or rulemaking as issues arise, but does not believe this proposed rulemaking is the appropriate vehicle to address all issues raised by new technologies. In the past, when FINRA has reviewed a member's advertisement or sales literature that includes a bond fund's 30-day yield, and the fund's affiliates have subsidized or reimbursed the fund's expenses, FINRA staff has required the member also to disclose the fund's yield that would have occurred had expenses not been subsidized (the "unsubsidized yield"). FINRA has imposed this requirement based on language contained in the SEC's 1988 adopting release for Rule 482 under the Securities Act.<sup>87</sup> The ICI and T. Rowe both objected to this requirement and requested that FINRA clarify that disclosure of the unsubsidized yield is unnecessary in such circumstances. Because this issue involves an interpretation of Rule 482 under the Securities Act, FINRA declines to provide guidance through the proposed rule change.

#### Public Appearances

Proposed FINRA Rule 2210(f) in the *Notice* proposal sets forth the content and supervision requirements for members and associated persons that participate in seminars, forums or radio or television interviews. Paragraph (f)(1) specifies that the member or associated person must follow the content standards of paragraph (d)(1), and if the member or associated person

recommends a security, paragraph (d)(7).

Fidelity, Invesco, the ICI and Morgan opposed requiring associated persons that make recommendations in public appearances to meet the content standards of paragraph (d)(7). These commenters argued that it would be impossible to monitor or supervise. Invesco also argued that this requirement creates an uneven playing field between broker-dealers and investment advisers, since investment advisers do not have a similar disclosure requirement.

FINRA disagrees with the comments that the disclosure requirements regarding recommendations would be impossible to monitor or supervise. Members that employ research analysts already must meet similar requirements under NASD Rule 2711. Members could impose similar policies and procedures for their associated persons who intend to recommend securities in public appearances. The ICI requested clarification that, if a member sponsors a seminar or forum, the member is responsible only for its own presentation and not those of others. This issue will be a matter of facts and circumstances, but generally a member is only responsible for the communications of the member or its associated persons, unless the member or its associated persons are entangled with or adopt others' communications.

NPFI requested clarification as to whether a discussion of a general product category constitutes a recommendation for purposes of the public appearance disclosure requirements. If a member or associated person merely discusses a general product category without recommending a particular security, the disclosure requirements would not apply. Similarly, T. Rowe asked whether the mere reference to a security is a recommendation. Generally the mere reference to a security is not a recommendation, but this issue will be a matter of facts and circumstances.

Under NASD Rule 2210, "public appearance" is a separate category of communications with the public.<sup>88</sup> Proposed FINRA Rule 2210 does not retain "public appearance" as a separate category of "communications with the public." T. Rowe suggested that FINRA retain its definition of "public appearance," since otherwise an email to a member of the media or private conversation might be viewed as a public appearance. FINRA does not believe this is necessary. Proposed paragraph (f)(1) makes clear that it

applies only to "a seminar, forum, radio or television interview or \* \* \* public appearances or speaking activities \* \* \*" An email or private conversation would not fall within this description.<sup>89</sup> In addition, the language used to describe a public appearance in proposed paragraph (f)(1) is similar to the current definition of "public appearance" under NASD Rule 2210(a)(5).

Proposed paragraph (f)(2) would require members to adopt written procedures that are appropriate to a member's business, size, structure, and customers to supervise its associated persons' public appearances. The procedures must include, among other things, surveillance and follow-up to ensure that such procedures are implemented and adhered to. T. Rowe requested clarification as to what level of surveillance and follow-up is required, particularly for one-time appearances. T. Rowe also commented that there should be an exception if a member approves appearances in advance. FINRA does not believe it would be appropriate to pre-determine how a member must supervise its associated persons' public appearances, since this will vary depending on a member's business model, size, and the type of public appearance involved. FINRA also does not agree that a member should have no obligation to review public appearances after the fact for compliance with applicable rules as long as it approves the appearance in advance.

FINRA is making one additional change to the proposed paragraph (f) in light of other changes to the proposed rule. Paragraph (f)(1) of the *Notice* proposal also covered "interactive electronic forums" within its description of a public appearance. To the extent participation in an interactive electronic forum takes the form of a written communication disseminated through an interactive Web site, FINRA considers such a communication to be a retail communication rather than a public appearance. However, as discussed above, proposed FINRA Rule 2210(b)(1)(D)(ii) allows a member to supervise and review retail communications that are posted on online interactive electronic forums in the same manner as required for supervising and reviewing correspondence. Accordingly, FINRA has deleted "(including an interactive electronic forum)" from proposed paragraph (f)(1).

<sup>89</sup> Moreover, proposed paragraph (f)(1) expressly excludes correspondence from the description of a public appearance.

<sup>87</sup> See Securities Act Release No. 6753 (February 2, 1988), 53 FR 3868 (February 10, 1988) (Order Approving File No. S7-23-86), p. 37.

<sup>88</sup> See NASD Rule 2210(a)(5).

### Investment Analysis Tools

Proposed FINRA Rule 2214 of the *Notice* proposal codifies largely without change current NASD IM-2210-6 (Requirements for the Use of Investment Analysis Tools).<sup>90</sup> Fidelity, the ICI, MBSC and T. Rowe commented that Rule 2214 should be revised to allow members to present projections of performance in retail communications even in cases where the tool is not interactive with customers. These commenters argue that a firm should be permitted to show projected performance of an investment in a communication that is not based on information provided by a customer independently or with the assistance of the member firm. T. Rowe also commented that members should be allowed to use the data generated by an investment analysis tool in sales material for target date funds provided that these illustrations are limited to a discussion of a fund's investment strategy and not used to project performance.

FINRA disagrees with the comment that proposed Rule 2214 should be revised to eliminate the requirement that an investment analysis tool be interactive. The purpose of NASD IM-2210-6 and proposed FINRA Rule 2214 is to allow members to use interactive tools with customers to show the likelihood of various investment outcomes under different scenarios, thereby serving as an additional resource to investors to evaluate their specific investment choices. It is not to allow the use of performance projections in retail communications in all circumstances as long as an investment analysis tool is used to create the projections. In the case of retail communications concerning target date funds that do not include projections, reliance on the proposed rule is unnecessary, since it only applies to retail communications that contain projections.

Supplementary Material 2214.06 provides that a retail communication that contains only an incidental reference to an investment analysis tool need not include the disclosures required by the proposed rule and would not need to be filed with the Department. Vanguard commented that proposed Rule 2214 should be revised to allow members not to include all of the proposed rule's required disclosures as long as the communication does not

include the tool itself or any data or results produced by the tool.

FINRA agrees that, under these circumstances, some of the proposed rule's required disclosures, such as those required by paragraph (c)(1) (a description of the tool's methodology) or paragraph (c)(3) (certain disclosures in situations in which the tool analyzes only a limited range of investments), are unnecessary. FINRA believes however, that a retail communication that refers to an investment analysis tool in more detail than an incidental reference but does not provide access to the tool or the results generated by the tool must disclose that results may vary with each use (as required by paragraph (c)(2)) and the warning required by paragraph (c)(4) that the projections generated by the tool are hypothetical and are not guarantees of future results. FINRA has revised proposed Rule 2214.06 accordingly.

### Security Futures

Proposed FINRA Rule 2215 (Guidelines for Communications with the Public Regarding Security Futures) is the successor to current NASD IM-2210-7. TD Ameritrade commented that paragraph (b)(1)(A)(iii), which prohibits projections of performance in communications used prior to the delivery of a security futures risk disclosure statement, should be modified to permit examples of hypothetical transactions. This comment is similar to another TD Ameritrade comment on proposed FINRA Rule 2210(d)(1)(F) (which also prohibits performance projections), and FINRA's response is the same as discussed above.

Proposed paragraph (b)(2)(A)(iv) requires any communication concerning a security future to include a statement that supporting documentation for any claims, comparisons, recommendations, statistics or other technical data will be supplied upon request. TD Ameritrade commented that FINRA should clarify that this disclosure requirement only applies if a communication actually includes a claim, comparison, recommendation, statistics or other technical data. While this issue will be a matter of facts and circumstances, FINRA agrees that no such disclosure would be required if a communication does not contain any statement or data that requires supporting documentation.

### Transition Period

Fidelity, Invesco and NPHI requested that FINRA allow members at least six months before having to comply with the new rules. The ICI suggested a compliance date of 10 business days

after the second quarter ending following adoption of the final rule changes. PSD requested nine months' lead time, and suggested that members should be permitted to "grandfather" and continue to use communications that were filed under the current rules. Alternatively, members should have a minimum of two years from the date the new rules become effective to continue to use communications filed under the existing rules.

FINRA plans on publishing a *Regulatory Notice* no later than 90 days following SEC approval of the rule changes. The implementation date will be no later than 365 days following SEC approval. In establishing the implementation schedule, FINRA will consider members' need to adopt and implement new policies and procedures necessary to comply with the new rules.

In most cases, FINRA expects that communications that are in compliance with the current communication rules will continue to be in compliance with the new rules, and thus "grandfathering" of past filed material will be unnecessary. To the extent a member has questions about whether a previously filed communication continues to be compliant under the new rules, the member should discuss this issue with its assigned Department advertising analyst.

### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve or disapprove such proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

### IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

#### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File

<sup>90</sup>Certain of NASD IM-2210-6's text that appears either in the Interpretive Material itself or in footnotes to the Interpretive Material have been moved to Supplementary Material.

Number SR-FINRA-2011-035 on the subject line.

#### Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-FINRA-2011-035. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-FINRA-2011-035 and should be submitted on or before August 24, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>91</sup>

**Elizabeth M. Murphy,**  
Secretary.

[FR Doc. 2011-19645 Filed 8-2-11; 8:45 am]

**BILLING CODE 8011-01-P**

## DEPARTMENT OF STATE

### [Public Notice 7476]

#### U.S. Advisory Panel to the U.S. Section of the North Pacific Anadromous Fish Commission; Notice of Renewal

The Department of State has renewed the Charter of the U.S. Advisory Panel

to the U.S. Section of the North Pacific Anadromous Fish Commission (NPAFC) for another two years.

The NPAFC was established by the Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean, signed on February 12, 1992, by Canada, Japan, the Russian Federation, and the United States, and entered into force on February 16, 1993. The U.S. Advisory Panel will continue to work with the U.S. Section to promote the conservation of anadromous fish stocks, particularly salmon, throughout their migratory range in the North Pacific Ocean, as well as ecologically related species.

The U.S. Section of the Commission is composed of three Commissioners who are appointed by the President. Each Commissioner is appointed for a term not to exceed 4 years, but is eligible for reappointment. The Secretary of State, in consultation with the Secretary of Commerce, may designate alternate commissioners. The Advisory Panel to the U.S. Section is composed of 14 members, 11 of whom are appointed by the Secretary in consultation with the Secretary of Commerce. Advisory Panel members serve for a term not to exceed 4 years, and may not serve more than two consecutive terms.

The Advisory Panel will continue to follow the procedures prescribed by the Federal Advisory Committee Act (FACA). Meetings will continue to be open to the public unless a determination is made in accordance with Section 10 of the FACA, 5 U.S.C. 552b(c)(1) and (4), that a meeting or a portion of the meeting should be closed to the public. Notice of each meeting will continue to be provided for publication in the **Federal Register** as far in advance as possible prior to the meeting.

For further information on the renewal of the Advisory Panel, please contact John Field, Office of Marine Conservation in the Department of State, (202) 647-3263.

Dated: July 8, 2011.

**David A. Balton,**

Deputy Assistant Secretary for Oceans and Fisheries, Department of State.

[FR Doc. 2011-19655 Filed 8-2-11; 8:45 am]

**BILLING CODE 4710-09-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

#### Notice of Final Federal Agency Actions on Proposed Highway in Alaska

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Notice of limitation on claims for judicial review of actions by FHWA.

**SUMMARY:** This notice announces actions taken by the FHWA that are final within the meaning of 23 U.S.C. 139(l)(1). The action relates to a proposed highway project in Hyder, State of Alaska. Those actions grant approval for the project.

**DATES:** By this notice, the FHWA is advising the public of final agency actions subject to 23 U.S.C. 139(l)(1). A claim seeking judicial review of the Federal agency actions on the listed highway project will be barred unless the claim is filed on or before January 30, 2012. If the Federal law that authorizes judicial review of a claim provides a time period of less than 180 days for filing such claim, then that shorter time period still applies.

**FOR FURTHER INFORMATION CONTACT:** Mr. Alex Viteri, Senior Transportation Engineer, FHWA Alaska Division, P.O. Box 21648, Juneau, Alaska 99802-1648; office hours 8 a.m. to 4:30 p.m. (AST), phone (907) 586-7544; e-mail [Alex.Viteri@dot.gov](mailto:Alex.Viteri@dot.gov). You may also contact Jane Gendron, DOT&PF Southeast Region, Regional Environmental Manager, Alaska Department of Transportation and Public Facilities, 6860 Glacier Highway, P.O. Box 112506, Juneau, Alaska 99811-2506; office hours 8:30 a.m. to 5 p.m. (AST), phone (907) 465-4499, e-mail [jane.gendron@alaska.gov](mailto:jane.gendron@alaska.gov).

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that the FHWA has taken final agency actions subject to 23 U.S.C. 139(l)(1) by issuing approvals for the following highway project in the State of Alaska: Project No. MGS-0003(113)/69070; Project Location: The project begins on Premier Avenue in the town of Hyder, Alaska and continues along the Hyder Causeway and trestle to Harbor Island in Portland Canal, a distance of 0.7 miles. Hyder is 75 air miles northeast of Ketchikan, Alaska and about 640 air miles northwest of Seattle, Washington. Project type: The project would reconstruct the surface approach (Premier Avenue and filled causeway) and replace the wooden trestle linking Hyder, Alaska to its marine transportation facility on Harbor Island.

The actions by the Federal agency on the project, and the laws under which

<sup>91</sup> 17 CFR 200.30-3(a)(12).