MorganStanley
SmithBarney

By Overnight Mail

November 19, 2009

Ms. Marcia E. Asquith
Senior Vice President and Corporate Secretary
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1500

Re: FINRA Regulatory Notice 09-55: Communications with the Public

Dear Ms. Asquith:

Morgan Stanley Smith Barney appreciates the opportunity to comment on the above-referenced FINRA Regulatory Notice, which proposes to replace current NASD Rules 2210 and 2211, the Interpretive Materials that follow NASD Rule 2210, and portions of Incorporated NYSE Rule 472 with new FINRA rules regarding communications with the public.

Morgan Stanley Smith Barney commends and supports FINRA's efforts to consolidate, streamline and enhance existing FINRA and Incorporated NYSE rules governing communications with the public. Further, we recognize the importance of FINRA's ongoing efforts to ensure that the investing public has clear and accurate information to guide its decision-making.

In addition to this letter, Morgan Stanley Smith Barney has joined with a number of other firms in a comment letter prepared and submitted by Wilmer Hale. We write separately to emphasize certain issues of particular concern to retail broker-dealers, specifically, the treatment of communications to more than 25 retail investors, the expansion of certain pre-use filing requirements and the proposed requirements regarding disclosures triggered by the making of recommendations.

I. Definition of Retail Communications

One of the most significant changes proposed by Regulatory Notice 09-55 is the inclusion of any correspondence to more than 25 retail investors (defined as anyone who is not an institutional investor) within the definition of Retail Communication. NASD Rule 2211(b)(1) limits its pre-approval requirement to communications that are sent to 25 or more

retail customers within a 30 day period *and* that make a financial or investment recommendation or otherwise promote a product or service of the firm.

The proposed rule greatly expands the current requirement. Under its terms any Retail Communication, including an e-mail which is sent by a broker to more than 25 existing or potential clients would require principal pre-approval, and in some cases pre-use filing with FINRA. Morgan Stanley Smith Barney recognizes that the proposed rule provides an exception for purely administrative communications, but respectfully suggests that the scope of this exception is too limited. We believe that the ability of brokers to provide clients with information in a timely manner is critical to our ability to serve our clients' investing needs. It is certainly not difficult to envision a situation where a broker wishes to communicate information about a recent development in the market to more than 25 clients. The imposition of a principal pre-approval requirement, and in some cases a pre-filing requirement may greatly reduce -- and in some situations eliminate -- the utility of that communication. This result, given that communication by e-mail is both a preferred method for many of our clients and the best way to convey information to numerous clients in a timely fashion, does not serve the interests of the investing public. We believe that the current rule limiting pre-approval to communications that include recommendations or the promotion of products strikes the appropriate balance and should be retained.

We also request that FINRA reconsider the elimination of the 30 calendar day time period in which to measure the number of recipients of a given piece of correspondence contained in NASD Rule 2211(b)(1). The deletion of a defined time period leaves open the question of how to count the number of recipients for purposes of determining whether a piece of correspondence is to remain classified as Correspondence or if it crosses the threshold into the proposed category of Retail Communication. As the proposal currently stands, Firms will need to pre-approve (and in some cases file with FINRA prior to use) all communications that have the potential to cross the 25 recipient threshold. A clear and unambiguous benchmark against which to monitor the scope of any given piece of correspondence is needed to ensure that the industry is in a position to meet the expectations of the proposed rules. We respectfully suggest that the 30 calendar day period be retained.

Further, we respectfully request that FINRA provide guidance as to the meaning of the newly included modifier "appropriately" before "qualified registered principal" in proposed FINRA Rule 2210(b)(1)(A). Currently, firms meet their obligations by having a properly registered General Securities Sales Supervisor (Series 9/10) review and approve ordinary communications and sales materials sent from branch offices. We are unaware of any findings that raise an issue with this methodology and indeed our experience over many years and hundreds of branches suggests that the current methodology is entirely adequate. In light of the consolidation of former categories into a broad Retail Communications bucket, we request that FINRA reiterate that a Series 9/10 is an "appropriately qualified principal" for purposes of approving both Correspondence and Retail Communications as those terms are defined in proposed FINRA Rule 2210(a)(2) and (a)(5).

Accordingly, we respectfully request that FINRA: (i) carve out from the definition of Retail Communication correspondence to 25 or more retail customers that does not include a financial or investment recommendation or otherwise promote a product or service of the firm; (ii) provide a clear and unambiguous time frame in which to determine the number of recipients of a given communication and (iii) clarify that a Series 9/10 meets the definition of an "appropriately qualified registered principal" in proposed Rule 2210(b)(1)(A) for purposes of approving Correspondence and Retail Communications.

II. Expansion of the Pre-use Filing Requirement

Proposed FINRA Rule 2210(c)(2) expands the categories of communications that fall within the pre-use filing requirement. The expansion comes not just through the definition of correspondence to more than 25 retail investors as Retail Communications, but through the addition of a new category of materials. Specifically, the proposed rule covers

> (B) Retail communications concerning publicly offered collateralized mortgage obligations, 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 ...

As set forth in Regulatory Notice 09-55, the stated purpose of this change "is to require the filing of retail communications concerning publicly offered structured products, such as exchange traded notes, that currently are not required to be filed."[1] While proposed Rule 2210(c)(7)(E) continues a number of current exemptions from the filing requirements of proposed Rule 2210(c)(1) through (4), it does not address the exemption for free writing prospectuses, which is relied upon for many structured products. In 2006, NASD staff confirmed their view that free writing prospectuses were exempt from NASD Rules 2210 and 2211.[2] The failure to preserve this exemption would necessitate a marked increase in the number of filings made to FINRA. That in turn could be a significant burden on FINRA's staff, which may add potentially significant delays affecting the ability of firms to offer these products to retail investors. Accordingly, we urge FINRA to explicitly include the exemption for free writing prospectuses in the final version of the proposal.

III. Disclosures of Financial Interest in Retail Communications, Correspondence and Public Appearances

Proposed Rule 2210(d)(7)(A) would require every retail communication, correspondence or public appearance that includes the recommendation of securities to disclose:

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[1] FINRA Regulatory Notice 09-55 at p. 7.
[2] FINRA Interpretive Letter of August 1, 2006 to Eileen Ryan re: NASD Rule 2210.

> (i) that at the time the communication was published or distributed, the member was making a market in the security being recommended, or in the underlying security if the recommended security is an option or security future, or that the member or associated persons will sell to or buy from customers on a principal basis; (ii) that the member or any associated person with the ability to influence the substance of the communication has a financial interest in any of the securities of the issuer whose securities are recommended, and the nature of the financial interest (including, without limitation, whether it consists of any option, right, warrant, future, long or short position); and (iii) that the member was manager or co-manager of a public offering of any securities of the recommended issuer within the past 12 months.

Morgan Stanley Smith Barney supports FINRA's efforts to ensure that the investing public is aware of potential conflicts of interest that could influence a recommendation, but respectfully suggests that the scope of the proposed rule is so broad as to be unworkable. Currently such disclosures are generally limited to recommendations in advertisements and sales literature. The proposed rule expands its coverage to every communication, up to and including a single email to a single client.

In order to comply with the proposed rule as written, firms would need to capture the ever-changing universe of "associated person[s] with the ability to influence the substance of the communication."[3] Further, information regarding those persons' holdings would need to be kept updated in real time as the proposal lacks any *de minimis* exception and provides no guidance as to how broadly "influence" is to be read.

Of even greater concern is the breadth of the application of this provision. Requiring the creation of an infrastructure that will make available to every broker the appropriate detailed disclosures for each security in the universe of securities that might be suitable for her clients is daunting. The likely result of such a mandate would be the near elimination of written communications that include recommendations in favor of oral communications, which would limit a firm's ability to supervise such communications and, respectfully, does not serve the interest of the investing public.

We respectfully propose that FINRA: (i) exclude from the disclosure requirements any communication that falls within the proposed definition of Correspondence; (ii) provide a meaningful threshold below which holdings need not be disclosed and therefore tracked and (iii) provide clear guidance regarding what amounts to an "ability to influence" a communication so that accurate disclosures can be created and maintained.

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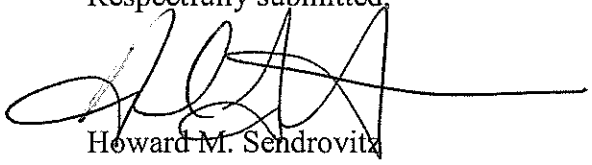
[3] Proposed FINRA Rule 2210(d)(7)(A)(ii).

Morgan Stanley Smith Barney appreciates the opportunity to provide comments on FINRA's proposal regarding communications with the public. If you have any questions or would find additional information helpful, please contact the undersigned at (201) 830-5222.

Respectfully submitted,



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