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Via e-mail to pubcom@finra.org
Marcia E. Asquith
Senior Vice President and Corporate Secretary
Office of the Corporate Secretary
FINRA
1735 K Street, N.W.
Washington, DC 20006-1500

Re: Proposed FINRA Rules Regarding Communications with the Public (FINRA Regulatory Notice 09-55)

Dear Ms. Asquith:

We submit this letter on behalf of Banc of America Securities LLC, Citigroup Global Markets Inc., Credit Suisse Securities (USA) LLC, Goldman, Sachs & Co., JP Morgan Securities Inc., Merrill Lynch, Pierce, Fenner & Smith Incorporated, Morgan Stanley & Co. Incorporated, Morgan Stanley Smith Barney, LLC, and UBS Securities LLC (together the "Firms") in response to a request for comments by the Financial Industry Regulatory Authority, Inc. ("FINRA") regarding the above-referenced proposed Rules ("Proposed Rule Changes").[1/]

I. Overview

We commend FINRA for its continuing efforts to refine the rules regarding communications with the public. In particular, we strongly support FINRA's proposal to treat all communications with institutional investors as "institutional communications" under proposed Rule 2210(a)(3), thereby according consistent treatment to like activities conducted by FINRA members that are also NYSE members. We also support the codification of interpretive guidance such as the exclusion in proposed Rule 2210(c)(7)(A) from filing requirements for retail communications based on templates already filed with FINRA for statistical updates and

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1/ *See* FINRA Regulatory Notice 09-55 *Communications with the Public* (Sep. 2009), in which FINRA proposes to adopt new FINRA Rules 2210 ("Communications with the Public"), 2212 ("Use of Investment Company 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 ("Guidelines for Communications with the Public Regarding Security Futures"), and 2216 ("Communications with the Public about Collateralized Mortgage Obligations (CMOs)"). FINRA also proposes to amend Incorporated New York Stock Exchange ("NYSE") Rule 472 ("Communications with the Public") to remove the provisions that would overlap with the proposed FINRA rules.

other non-narrative information. We believe such amendments appropriately reflect changes in the market and in technology over the last several years.

While we appreciate FINRA's desire to streamline and simplify the categories of communications with the public from six to three, we are concerned that the consequences of the reorganization, particularly as they pertain to filing and disclosures, would impose unintended and unprecedented burdens on member firms and hinder their ability to communicate in a timely manner with customers. In particular, the adoption of a single "retail communications" category, which would include any communication not falling within the definition of "institutional communication" or "correspondence," would expand certain filing, content, disclosure, and pre-approval requirements to broad categories of communications to which they have never before applied when there is no perceptible need for such an expansion.

This new category is particularly inapposite for communications issued by research departments because research communications are already extensively covered by rules and regulations tailored specifically to research, such as Regulation AC,[2/] NASD Rule 2711, NYSE Rule 472, FINRA Rule 5280, and FINRA proposed Rules 1223 and 2240.[3/] While the Proposed Rule Changes include some accommodations for research reports,[4/] we urge FINRA to exclude research communications more generally from the scope of proposed Rule 2210 and to address all issues relating to research communications in its proposed Rule 2240.

The Proposed Rule Changes raise a number of other concerns as well, including the proposed requirements regarding disclosures for recommendations in correspondence, retail communications and public appearances, which we address below.

We appreciate the opportunity to engage with FINRA on these issues and urge FINRA to reconsider and modify the Proposed Rule Changes in light of our concerns.

II. FINRA Should Make Certain Critical Modifications to the Proposed Rule Changes

A. The Proposed Rule Changes Relating to the Filing of "Retail Communications" Are Overly Broad and Would Impose Unwarranted Delays and Burdens on Such Communications

Proposed Rule 2210(a)(5) captures a broad and disparate set of communications in the category of "retail communications" by defining the category as "any written (including

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2/ Exchange Act Regulation AC (Analyst Certification), 17 C.F.R. §242.500.

3/ *See* FINRA Regulatory Notice 08-55 *Research Analysts and Research Reports* (Oct. 2008).

4/ For example, equity research reports are excluded from the disclosure requirements of proposed Rule 2210(d)(7).

electronic) communication that is distributed or made available to more than twenty-five retail investors." Thus, retail communications would include advertisements, sales literature, research reports, and even e-mails that under current NASD Rules 2210 and 2211 are classified as "correspondence." With very few exceptions, all of these materials would be subject to a single set of standards and requirements. While some of those requirements have historically been applied to advertisements or certain types of sales literature, the imposition of those requirements to all retail communications would necessitate a commitment of technology and human resources and impose delays that do not appear to be justified by any potential benefit.

1. <u>The Pre-Use Filing Requirements Are Increased Exponentially by the Proposed Rule Changes</u>

The Proposed Rule Changes would require pre-use filing of many types of communications that are not now covered. The pre-use filing requirements currently imposed by NASD Rule 2210 on advertisements and sales literature relating to a limited set of products would be expanded to cover advertisements and sales literature relating to a significantly broader set of products, including structured products and options. Furthermore, the Proposed Rule Changes would impose this expanded pre-use filing requirement on the significantly broader category of all retail communications (not just advertisements and sales literature) relating to such products, including e-mails to more than 25 retail customers. In particular, proposed Rule 2210(c)(2) would require pre-filing of *all* retail communications (with minor exceptions) concerning

- registered investment companies (including mutual funds, exchange-traded funds, variable insurance products, closed-end funds and unit investment trusts) that include or incorporate performance rankings or performance comparisons of the investment company with other investment companies when the ranking or comparison category is not generally published or is the creation, either directly or indirectly, of the investment company, its underwriter or an affiliate;

- publicly offered collateralized mortgage obligations ("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; and

- bond mutual funds that include or incorporate bond mutual fund volatility ratings.

Member firms would be required to file such communications with FINRA's Advertising Regulation Department ("Department") at least ten business days prior to first use or publication and refrain from using such communication until the Department has reviewed it and any changes specified by the Department have been made.

While the industry has long accepted the benefits of the pre-use filing requirement for advertisements that address mutual fund performance information, CMOs or futures and for sales literature that include or incorporate mutual fund performance data or bond mutual fund volatility ratings,[5/] the Proposed Rule Changes would replace this previously targeted approach with a regime that imposes pre-use filing of a significantly larger and undifferentiated universe of communications. The benefits of this sweeping change are not obvious and are not articulated in FINRA's proposal. In contrast, the change would clearly impose significant burdens on member firms, and, more importantly, the delays involved in the pre-use filing process, especially for research communications and structured product communications, could harm investors by hampering their access to important and time-sensitive information. We question whether the FINRA review process will be able to accommodate the extraordinary increase in filings without creating significant delays that may frustrate retail investors' ability to receive timely communications about investment and risk mitigation opportunities. For example, if a broker has more than 25 retail clients who own particular options, the broker would not be able to send an e-mail to remind those clients that the option is expiring or "in the money" without filing the e-mail with FINRA at least ten business days before sending it.

2. The Pre-Use Filing Requirements of Proposed Rule 2210(c) Should Not Apply to Research

The Proposed Rule Changes would subject research made available to more than 25 non-institutional investors to the pre-use filing requirements because such research ("retail research") would constitute "retail communications" under proposed Rule 2210(a)(5). New filers would need to pre-approve and pre-file with FINRA *all* retail research. Established filers would need to pre-file all retail research containing certain investment company performance rankings or comparisons, bond mutual fund volatility ratings, CMOs, structured products, 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. Member firms would not be permitted to send such research to customers until after FINRA had approved it for use, which could take significantly longer than the ten business day filing period. Any market developments, changes or announcements in the interim would require updating the retail research and resubmitting it to FINRA, thereby beginning the process all over again.

It is hard to understand how a pre-use filing requirement for research would benefit investors. Research (which would include but not be limited to "research reports" as that term is defined in Regulation AC) by its very nature is time-sensitive. In that regard, it is very different from communications like advertisements, which are intended to be used over an extended period of time and are therefore amenable to pre-use filing. Indeed, in the context of research, FINRA itself has emphasized the importance of assuring the flow of information to investors and

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5/ NASD Rule 2210((c)(3) and (4).

minimizing costs and burdens to member firms.[6/] Any pre-use filing requirement would essentially render retail research useless and would harm rather than help investors by impeding their receipt of timely information. It would leave member firms with the choice of providing only stale research to all of its customers or converting research into an institutional product that is not made available to retail investors.

Accordingly, we urge FINRA to exclude research communications from the Proposed Rule Changes and to address any specific concerns about research (not just NASD Rule 2711 research reports) in its proposed Rule 2240. If FINRA decides not to carve research communications out of the definition of "retail communications," however, we request that FINRA exempt all communications – not only research reports as currently defined by Rule 2711 or as may be defined in proposed Rule 2240 – generated by a research department from the filing requirements of proposed Rule 2210.[7/]

3. <u>The Filing Requirements of Proposed Rule 2210(c) Should Not Apply to Informal Retail Communications</u>

As we discuss below, the Proposed Rule Changes would treat every piece of correspondence that goes to more than 25 retail investors as a "retail communication." Accordingly, any e-mail or letter that is sent to more than 25 retail investors over an indeterminate period of time would be subject to the pre-use filing requirements of proposed Rule 2210(c)(1) and (2) and the post-use filing requirement of proposed Rule 2210(c)(3).

The imposition of filing requirements on correspondence to more than 25 retail investors is a dramatic departure from the current NASD and NYSE requirements, but FINRA has not articulated a rationale for the extraordinary burdens that it would create. The administrative burdens and costs of filing (pre-use or post-use) every piece of correspondence sent to more than 25 retail investors if it contains certain content would be enormous. Moreover, as noted above, some of these communications are only useful if customers receive them in a timely manner, and pre-use filing would pose the same issues and concerns as pre-use filing of research communications.

Accordingly, we request that FINRA reconsider its decision to impose filing requirements on correspondence that goes to more than 25 retail investors.

6/ *See* Regulatory Notice 08-55 at 3.

7/ In that regard, we understand that FINRA takes the position that FINRA Rule 5280 applies to a broader set of research communications than "research reports" as defined by Rule 2711.

4. The Filing Requirement for First Year Filers Is Too Broad and Could Undermine the Competitiveness of New Broker-Dealers

Proposed Rule 2210(c)(1)(A) would require all new member firms to file at least ten business days before use, *all* of its retail communications (including advertisements, sales literature, and correspondence to more than 25 investors) – regardless of content – during its first year. While current NASD Rule 2210(c)(5)(A) requires pre-use filing of advertisements by new firms for one year, we generally agree that the benefits of requiring firms that have no history of using advertisements to seek regulatory review of advertisements for one year outweigh the costs. In contrast, imposing a minimum ten business day delay on virtually all of a new member firm's communications with its customers for one year would place an extraordinary burden on the member firm's ability to build a business. Although none of the Firms would be subject to this first-year filer rule, we nevertheless request that FINRA reconsider the breadth of this new rule proposal.

5. Proposed Rule 2210(c)(7)(E) Should Expressly Exempt Free Writing Prospectuses From Filing Requirements

Proposed Rule 2210(c)(7)(E) would continue to exempt from the filing requirements of proposed Rule 2210(c)(1) through (4) "[p]rospectuses, preliminary prospectuses, fund profiles, offering circulars and similar documents that have been filed with the SEC or any state, or that [are] exempt from such registration." We request that FINRA make explicit in its final rule that free writing prospectuses also are excluded from the filing requirements, consistent with the NASD's interpretive position in its 2006 letter to the Securities Industry Association and the Bond Market Association.[8/] In that letter, the NASD staff confirmed their view that free writing prospectuses, whether or not filed with the SEC, should be excluded from the provisions of NASD Rule 2210 (Communications with the Public) and NASD Rule 2211 (Institutional Sales Material and Correspondence).

[8/] FINRA Interpretive Letter of Aug. 1, 2006 to Eileen Ryan re: NASD Rule 2210 – Communications with the Public: Free Writing Prospectuses Are Not Subject to Rules 2210 and 2211 or the filing requirements of Rules 2710 and 2720.

B. The Proposed Pre-Approval Requirements for Retail Communications Should Be Amended

1. FINRA Should Not Change the Current NASD Standard Regarding Pre-Approval of Correspondence

By treating all correspondence that goes to more than 25 retail investors, including existing retail customers of the member firm, as "retail communications," proposed Rule 2210(b)(1)(A) would require prior approval by an "appropriately qualified" registered principal of every piece of retail correspondence that goes to more than 25 investors. This proposed rule is notably broader than current NASD Rule 2211(b)(1), which requires prior approval of correspondence only if it is distributed to 25 or more existing retail customers within a 30 calendar-day period *and* if it makes a financial or investment recommendation or otherwise promotes a product or service of the member firm.

The Proposed Rule Change would create a logistical nightmare for member firms because every e-mail that a broker sends to more than 25 retail investors would require supervisory pre-approval and, if it relates to certain products, would also require filing. Since there is no time-frame (e.g., 30 calendar days) specified, an e-mail would not need to be pre-approved or pre-filed for the first 25 customers. However, if six months later, the same e-mail were sent to a 26th customer, it would suddenly become a retail communication subject after the fact to the pre-approval and filing requirements, none of which necessarily would have been done. We urge FINRA to retain a time-frame qualifier for pre-approval. For these purposes, 30 calendar days continues to be reasonable in our view. Similarly, the current content qualifier triggering the pre-approval requirement (*i.e.,* that the communication makes a recommendation or promotes a product or service of the firm) is one that makes sense, and we urge FINRA to retain it.

Without a time frame and content qualifiers, supervisors would have to approve in advance every communication, including e-mail, that had the potential to be sent to more than 25 customers at any time in the future. Accordingly, we urge FINRA to retain the pre-approval standard set forth in NASD Rule 2211(b)(1).

2. FINRA Should Permit Member Firms to Rely on Supervisory Analysts for Approving Any Research Communication

Currently, a registered principal is required to pre-approve advertisements, sales literature and independently-prepared reprints. As discussed above, the Proposed Rule Changes would significantly expand the category of communications subject to pre-approval by requiring approval in advance of all "retail communications" by "an appropriately qualified registered principal," a term left undefined by the Proposed Rule Changes.[9/]

For NYSE member firms that are also FINRA members, Incorporated NYSE Rule 472 allows a Series 16 supervisory analyst or designated "qualified person" acceptable to the NYSE to pre-approve "advertisement, sales literature or other similar type of communication which is generally distributed or made available by a member organization to customers or the public." While proposed Rule 2210(b)(1)(B) would continue to allow a Series 16 supervisory analyst to pre-approve "research reports on debt and equity securities," it would not permit a Series 16 supervisory analyst to approve any other type of communication. Instead, all other material distributed or made available to more than 25 retail investors, including research notes or communications such as technical or economic analysis and other traditional research products that do not fall within the Regulation AC definition of "research report," would have to be pre-approved by a registered principal, even if the member firm has a Series 16 analyst who would be better qualified to supervise such materials.

As NYSE member firms with considerable experience with Series 16 supervisory analysts, the Firms believe supervisory analysts are more appropriately qualified to review research-related communications, including but not limited to "research reports," because the Series 16 exam focuses more specifically on financial analysis and research regulations than the Series 24 general securities principal exam. FINRA does not contend that supervisory analysts have failed to supervise research appropriately, nor does it articulate the potential benefits for requiring a general securities principal (rather than a supervisory analyst) to approve research materials that may not meet the technical definition of "research report." Accordingly, we urge FINRA to permit member firms to rely on Series 16 supervisory analysts to approve or review any communications that the member firm reasonably believes are appropriate for review by a Series 16.[10/]

Further, we note that many member firms meet their supervisory 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. Based on their experience over many years, the Firms endorse this role for Series 9/10 supervisors. To the best of our knowledge, no issue has been raised with this structure in any FINRA study or otherwise. Accordingly, we request FINRA's confirmation that firms may determine that a Series 9/10

9/ Proposed Rule 2210(b)(1)(A). The Regulatory Notice suggests that the "principal registration required to approve particular communications would depend upon the permissible activities for each principal registration category." Regulatory Notice 09-55 at 5.

10/ If the Proposed Rule Changes are adopted without change, some NYSE member firms may also have to restructure their supervisory processes substantially, particularly at non-branch locations outside the U.S. where a Series 16 supervisory analyst now reviews and approves research communications.

supervisor is an "appropriately qualified principal" for purposes of approving both correspondence and retail communications.

C. The Proposed Rule Changes Relating to Recommendation-Triggered Disclosures (Proposed Rule 2210(d)(7)) Are Enormous in Scope and Would Be Virtually Impossible to Implement and Monitor

Proposed Rule 2210(d)(7) would require every retail communication, correspondence or public appearance that contains a recommendation to provide certain disclosures, including a disclosure if the firm or "any associated person with the ability to influence the substance of the communication" has a financial interest in the recommended issuer and the nature of the financial interest. In contrast to the current requirement in NASD IM 2210-1(6)(A)(ii), which applies only to recommendations in advertisements and sales literature, focuses on the interests of the member and/or its officers or partners, and excludes "nominal" financial interests, the scope of this proposed Rule is enormous and represents a significant departure from FINRA's current communications framework.

As drafted, the proposed disclosure requirements would apply to any non-institutional communication containing a recommendation – except for a "research report" under NASD Rule 2711 (*i.e.*, an equity research report) or communications limited to registered investment companies and variable insurance products. Thus the disclosure requirements would apply to a staggering amount of written communications - every single e-mail and letter in which an associated person of a member firm makes a recommendation to any individual retail investor and every communication that is made available to more than 25 retail investors, including all fixed income research. It would also apply to *every* public appearance by any associated person – including a research analyst - in which that person makes a recommendation to a retail investor.

Because the disclosure requirements would be triggered every time an associated person makes or intends to make a recommendation in a retail communication, correspondence or public appearance, proposed Rule 2210(d)(7) would be virtually impossible to implement and supervise. The proposed financial holdings disclosure requirement alone would require firms to gather and process an entirely new and enormous set of information, keep this information updated on a real-time basis, and make it available for application to innumerable communications. Member firms also would have to determine which associated persons had the ability to influence every piece of retail communication or every public appearance and gather up-to-date information about the financial holdings of each of those persons. Even if the proposed disclosure included the exception for a "nominal" financial interest found in the current NASD IM-2210-1, member firms would have to undertake a massive systems' overhaul in order to capture the information and make it available for immediate application to retail communications and correspondence and for immediate access by anyone making a public appearance.

The proposed application of specific market-making and underwriting disclosures to every retail communication, correspondence and public appearance would also involve enormous technological and logistical challenges. While "public appearance" is described in proposed Rule 2210(f) to include "speaking activities that are unscripted," the proposed disclosure requirements would by definition require a level of scripting with significant associated costs. These new requirements may serve to further reduce members' interactions with the public, particularly with retail investors.

FINRA may have assumed that because firms have been able to devise technological solutions to the disclosure requirements for equity research reports, they should similarly be able to devise disclosures that would satisfy the Proposed Rule Change. This assumption is inappropriate, however, for several reasons. First, the number of equity securities covered by a firm's research department is both finite and well-defined by tickers, so that those securities can be "matched" in the disclosure system. Second, the publishing platform is uniform and controlled. Third, the disclosure algorithms are binary in terms of whether the disclosure - in a predetermined set of words - need be made. In contrast, "retail communications" could refer to any number of securities, not simply common stocks; retail communications, correspondence and public appearances can occur in any number of formats; and, in each case, the question of who can influence, what is a nominal interest, and how to make the disclosures would be highly variable. Trying to devise a solution across all businesses, securities, types of communications and various personnel and holdings would be virtually impossible.

Before imposing such an overwhelming burden on member firms, FINRA should explain what the benefit of such disclosures would be. In that regard, FINRA should reconsider whether the potential marginal benefits of the proposed disclosures justify the technological, administrative and cost difficulties of compliance.

We urge FINRA to revise the scope and substance of proposed Rule 2210(d)(7) to that of the current requirement in IM-2210-1(6). At a minimum, we believe the proposed rule should exclude correspondence as well as any retail communication and public appearance by research analysts. As noted above, research analysts are already subject to comprehensive conflict of interest rules requiring prominent disclosure of financial interests.[11/]

11/ *See* proposed FINRA Rule 2240 (replacing NASD Rule 2711 and the corresponding provisions of Incorporated NYSE Rules 351, 472 and Rule Interpretation 472).

D. The Institutional Investor Threshold is Unduly Restrictive in the Context of Communications

Some of the Firm's concerns about the Proposed Rule Changes are exacerbated by the $50 million total assets threshold in the definition of "institutional investor."[12/] This threshold is substantially higher than that of "qualified purchaser," a category of investor considered sufficiently sophisticated by Congress to warrant a reduced level of regulatory constraint and oversight under the federal securities laws.[13/] We therefore urge FINRA to modify proposed Rule 2210(a)(4) and expand the definition of "institutional investor" to include qualified purchasers. If FINRA is not prepared to adopt this standard, however, we request that for purposes of proposed Rule 2210 it at least consider lowering the $50 million threshold (both for entities and for natural persons) to $10 million in investments, as described in NASD IM-2310-3, which discusses suitability obligations to institutional customers. We believe that if an investor is considered institutional for purposes of suitability obligations, it should be viewed as institutional for purposes of the communications it can receive.

12/ Proposed Rule 2210(a)(5) defines "institutional investor" as, among other categories, "any person described in NASD Rule 3110(c)(4), regardless of whether that person has an account with the member."

As a general matter, we suggest that FINRA should define relevant terms directly in the new rule rather than making reference to or incorporating NASD rules that that will still need to be reviewed and incorporated into the FINRA rulebook.

13/ A "qualified purchaser," which an investor must be to invest in a fund that is exempt from registration as an investment company under Section 3(c)(7) of the Investment Company Act of 1940 ("Investment Company Act"), includes a natural person, or a family-owned company, foundation or trust with at least $5 million in investments, or a person with discretionary authority over at least $25 million in investments. Section 2(a)(51) of the Investment Company Act.

III. Conclusion

We appreciate the opportunity to comment on the Proposed Rule Changes. We reiterate our support for many of the proposed changes as well as our concerns with respect to others. We would be pleased to discuss any of these points further and to provide additional information you believe would be helpful. Please feel free to contact me if you have any questions at (202) 663-6720.

Sincerely,

Yoon-Young Lee

Yoon-Young Lee

YL:cap

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