



December 1, 2009

VIA ELECTRONIC MAIL

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:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ appreciates the opportunity to comment on FINRA Regulatory Notice 09-55, which proposes to consolidate and reorganize current NASD and NYSE rules governing communications with the public by FINRA members (“Rule Proposal”). Specifically, FINRA proposes to create new FINRA Rule 2210, which, among other things, would establish new communications categories and expand the principal pre-approval and FINRA pre-use filing requirements to cover a broad range of communications not covered by the current communications rules. Proposed new Rule 2210 would also make various changes to the disclosure obligations in the current communications rules.

Overall, SIFMA applauds FINRA’s efforts to streamline the current communications rules, which have posed compliance challenges for SIFMA members over the years. In particular, we support greater consistency among the communications rules by focusing on the recipient of the communication rather than the form of the communication.²

¹ SIFMA brings together the shared interests of more than 600 securities firms, banks and asset managers locally and globally through offices in New York, Washington, D.C., and London. Its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong. SIFMA’s mission is to champion policies and practices that benefit investors and issuers, expand and perfect global capital markets, and foster the development of new products and services. Fundamental to achieving this mission is earning, inspiring and upholding the public’s trust in the industry and the markets. More information about SIFMA is available at <http://www.sifma.org>.

² In that regard, we commend FINRA for eliminating the provision in NYSE 472 that would have required institutional communications to be approved by a supervisory principal (i.e., a “qualified person”). This provision has limited the usefulness of the review process for institutional sale material set forth in NASD Rule 2211 for members of FINRA and NYSE.

SIFMA believes, however, that additional modifications to proposed FINRA Rule 2210 are necessary to avoid certain unintended consequences, including practical implementation challenges. Of particular concern are the proposed expansions to the principal pre-approval requirements and FINRA pre-use filing obligations, which, we believe are overbroad and unless modified, could severely limit the ability of member firms to provide timely information to clients. In addition, we believe that some of the new communications categories, as well as the disclosure obligations, also require further reconsideration and amendments. Our comments and recommended modifications are set forth below.

I. Revised Categories of Public Communication

In the Rule Proposal, FINRA seeks to replace the current six categories of communications contained within NASD Rules 2210 and 2211 (advertisement, sales literature, correspondence, institutional sales material, independently prepared reprint and public appearance) with the following three broad categories:

- (i) *Retail Communication*: any written (including electronic) communication that is distributed or made available to more than 25 retail investors;³
- (ii) *Correspondence*: any written (including electronic) communication that is distributed or made available to 25 or fewer retail investors, regardless of whether they are existing or prospective customers;⁴ and
- (iii) *Institutional Communication*: any communications that are distributed or made available only to institutional investors.⁵

As a general matter, SIFMA supports the consolidated new definitions of “retail communication” and “correspondence.” We respectfully request, however, that FINRA retain the existing 30 calendar-day qualifier in the current rule. As proposed, the new definition would present considerable compliance challenges by requiring member firms to track *over an indefinite period of time* the number of retail investors that receive a particular communication or correspondence. Reintroducing the existing 30-calendar day timeframe would create greater certainty and allow firms to utilize processes and surveillance systems presently in place.

SIFMA also generally supports the proposed definition of “institutional communication.” SIFMA recommends, however, that FINRA widen the scope of this category by expanding the

³ “Retail investor” is defined in the new rule as “any person other than an institutional investor.”

⁴ Under current NASD Rule 2211(a)(1), “Correspondence” is defined 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.” “Market letter” is defined in that rule as “any written communication excepted from the definition of ‘research report’ pursuant to [NASD] Rule 2711(a)(9)(A).”

⁵ “Institutional investor” would have the same definition as under NASD Rule 2211(a)(3). Notably, this definition would capture those communications that fall under the current definition of “institutional sales material” contained within NASD Rule 2211(a).

definition “institutional investor” to capture communications distributed to other non-retail type entities, such as smaller unregistered hedge funds, money managers and family offices. While such entities would be included in the definition of “institutional investor” if they have assets of at least \$50 million, SIFMA believes that smaller hedge funds and money managers have the requisite level of sophistication to be treated as institutional investors under the rule. Indeed, the rule treats any registered investment adviser as an institutional investor, regardless of the amount of assets the adviser has under management.

Moreover, we also suggest that FINRA clarify that if a member firm distributes an institutional communication solely to institutional investors, the member may treat that communication as an institutional communication as long as the firm is not aware at the time of distribution that the recipient intends to resend that communication to retail investors. While we believe this clarification is implicit in the “reason to believe” language of the proposed rule,⁶ some member firms have experienced compliance issues under current NASD rules when institutional communications distributed solely to institutional investors(including to broker-dealer affiliates) were subsequently redistributed to retail investors. Thus we believe that the requested clarification would be helpful. Additionally, we also ask that FINRA make clear that each member firm is responsible for its own compliance with the rule, such that if a member firm provides an institutional communication to a broker-dealer, whether or not an affiliate, the member will not be held responsible for that broker-dealer’s forwarding the communication to a retail investor.

II. Proposed Principal Pre-Approval Requirements for “Retail Communications”

A. Non-Promotional Client Communications

Under current NASD rules, a registered principal generally is required to approve: (i) all advertisements, sales literature, and independently prepared reprints; and (ii) client correspondence distributed to 25 or more retail customers within any 30 calendar-day period if the correspondence makes a financial or investment recommendation or otherwise promote a product or service of the member.⁷

Proposed Rule 2210 significantly expands the current principal pre-approval obligations of member firms by mandating that *all retail communications* (subject to limited exceptions) be subject to review and approval by an “appropriately qualified” registered principal prior to first use. SIFMA believes that this proposed modification is highly problematic because it casts too wide a net over routine client communications that historically have been excluded from

⁶ Consistent with the current rules, proposed new FINRA Rule 2210 would prohibit members from treating a communication as having been distributed to an institutional investor if the member “has reason to believe” that the communication or any excerpt thereof will be forwarded or made available to any retail investor.

⁷ NASD Rules 2210(b)(1)(A) and 2211(b)(1)(A) *exempt* correspondence from principal pre-approval unless they are distributed to more than 25 existing retail customers and contain a recommendation or otherwise promotes a product or service of the member.

principal pre-approval. Among these are email messages, written letters and market commentary.

In approving current NASD Rule 2211, the Securities and Exchange Commission (“SEC”) made a sound policy judgment that written letters, electronic messages and market letters sent to 25 or more existing retail customers do not need to be pre-approved by a principal *unless* they contain a recommendation or promote a product or service of a member.⁸ Consequently, the current rule imposes principal approval on communications involving direct sales efforts, which raise investor protection concerns, without unduly burdening a member’s need to contact existing customers.

SIFMA fully supports the current rule’s approach and respectfully request that FINRA modify the proposed rule to likewise exclude non-promotional communications from the principal pre-approval requirement. FINRA could accomplish this by amending proposed Rule 2210(b)(1) proposed rule to exclude retail communications (written or electronic) that do not make a financial or investment recommendation or otherwise promote a product or service of the member. Alternatively, FINRA could expand the exception for administrative materials within proposed FINRA Rule 2210(b)(1)(D) to capture such communications.

In any event, we suggest that FINRA reiterate the guidance articulated in Regulatory Notice 07-59 regarding the supervision and review of electronic communications. This guidance will be helpful to members in determining the scope of their obligations with respect to electronic communications. We also recommend that FINRA consider amending the rule proposal to specifically address member firms’ increasing use of social and interactive media. For some firms, this rapidly developing area of interactive electronic communications is integral to serving investors on a real-time basis. In the meantime, FINRA could develop interpretive guidance through a *Regulatory Notice*, which would address this and other important areas including hosting of third-party content, supervision and record keeping.

B. Application of the New Rule to Supervisory Analysts’ Approval of Research Communications

SIFMA further requests that FINRA clarify that member firms may continue to rely on supervisory analysts to review research-related communications, including, but not limited to research reports, research notes and other forms of technical and economic analysis. As drafted, Proposed Rule 2210(b)(1)(B) appears to limit the ability of Supervisory Analysts to review only “research reports on debt and equity securities,” which is more restrictive than current NASD Rule 2210(b)(1)(B).

⁸ As stated by the SEC “requiring pre-use approval by a principal of correspondence sent to 25 or more existing retail customers within any 30 calendar-day period appropriately balances the needs of members to contact existing customers without being unduly burdened against the goal of having communications with retail customers that are fair and balanced.” See Release No. 34-54217 (Jul. 26, 2006), 71 FR 43831 (Aug. 2, 2006) at 43833.

C. “Appropriate” Principal Registration

SIFMA also believes it would be helpful for FINRA to provide additional guidance as to what would constitute an “appropriately qualified” registered principal as required under proposed FINRA Rule 2210(b)(1)(A). At a minimum, we request that FINRA reiterate prior guidance that generally permits a General Securities Sales Supervisor (formerly Series 8 and now Series 9/10) to approve retail communications.⁹

II. Revised FINRA Filing Requirements

A. FINRA Pre-Approval Requirement

FINRA also proposes to dramatically expand the universe of communications that must be filed with the FINRA Advertising Regulation Department at least 10 business days prior to first use and withheld from use until any changes specified by FINRA staff have been made (the “FINRA pre-approval requirement”). Currently, NASD Rule 2210(c)(4) imposes the FINRA pre-approval requirement on a limited scope of communications, including advertisements and sales literature for certain registered investment companies that include self-created rankings, advertisements concerning collateralized mortgage obligations (CMOs), and advertisements concerning security futures.

Proposed Rule 2210 would dramatically expand the categories of communications subject to the FINRA pre-approval requirement well beyond advertisements. Specifically, proposed Rule 2210(c)(2) would obligate members to file *all retail communications*, including e-mails sent to more than 25 retail customers, concerning the following products:

- any registered investment company (including mutual funds, exchange-traded funds, variable insurance products, closed-end funds and unit investment trusts) that include or incorporate self-created rankings;
- publicly offered collateralized mortgage obligations, options and 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

SIFMA believes that these proposed expansions are unduly broad and should be modified as described below.

⁹ See Release No. 34-53333 (Feb. 18, 2006), 71 FR 10090 (Feb. 28, 2006) at 10091-92. This guidance was directed toward correspondence required to be approved under current NASD Rule 2211. Such communications would be defined as retail communications under new FINRA Rule 2210 if they are distributed to more than 25 retail investors.

1. *Options*

SIFMA believes that the reference to “options” should be stricken from proposed Rule 2210(c)(2) because options communications are already covered by a separate FINRA rule. Specifically, recently approved FINRA Rule 2220 sets forth the requirements and standards governing options communications, including those governing pre-use filing with the FINRA Advertising Regulation Department.¹⁰ Applying both the proposed FINRA pre-approval requirement and the requirements in FINRA Rule 2220 to options communications would only serve to confuse members and complicate compliance without providing any corresponding investor protection benefits. Accordingly, SIFMA recommends that the reference to “options” in paragraph (c)(2)(B) of the proposed rule be removed, and that options be specifically added to the list of exceptions in that paragraph.

2. *Structured Products*

As noted above, the Rule Proposal also would extend the FINRA pre-approval requirement to “publicly offered” securities derived or based on a single security, a basket of securities, an index, a commodity, a debt issuance or a foreign currency (“structured products”). FINRA’s stated objective in proposing this change is to require filing of retail communications concerning publicly offered structured products, such as exchange-traded notes, that currently are not required to be filed. In our view, requiring pre-filing of communications relating to structured products would severely impair member firms’ ability to provide timely information to current and potential investors regarding these products.¹¹

Over the past few years, the structured products market has seen rapid growth in the United States. This growth has been facilitated by the ability of issuers and offering participants to educate potential investors about the features of structured products, through the use of materials that likely would constitute retail communications under the proposed rule (e.g., “free writing prospectuses,” which are discussed in more detail below), as well as more general educational materials that are not related to a particular securities offering. In a fast-moving market segment such as structured products, subjecting such communications to the FINRA pre-approval requirement -- which could take two weeks or more -- may dissuade FINRA members from using them, to the possible detriment of investor education.

¹⁰ FINRA Rule 2220(c)(1), which becomes effective on December 14, 2009, states that all advertisements, sales literature, and independently prepared reprints issued by a member concerning standardized options used prior to delivery of the applicable current options disclosure document or prospectus must be submitted to FINRA at least 10 calendar days prior to use and must be withheld from use until any changes specified by FINRA staff have been made.

¹¹ SIFMA suggests that FINRA consider issuing additional guidance regarding the content requirements for retail communications concerning structured products that are subject to a FINRA pre-approval requirement. The NASD previously issued guidance regarding the sale of structured products in Notice to Members 05-59.

At a minimum, SIFMA requests that FINRA expressly exempt “free writing prospectuses” under the Securities Act of 1933 (“Securities Act”) from the FINRA pre-approval requirement.¹² As noted by the SEC in the free writing prospectuses adopting rules:

*“consistent with our belief that investors and the securities markets will benefit from greater permissible communications by issuers while retaining appropriate liability for these communications, we have sought to address the need for timeliness of information for investors by building on existing statutory provisions and processes without mandating delays in the offering process that we believe would be inconsistent with the needs of issuers for timely access to the securities markets and capital.”*¹³

Notably, although Proposed FINRA Rule 2210(c)(7)(E) would continue to exempt from the filing requirement “preliminary prospectuses that have been filed with the SEC or any state,” many structured products offered on a registered basis are initially offered using a “free writing prospectus” in accordance with Rule 433, rather than through the use of a “preliminary prospectus.” SIFMA therefore requests that FINRA clarify that this exclusion applies to free writing prospectuses as well. FINRA could do this either by adding “free writing prospectus” to the recited exceptions in the rule or by otherwise confirming that the interpretive guidance issued in August 2006, which confirmed that free writing prospectuses (whether created by the issuer or by another offering participant) are exempt from the filing requirements of the current NASD Rule 2210, continues to apply under proposed FINRA Rule 2210.¹⁴

With respect to more general educational materials, SIFMA recommends that FINRA add an exception in paragraph (c)(2)(B) for retail communications concerning structured products distributed to existing customers that do not make a financial or investment recommendation or otherwise promote a product or service of the member. Instead, we believe that such communications should be subject to the post-use filing requirement in paragraph (c)(3) of proposed FINRA Rule 2210.

¹² The SEC issued rules in 2005 that permitted the use of “free writing prospectuses” in connection with registered securities offerings. *See* Release No. 33-8591 (July 19, 2005), 70 FR 44722 (August 3, 2005) (Securities Offering Reform Release). As defined in Securities Act Rule 405, a free writing prospectus is any written communication, including an electronic communication, that constitutes an offer to sell or solicitation of an offer to buy securities in a registered offering by means other than the statutory prospectus. Free writing prospectuses may be created by the issuer or by another offering participant. Pursuant to Securities Act Rule 433, issuer free writing prospectuses and broadly distributed free writing prospectuses of other offering participants are generally required to be filed with the SEC, though some free writing prospectuses are exempt from filing (for instance, preliminary term sheets) but are subject to the requirement that the issuer or other offering participant using them maintain them in their files for three years following use.

¹³ *See* Securities Offering Reform Release at 44725 (emphasis added).

¹⁴ *See* FINRA Interpretative Letter re: Free Writing Prospectus Interpretation (August 1, 2006). In this letter, FINRA took the position that free writing prospectuses are not subject to Rules 2210 and 2211 or the filing requirements of Rules 2710 and 2720.

3. *Structured Products Not Required To Be Registered Under the Securities Act*

Although the new rule's pre-approval requirement applies only to retail communications concerning "publicly offered" structured products, we respectfully request that FINRA specifically exempt within (c)(2)(B) retail communications concerning structured products for which there is a registration exemption or that are not otherwise required to be registered under the Securities Act of 1933. For example, this exception would cover communications sent only to accredited investors or non-U.S. persons, as well as communications sent only to such investors that concern privately offered structured products (e.g., private placement memorandums regarding structured products). This exception also should make clear that structured products that are not securities are excluded from the FINRA pre-approval requirement.

4. *New Members*

FINRA proposes to require a new member in proposed FINRA Rule 2210(c)(1) to file *all* retail communications with FINRA at least 10 business days prior to use for a period of one year beginning on the effective date of the member's FINRA registration. This provision appears to cover all pages of the websites of new member firms, including pages that are subject to password protection. Under current NASD 2210, such password protected pages are excluded from the filing requirements for new member firms. Requiring the filing of such password protected pages under the new rule would place substantial burdens and costs on new member firms without commensurate investor protection benefits. Accordingly, SIFMA requests that FINRA amend paragraph (c)(1) of the new rule to specifically exclude the password protected portions of a new member's website.

5. *General Concern about Timeliness of Reviews*

SIFMA also notes its general concern about the ability of FINRA to timely review and approve the additional communications that would be subject to the FINRA pre-approval requirement under the proposed rule. It is our observation that over the past several years, member firms have experienced significant delays in turn-around for material filed with FINRA. We would hope that FINRA's Advertising Regulation Department has made effective organizational and staffing changes designed to address the backlog of issues in anticipation of the potential impact of increased filing on their workflow. Requiring the pre-filing of additional types of materials without taking appropriate steps to ensure that the materials are reviewed within expected time frames could significantly impact a firm's ability to launch new products, announce enhancements to existing products or actively market their services and products. Firms would greatly appreciate it if Advertising Regulation would be better able to accommodate filers, and provide more consistent and timely responses.

B. Exclusions from FINRA Filing Requirements

FINRA is proposing to retain in new FINRA Rule 2210(c)(7) the exclusions in current NASD Rule 2210(c)(8) from the requirements to file certain communications with FINRA. While SIFMA applauds this decision, it requests that FINRA make certain changes to paragraph

(c)(7) of the proposed rule which are designed to improve members' compliance with paragraph (c) of the proposed rule. In particular, SIFMA requests that FINRA clarify that the exclusion in paragraph (c)(7)(A) of the proposed rule for previously-filed templates covers templates that were filed before the proposed rule, if approved, becomes effective. SIFMA also requests that FINRA clarify that the exclusion for administrative communications in paragraph (c)(7)(B) of the proposed rule covers generic documents or excerpts describing a member's products and services, even if such communications reference a product subject to a filing requirement under paragraph (c) of the proposed rule. SIFMA believes that such communications do not raise sufficient investor protection concerns necessary to warrant a filing obligation under paragraph (c).

Furthermore, SIFMA requests that FINRA clarify that independent research reports concerning investment companies, which are not required to be filed with FINRA under current NASD Rule 2210(c)(8)(H), are covered by the exclusion for independent reprints in proposed FINRA Rule 2210(c)(7)(G). Finally, SIFMA requests that FINRA add an exclusion to paragraph (c)(7) of the proposed rule for general investment pieces that discuss an investment strategy, but do not recommend a particular security or promote a product or service of a member. Like generic documents or excerpts describing a member's products and services, SIFMA believes that such communications do not raise sufficient investor protection concerns necessary to warrant a filing obligation under paragraph (c).

III. Expanded Disclosure Requirement Regarding Recommendations

Proposed FINRA Rule 2210 would greatly expand the disclosure requirements regarding recommendations in current NASD IM-2210-1.¹⁵ Specifically, proposed new FINRA Rule 2210(d)(7)(A)(ii) would require a member making a recommendation in retail communications, correspondence and public appearances to disclose, if applicable, 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). This provision would apply to virtually all communications distributed by a member, and would require the disclosure of a financial interest held by the member and any associated person with the ability to influence the substance of the communication, regardless of whether the financial interest is nominal.¹⁶

¹⁵ Under current NASD IM-2210-1(6), a member making a recommendation in advertisements and sales literature must disclose, if applicable, that the member and/or its officers or partners have 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), unless the extent of the financial interest is nominal. This provision only applies to advertisements and sales literature distributed by a member, and only requires disclosure of a financial interest held by the member, its officers and partners if the extent of the interest is more than nominal.

¹⁶ The provision would not apply to institutional communications, research reports as defined in NASD Rule 2711, and communications limited only to investment companies or variable insurance products.

SIFMA believes that this provision will be extremely difficult, if not impossible, for members to implement and supervise, particularly in light of the expanded universe of communications and individuals to which it would apply. For example, it would extend to all correspondence sent to existing customers, all fixed income research reports (which are not research reports under NASD Rule 2711), and all public appearances (e.g., seminars) by a member's associated persons.¹⁷ It also significantly expands the number of associated persons subject to the disclosure requirements because it applies to any associated person with the ability to influence the substance of the communication. In effect, members would be required to implement extensive compliance systems to track who has a financial interest in a particular issuer, and to make this information available on a real-time basis to all of its associated persons so that they are in a position to satisfy the disclosure requirements with respect to any recommendations they make.

Indeed, though clearly well intentioned, the proposed disclosure requirements could ultimately disserve investor interests. Consider, for example, the application of the rule to an email communications sent by a broker to 10 existing retail clients containing a recommendation to purchase 100 shares of Microsoft stock. If the broker's branch manager owns Microsoft securities, then disclosure could be required under the rule proposal because the branch manager, by virtue of his supervisory role, could be deemed to have the ability to influence the substance of the communication. Given the practical implementation challenges with complying with the proposed disclosure requirements, the broker may forego making recommendations in emails and instead make recommendations over the phone. This outcome would not serve investors interests because oral recommendations are more difficult for members to supervise and retain than written recommendations.

Accordingly, SIFMA recommends that FINRA limit the disclosure of a financial interest in proposed FINRA Rule 2210(d)(7)(A)(ii) to financial interests held by a member and/or its officers or partners. SIFMA also recommends that FINRA exclude correspondence from the disclosure requirements. SIFMA believes that these changes will allow members to comply with the proposed disclosure requirements regarding recommendations while still providing meaningful disclosure regarding potential conflicts to retail investors.

As with current NASD IM-2210-1(6), FINRA also is proposing in new FINRA Rule 2210(d)(7)(A) to require a member making a recommendation to disclose, if applicable, (1) 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; and (2) that the member was manager or co-manager of a public offering of any securities of the recommended issuer within the past 12 months. SIFMA requests that FINRA clarify that a member may provide such disclosure, as well as disclosure regarding a

¹⁷ SIFMA requests that FINRA provide guidance on the scope of the term "public appearance" as described in proposed FINRA Rule 2210(f) with respect to an "interactive electronic forum." SIFMA would like to know, for example, whether webinars and blogs are a form of an interactive electronic forum, and if so, how members should comply with the proposed disclosure requirements regarding recommendations when communicating in this manner.

financial interest, by stating that a member may make a market in, have a financial interest in, or have underwritten within the past 12 months securities of the recommended issuer.

* * *

As noted above, we appreciate the opportunity to comment on Regulatory Notice 09-55. We would be pleased to discuss any comments herein, or provide FINRA with any additional assistance as it proceeds with the rule proposal. Please do not hesitate to contact me at (212) 313-1268 if you have any questions or comments.

Sincerely,

A handwritten signature in cursive script, appearing to read "Amal Aly", with a long, sweeping flourish extending to the right.

Amal Aly
SIFMA Managing Director and
Associate General Counsel