

# Notices

## Regulatory Notices

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## Corporate Financing Rule

### FINRA Requests Comment on Proposed Amendments to FINRA Rule 5110 Regarding Deferred Compensation Arrangements in Public Offerings

Comment Period Expires: July 23, 2012

#### Executive Summary

FINRA is requesting comments on proposed amendments to FINRA Rule 5110 (Corporate Financing Rule) that address current deferred compensation arrangements for financial advisory services in connection with public offerings, eliminate an anomalous filing requirement for exchange traded funds structured as statutory or grantor trusts, and make certain ministerial amendments to, among other things, reflect electronic filing requirements.

The text of the proposed rule change is set forth in Attachment A.

Questions regarding this *Notice* may be directed to:

- ▶ Joseph E. Price, Senior Vice President, Corporate Financing/Advertising Regulation, at (240) 386-4623;
- ▶ Paul Mathews, Director, Corporate Financing Department, at (240) 386-4639; or
- ▶ Lisa Jones Toms, Associate Director and Senior Counsel, Corporate Financing Department, at (240) 386-4661.

#### Action Requested

FINRA encourages all interested parties to comment on the proposal. Comments must be received by July 23, 2012.

#### June 2012

##### Notice Type

- ▶ Request for Comment

##### Suggested Routing

- ▶ Compliance
- ▶ Corporate Finance
- ▶ Legal
- ▶ Senior Management

##### Key Topics

- ▶ Deferred Compensation Arrangements in Public Offerings
- ▶ Exemption for Exchange-Traded Fund Offerings

##### Referenced Rules & Notices

- ▶ FINRA Rule 5110
- ▶ NASD Rule 2830
- ▶ NTM 97-82

Member firms and other interested parties can submit their comments using the following methods:

- ▶ Emailing comments to [pubcom@finra.org](mailto:pubcom@finra.org); or
- ▶ Mailing comments in hard copy to:

Marcia E. Asquith  
Office of the Corporate Secretary  
FINRA  
1735 K Street, NW  
Washington, DC 20006-1506

To help FINRA process and review comments more efficiently, persons should use only one method to comment on the proposal.

Important Notes: The only comments that FINRA will consider are those submitted pursuant to the methods described above. All comments received in response to this *Notice* will be made available to the public on the FINRA website. Generally, FINRA will post comments as they are received.<sup>1</sup>

Before becoming effective, a proposed rule change must be authorized for filing with the Securities and Exchange Commission (SEC) by the FINRA Board of Governors, and then must be filed with the SEC pursuant to Section 19(b) of the Securities Exchange Act of 1934 (SEA).<sup>2</sup>

## Background and Discussion

### A. Deferred Compensation Arrangements

The Corporate Financing Rule requires member firms to file with FINRA's Corporate Financing Department documents and information about the underwriting terms and arrangements in public offerings in which they will participate. Before a public offering is filed, investment banks may enter into engagement letters with issuers for underwriting and financial advisory services, and these engagement letters often have provisions that allow issuers to defer payment until after the completion of a capital-raising transaction (deferred compensation arrangement). A deferred compensation arrangement responds to issuer concerns that up-front payment for financial advisory services could adversely affect the issuer's business. To address the risks that an issuer having received financial advisory services might unreasonably cancel an engagement to avoid the deferred compensation payment, engagement letters often provide for termination fees (sometimes called tail fees) or rights of first refusal. A termination fee permits an underwriter to receive fees if its services are terminated and the issuer consummates a similar transaction with another underwriter in lieu of the transaction subject to the engagement letter. A right of first refusal (ROFR) grants an underwriter the right to act in an agreed upon capacity in a subsequent financing transaction. Both arrangements provide issuers and underwriters with greater flexibility to negotiate deferred compensation arrangements.

The Corporate Financing Rule only permits termination fees in exchange offers or similar transactions in which substantial structuring and advisory services beyond traditional underwriting and distribution services have been provided.<sup>3</sup> The rule permits ROFRs, but the staff has interpreted the rule to prohibit ROFRs when a member's participation in the original transaction is terminated.<sup>4</sup> The restrictions on the establishment of termination fees and ROFRs in the Corporate Financing Rule may unnecessarily interfere with the ability of issuers and underwriters to negotiate deferred or other appropriate compensation arrangements that may be better suited to the issuer's business interests. For this reason, FINRA proposes to amend the Corporate Financing Rule to permit termination fees and ROFRs in a wider set of circumstances.<sup>5</sup>

FINRA proposes to amend Rule 5110(f)(2)(D) to allow termination fees and ROFRs when the written agreement between the issuer and underwriter specifies that:

- ▶ the amount of the termination fee must be reasonable in relation to the services contemplated in the agreement and fees arising from services provided under an ROFR must be customary for those type of services;
- ▶ the issuer has a right of "termination for cause," which includes the member's material failure to provide the services contemplated in the agreement; and
- ▶ an issuer's termination for cause eliminates any obligations with respect to any termination fee or ROFR.

The proposed amendments would retain the requirements in the existing rule that termination fees can only be paid and ROFRs can be executed within certain time periods. The proposed amendments thus would require that an offering or other transaction described in the agreement must be consummated within two years of the date the engagement is terminated, and would continue to prohibit any ROFR with a duration of more than three years from the date of effectiveness or commencement of sales of a public offering.<sup>6</sup> These time limitations will help ensure that the issuer is not subject to a termination fee or ROFR even after its business and operations may have significantly changed.

## **B. Filing Requirements for Certain Exchange-Traded Funds**

Most exchange-traded funds (ETFs) are structured as open-end investment companies or unit investment trusts (UITs) that offer redeemable securities. Investment companies and UITs are exempt from regulation under the Corporate Financing Rule and are not required to be filed with FINRA's Corporate Financing Department. However, some ETFs are structured as Delaware statutory trusts or grantor trusts. The portfolio assets in these trusts typically are commodities, currencies or other assets that are not securities. Currently, there is no exemption for public offerings of ETFs structured in this manner and therefore these offerings are required to be filed under the rule.

The provisions in the Corporate Financing Rule regarding underwriting terms and arrangements are not designed for the ETF distribution methodology by which a “basket” of the underlying assets is deposited into the ETF’s portfolio and “creation units” of shares are provided to the broker-dealer in return. ETFs should be treated consistently, without regard to the chosen legal structure, which is dictated primarily by the nature of the assets in the portfolios rather than differences in distribution methods or underwriting terms and arrangements. Accordingly, the proposed amendments would exempt from the rule’s filing requirement offerings of securities issued by ETFs formed as grantor or statutory trusts in which the portfolio assets include commodities, currencies or other assets that are not securities.

### C. Administrative Changes

FINRA proposes to make certain ministerial amendments to certain provisions in the Corporate Financing Rule to, among other things, reflect the acceptance of electronic filings.

## Endnotes

1. FINRA will not edit personal identifying information, such as names or email addresses, from submissions. Persons should submit only information that they wish to make publicly available. See [NTM 03-73](#) (November 2003) (NASD Announces Online Availability of Comments) for more information.
2. See SEA Section 19 and rules thereunder. After a proposed rule change is filed with the SEC, the proposed rule change generally is published for public comment in the *Federal Register*. Certain limited types of proposed rule changes, however, take effect upon filing with the SEC. See SEA Section 19(b)(3) and SEA Rule 19b-4.
3. See Rule 5110(f)(2)(E).
4. See Rule 5110(f)(2), (F) & (G).
5. If an underwriter does not meet the requirements of proposed Rule 5110(f)(2)(D)(ii), then it would continue to be prohibited from receiving compensation for underwriting services in a terminated offering except for reimbursement of out-of-pocket accountable expenses.
6. Currently, Rule 5110(f)(2)(E) requires that the issuer consummate a transaction similar to the transaction contemplated in the agreement between the issuer and the underwriter within two years of termination of the agreement.

## Attachment A

\* \* \* \* \*

### 5110. Corporate Financing Rule — Underwriting Terms and Arrangements

(a) No Change.

#### (b) Filing Requirements

(1) through (4) No Change.

#### (5) Documents to be Filed

(A) The following documents relating to all proposed public offerings of securities that are required to be filed under paragraph (b)(4) above shall be filed [with] through FINRA's electronic filing system for review:

(i) [Three copies of t]The registration statement, offering circular, offering memorandum, notification of filing, notice of intention, application for conversion and/or any other document used to offer securities to the public;

(ii) [Three copies of a]Any proposed underwriting agreement, agreement among underwriters, selected dealers agreement, agency agreement, purchase agreement, letter of intent, consulting agreement, partnership agreement, underwriter's warrant agreement, escrow agreement, and any other document that describes the underwriting or other arrangements in connection with or related to the distribution, and the terms and conditions relating thereto; and any other information or documents that may be material to or part of the said arrangements, terms and conditions and that may have a bearing on FINRA's review;

(iii) [Three copies of e]Each pre- and post-effective amendment to the registration statement or other offering document, [one] with a copy marked to show changes; and [three (3) copies of] any other amended document previously filed pursuant to subparagraphs (i) and (ii) above, [one] with a copy marked to show changes; and

(iv) [Three copies of t]The final registration statement declared effective by the SEC or equivalent final offering document and a list of the members of the underwriting syndicate, if not indicated therein, and one copy of the executed form of the final underwriting documents and any other document submitted to FINRA for review.

(B) [All d]Documents that are filed with the SEC through the SEC’s Electronic Data Gathering, Analysis, and Retrieval (“EDGAR”) System that are referenced in FINRA’s electronic filing system shall be treated as filed with FINRA.

(6) No Change.

**(7) Offerings Exempt from Filing**

Notwithstanding the provisions of subparagraph (1) above, documents and information related to the following public offerings need not be filed with FINRA for review, unless subject to the provisions of Rule 5121(a)(2). However, it shall be deemed a violation of this Rule or Rule 2310, for a member to participate in any way in such public offerings if the underwriting or other arrangements in connection with the offering are not in compliance with this Rule or Rule 2310, as applicable:

(A) through (E) No Change.

(F) exchange offers of securities where:

(i) the securities to be issued or the securities of the company being acquired are listed on The Nasdaq Global Market, the New York Stock Exchange, or the American Stock Exchange; or

(ii) the company issuing securities qualifies to register securities with the SEC on registration statement Forms S-3, F-3, or F-10, pursuant to the standards for those Forms as set forth in subparagraphs (C)(i) and (ii) of this paragraph; [and]

(G) offerings of securities by a church or other charitable institution that is exempt from SEC registration pursuant to Section 3(a)(4) of the Securities Act[.]; and

(H) offerings of securities issued by an exchange-traded fund formed as a grantor trust or statutory trust in which the portfolio assets include commodities, currencies or other assets that are not securities.

(8) through (9) No Change.

**(c) Underwriting Compensation and Arrangements**

(1) No Change.

**(2) Amount of Underwriting Compensation**

(A) No Change.

(B) For purposes of determining the amount of underwriting compensation, all items of value received or to be received from any source by the underwriter and related persons which are deemed to be in connection with or related to the distribution of the public offering as determined pursuant to subparagraph[s] (3) [and (4)] below shall be included.

(C) through (D) No Change.

(3) No Change.

(d) through (e) No Change.

**(f) Unreasonable Terms and Arrangements**

(1) No Change.

**(2) Prohibited Arrangements**

Without limiting the foregoing, the following terms and arrangements, when proposed in connection with a public offering of securities, shall be unfair and unreasonable.

(A) Any accountable expense allowance granted by an issuer to the underwriter and related persons that includes payment for general overhead, salaries, supplies, or similar expenses of the underwriter incur[ ]red in the normal conduct of business.

(B) through (C) No Change.

(D) [The payment of a] Any compensation by an issuer to a member or person associated with a member in connection with an offering of securities that is not completed according to the terms of agreement between the issuer and underwriter, except: [those negotiated and paid in connection with a transaction that occurs in lieu of the proposed offering as a result of the efforts of the underwriter and related persons and provided, however, that]

(i) the reimbursement of out-of-pocket accountable expenses actually incurred by the member or person associated with a member[ shall not be presumed to be unfair or unreasonable under normal circumstances.];

(ii) a termination fee or a right of first refusal, as set forth in a written agreement between the issuer and the member, provided that the agreement specifies:

a. the amount of any termination fee must be reasonable in relation to the services contemplated in the agreement and any fees arising from services provided under a right of first refusal must be customary for those type of services;

b. the issuer has a right of “termination for cause,” which shall include the member’s material failure to provide the services contemplated in the agreement;

c. an issuer’s “termination for cause” eliminates any obligations with respect to any termination fee or right of first refusal; and

d. the termination fee requires that in order for the issuer to be responsible for paying the fee, an offering or other transaction (as set forth in the agreement) must be consummated within two years of the date the engagement is terminated by the issuer.

[(E) Any “tail fee” arrangement granted to the underwriter and related persons that has a duration of more than two years from the date the member’s services are terminated, in the event that the offering is not completed in accordance with the agreement between the issuer and the underwriter and the issuer subsequently consummates a similar transaction, except that a member may demonstrate on the basis of information satisfactory to FINRA that an arrangement of more than two years is not unfair or unreasonable under the circumstances.]

[(F)E] Any right of first refusal provided to the underwriter or related persons to underwrite or participate in future public offerings, private placements or other financings that:

(i) has a duration of more than three years from the [date of effectiveness or] commencement of sales of the public offering or the termination date of the engagement between the issuer and underwriter; or

(ii) has more than one opportunity to waive or terminate the right of first refusal in consideration of any payment or fee;

[(G)F] Any payment or fee to waive or terminate a right of first refusal regarding future public offerings, private placements or other financings provided to the underwriter and related persons that:

(i) has a value in excess of the greater of 1% of the offering proceeds in the public offering where the right of first refusal was granted (or an amount in excess of 1% if additional compensation is available under the compensation guideline of the original offering) or 5% of the underwriting discount or commission paid in connection with the future financing (including any overallotment option that may be exercised), regardless of whether the payment or fee is negotiated at the time of or subsequent to the original public offering; or

(ii) is not paid in cash.

(H) through (I) redesignated as (G) through (H).

[(J)I] When proposed in connection with the distribution of a public offering of securities on a “firm commitment” basis, any over[ ]allotment option providing for the over[ ]allotment of more than 15% of the amount of securities being offered, computed excluding any securities offered pursuant to the over[ ]allotment option.

(K) through (L) redesignated as (J) through (K).

[(M)] For a member or person associated with a member to participate in a public offering of real estate investment trust securities, as defined in NASD Rule 2340(c)(4), unless the trustee will disclose in each annual report distributed to investors pursuant to Section 13(a) of the Exchange Act a per share estimated value of the trust securities, the method by which it was developed, and the date of the data used to develop the estimated value.]

**(g) Lock-Up Restriction on Securities**

(1) No change.

(2) Exceptions to Lock-Up Restriction

(A)(i) through (ii) No Change.

(iii) if the aggregate amount of securities of the issuer held by the underwriter [or] and related persons do not exceed 1% of the securities being offered;

(iv) through (viii) No Change.

(B) No Change.

**(h) Non-Cash Compensation**

(1) No Change.

**(2) Restrictions on Non-Cash Compensation**

(A) through (B) No Change.

(C) Payment or reimbursement by offerors in connection with meetings held by an offeror or by a member for the purpose of training or education of associated persons of a member, provided that:

(i) associated persons obtain the member's prior approval to attend the meeting and attendance by a member's associated persons is not conditioned by the member on the achievement of a sales target or any other incentives pursuant to a non-cash compensation arrangement permitted by paragraph ([d]h)(2)(D);

(ii) through (iii) No Change.

(iv) the payment or reimbursement by the issuer or affiliate of the issuer is not conditioned by the issuer or an affiliate of the issuer on the achievement of a sales target or any other non-cash compensation arrangement permitted by paragraph ([d]h)(2)(D).

(D) No Change.

(E) Contributions by a non-member company or other member to a non-cash compensation arrangement between a member and its associated persons, provided that the arrangement meets the criteria in paragraph ([d]h)(2)(D).

A member shall maintain records of all non-cash compensation received by the member or its associated persons in arrangements permitted by paragraphs ([d]h)(2)(C) through (E). The records shall include: the names of the offerors, non-members or other members making the non-cash compensation contributions; the names of the associated persons participating in the arrangements; the nature and value of non-cash compensation received; the location of training and education meetings; and any other information that proves compliance by the member and its associated persons with paragraphs ([d]h)(2)(C) through (E).

**(i) No Change.**

\* \* \* \* \*

## Collective Action Claims

### SEC Approves Amendments to Rule 13204 of the Industry Code to Preclude Collective Action Claims from Being Arbitrated Under the Code

Effective Date: July 9, 2012

#### Executive Summary

The SEC approved amendments to FINRA Rule 13204 of the Code of Arbitration Procedure for Industry Disputes (Industry Code) to preclude collective action claims by employees of FINRA member firms under the Fair Labor Standards Act (FLSA),<sup>1</sup> the Age Discrimination in Employment Act (ADEA)<sup>2</sup> or the Equal Pay Act of 1963 (EPA)<sup>3</sup> from being arbitrated under the Industry Code.<sup>4</sup>

The amendments are effective on July 9, 2012, for any claims that are part of a certified or putative collective action under the FLSA, ADEA or EPA. The text of the amendments is set forth in Attachment A.

Questions concerning this *Notice* should be directed to:

- ▶ Kenneth L. Andrichik, Senior Vice President, Chief Counsel and Director of Mediation and Strategy, Dispute Resolution, at (212) 858-3915 or [ken.andrichik@finra.org](mailto:ken.andrichik@finra.org); or
- ▶ Mignon McLemore, Assistant Chief Counsel, Dispute Resolution, at (202) 728-8151 or [mignon.mclemore@finra.org](mailto:mignon.mclemore@finra.org).

#### Background and Discussion

The Code of Arbitration Procedure for Customer Disputes (Customer Code) and the Industry Code (together, Codes) prohibit a claim that is part of a class action from being arbitrated in FINRA's Dispute Resolution forum.<sup>5</sup> Specifically, the class action rules provide that any claim that is based upon the same facts and law, and involves the same defendants as in a court-certified class action or a putative class action, shall not be arbitrated, unless the party bringing the claim files with FINRA one of the following:

#### June 2012

##### Notice Type

- ▶ Rule Amendment

##### Suggested Routing

- ▶ Compliance
- ▶ Legal
- ▶ Registered Representatives

##### Key Topics

- ▶ Arbitration
- ▶ Code of Arbitration Procedure
- ▶ Collective Action
- ▶ Industry Code

##### Referenced Rules & Notices

- ▶ Rule 13204

- ▶ a copy of a notice filed with the court in which the class action is pending that the party will not participate in the class action or in any recovery that may result from the class action, or has withdrawn from the class according to any conditions set by the court; or
- ▶ a notice that the party will not participate in the class action or in any recovery that may result from the class action.<sup>6</sup>

FINRA issued an interpretive letter (FINRA letter) in 1999 that stated that its class action rules should include collective action claims brought under the FLSA and, thus, considered these claims ineligible for arbitration in its forum.<sup>7</sup> Despite that interpretation, a district court decision found that an FLSA collective action is not a class action for purposes of Rule 13204 of the Industry Code and compelled arbitration of the claim in FINRA's dispute resolution forum.<sup>8</sup> FINRA is, therefore, amending Rule 13204 of the Industry Code to preclude expressly collective actions from being arbitrated in its dispute resolution forum.<sup>9</sup>

Under the amendments, Rule 13204(b)(1) provides that collective action claims under the FLSA, the ADEA or the EPA may not be arbitrated under the Code.

Second, Rule 13204(b)(2) states that any claim that involves similarly-situated<sup>10</sup> plaintiffs against the same defendants, such as a court-certified collective action or a putative collective action,<sup>11</sup> or that is ordered by a court for collective action at a forum not sponsored by a self-regulatory organization, shall not be arbitrated under the Code, if the party bringing the claim has opted-in to the collective action. Thus, under the rule, if an associated person opts in to a collective action, that person would be precluded from arbitrating the same claims in FINRA's arbitration forum.

Third, Rule 13204(b)(3) provides that the director will refer to a panel any dispute as to whether a claim is part of a collective action, unless a party asks the court or other forum hearing the collective action to resolve the dispute within 10 days of receiving notice that the director has decided to refer the dispute to a panel. The rule gives arbitrators the authority to decide disputes about whether a claim is part of a collective action, unless a court or other forum resolves the dispute.

Finally, Rule 13204(b)(4) prohibits a member firm or associated person from enforcing an agreement to arbitrate in this forum against a member of a certified or putative collective action with respect to any claim that is the subject of the certified or putative collective action until either the collective certification is denied or the group is decertified. This rule clarifies that the existence of a certified or putative collective action nullifies any pre-dispute arbitration agreements with respect to claims involving that collective action. If, however, a court denies a plaintiff's request to certify a collective action or the court decertifies the collective action, the pre-dispute arbitration agreement would be enforceable.

## Effective Date Provisions

The amendments are effective on July 9, 2012, for any claims that are part of a certified or putative collective action under the FLSA, ADEA or EPA.

## Endnotes

1. See 29 U.S.C. § 201 *et seq.*
2. See 29 U.S.C. §§ 621 *et seq.* The relief provisions of the ADEA incorporate Section 16 of the FLSA, which outlines the penalties for violations of the statute, and state that the ADEA shall be enforced by the “powers, remedies and procedures” of the FLSA. See 29 U.S.C. § 626(b).
3. See 29 U.S.C. § 206(d). The EPA, which is part of FLSA as amended, is administered and enforced by the United States Equal Employment Opportunity Commission. The relief provisions of the EPA also incorporate Section 16 of the FLSA.
4. See Securities Exchange Act Rel. No. 66774 (April 9, 2012), 77 FR 22374 (April 13, 2012) (Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change as Modified by Amendment No. 1, Amending Rule 13024 of the Code of Arbitration Procedure for Industry Disputes To Preclude Collective Action Claims From Being Arbitrated) (File No. SR-FINRA-2011-075).
5. See Rule 12204 of the Customer Code and Rule 13204 of the Industry Code (class action rules).
6. In its April 2012 Approval Order, the SEC states that “Rule 13204 of the Industry Code generally provides that any claim that is based upon the same facts and law, and involves the same defendants as in a court-certified class action or a putative class action, shall not be arbitrated.” See *supra* note 4 at p. 22374. FINRA notes that, under its class action rules, claims based on the same facts and law and involving the same defendants may be arbitrated in FINRA’s forum provided that the party bringing the claims meets certain criteria. See *supra* note 5.
7. See, e.g., [FINRA Interpretive Letter to Cliff Palefsky, Esq.](#), dated Sept. 21, 1999.
8. *Hugo Gomez et al. v. Brill Securities, Inc. et al.*, No. 10 Civ. 3503, 2010 U.S. Dist. LEXIS 118162 (S.D.N.Y. Nov. 2, 2010); see also *Velez v. Perrin Holden & Davenport Capital Corp., Nelson Braff, Jody Eisenman and Perter Hoffman*, No. 10 Civ. 3735, 2011 U.S. Dist. LEXIS 16678 (S.D.N.Y. Feb. 3, 2011).
9. The Customer Code would not be amended because, for the FLSA, ADEA or EPA to apply, there must be an employment relationship between an employer and employee. See U.S. Department of Labor, “[What does the Fair Labor Standards Act require?](#)”, elaws—Fair Labor Standards Act Advisor.
10. The FLSA statute uses the term “similarly-situated” to describe the type of plaintiffs who file a collective action claim. See 29 U.S.C. § 216(b).
11. Before a collective action is certified, courts often refer to the case as a *putative* collective action.

## ATTACHMENT A

New language is underlined; deleted language is in brackets.

### Code of Arbitration Procedure for Industry Disputes

#### Industry Code

#### 13204. Class Action & Collective Action Claims

##### (a) Class Actions

(1) Class action claims may not be arbitrated under the Code.

(2) Any claim that is based upon the same facts and law, and involves the same defendants as in a court-certified class action or a putative class action, or that is ordered by a court for class-wide arbitration at a forum not sponsored by a self-regulatory organization, shall not be arbitrated under the Code, unless the party bringing the claim files with FINRA one of the following:

(i) a copy of a notice filed with the court in which the class action is pending that the party will not participate in the class action or in any recovery that may result from the class action, or has withdrawn from the class according to any conditions set by the court; or

(ii) a notice that the party will not participate in the class action or in any recovery that may result from the class action.

(3) The Director will refer to a panel any dispute as to whether a claim is part of a class action, unless a party asks the court hearing the class action to resolve the dispute within 10 days of receiving notice that the Director has decided to refer the dispute to a panel.

(4) A member or associated person may not enforce any arbitration agreement against a member of a certified or putative class action with respect to any claim that is the subject of the certified or putative class action until:

- The class certification is denied;
- The class is decertified;
- The member of the certified or putative class is excluded from the class by the court; or
- The member of the certified or putative class elects not to participate in the class or withdraws from the class according to conditions set by the court, if any.

**(b) Collective Actions**

(1) Collective action claims under the Fair Labor Standards Act, the Age Discrimination in Employment Act, or the Equal Pay Act of 1963 may not be arbitrated under the Code.

(2) Any claim that involves plaintiffs who are similarly-situated against the same defendants as in a court-certified collective action or a putative collective action, or that is ordered by a court for collective action at a forum not sponsored by a self-regulatory organization, shall not be arbitrated under the Code, if the party bringing the claim has opted-in to the collective action.

(3) The Director will refer to a panel any dispute as to whether a claim is part of a collective action, unless a party asks the court or other forum hearing the collective action to resolve the dispute within 10 days of receiving notice that the Director has decided to refer the dispute to a panel.

(4) A member or associated person may not enforce an agreement to arbitrate in this forum against a member of a certified or putative collective action with respect to any claim that is the subject of the certified or putative collective action until the collective action certification is denied or the collective action is decertified.

[This] These subparagraphs do[es] not otherwise affect the enforceability of any rights under the Code or any other agreement.

## Communications With the Public

### SEC Approves New Rules Governing Communications With the Public

Effective Date: February 4, 2013

#### Executive Summary

The SEC approved FINRA's proposed rule change 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 (collectively, the Communications Rules), and to delete certain provisions of Incorporated NYSE Rule 472 and certain Supplementary Material and Rule Interpretations related to NYSE Rule 472.<sup>1</sup> The Communications Rules become effective on February 4, 2013.

The text of the Communications Rules can be found at [www.finra.org/notices/12-29](http://www.finra.org/notices/12-29).

Questions concerning this *Notice* should be directed to:

- ▶ Thomas A. Pappas, Vice President & Director, Advertising Regulation, at (240) 386-4553; or
- ▶ Joseph P. Savage, Vice President & Counsel, Investment Companies Regulation, at (240) 386-4534.

#### Background & Discussion

##### Current Rules Governing Communications With the Public

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

#### June 2012

##### Notice Type

- ▶ Consolidated Rulebook
- ▶ New Rules

##### Suggested Routing

- ▶ Advertising
- ▶ Compliance
- ▶ Investment Companies
- ▶ Legal
- ▶ Registered Representatives
- ▶ Research
- ▶ Senior Management

##### Key Topics

- ▶ Advertising
- ▶ Communications With the Public
- ▶ Correspondence
- ▶ Institutional Communications
- ▶ Retail Communications

##### Referenced Rules & Notices

- ▶ FINRA Rule 2200 Series
- ▶ FINRA Rule 4511
- ▶ FINRA Rule 9600 Series
- ▶ Incorporated NYSE Rules 344 and 472
- ▶ Investment Advisers Act Rule 206(4)-1
- ▶ Investment Company Act Rule 24b-3
- ▶ Investment Company Act Section 24(b)
- ▶ NASD IM-2210-1 through IM-2210-8
- ▶ NASD Rules 1022, 2210, 2211, 2711, 3010
- ▶ Regulatory Notices 08-64, 09-10, 09-70, 10-06 and 10-52
- ▶ SEA Rule 17a-4
- ▶ Securities Act Rules 134, 433 and 482



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 websites.
- ▶ **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 certain of the principal pre-use approval, filing and content standards may 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; (2) public appearances; or (3) 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 firm. While such communications do not require principal pre-use approval, firms still must establish and maintain policies and procedures to supervise them for compliance with applicable standards.

Firms must file with the FINRA Advertising Regulation Department for review certain advertisements and sales literature. For example, advertisements and sales literature concerning mutual funds, variable insurance products and public direct participation programs, and advertisements concerning government securities, must be filed within 10 business days of first use, but firms are not required to file independently prepared reprints, correspondence or institutional sales material. The filing requirements also differ based on the firm using the material. A firm that has not previously filed advertisements with FINRA must file its initial advertisement with FINRA at least 10 business days prior to use and must continue to file its advertisements at least 10 business days prior to use for a one-year period.

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>2</sup> The Incorporated 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.

### Reorganization of Rules

New FINRA Rule 2210 encompasses, 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, except IM-2210-2 (Communications with the Public About Variable Life Insurance and Variable Annuities), have been assigned separate FINRA rule numbers and adopt the same communication categories used in FINRA Rule 2210.<sup>3</sup>

### Communication Categories

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

- ▶ **Institutional communication** includes written (including electronic) communications that are distributed or made available only to institutional investors, but does not include a firm’s internal communications. “Institutional investor” generally has the same definition as under NASD Rule 2211(a)(3).<sup>4</sup>
- ▶ **Retail communication** includes 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” includes any person other than an institutional investor, regardless of whether the person has an account with the firm.
- ▶ **Correspondence** includes any written (including electronic) communication that is distributed or made available to 25 or fewer retail investors within any 30 calendar-day period.

Communications that currently qualify as advertisements and sales literature generally fall under the definition of “retail communication.” In addition, to the extent that a firm distributes or makes 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 falls under the definition of “retail communication.”

### Correspondence

As discussed above, the definition of “correspondence” has changed in several key respects. Currently, NASD Rule 2211(a)(1) defines “correspondence” as “any written 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.”

As revised, FINRA Rule 2210(a)(2) defines “correspondence” as “any written (including electronic) communication that is distributed or made available to 25 or fewer retail investors within any 30 calendar-day period.” Thus, the current distinction between existing retail customers and prospective retail customers is eliminated. Instead, if a firm distributes or makes available a written communication to 25 or fewer retail investors within a 30 calendar-day period, the communication is considered correspondence. If a firm distributes or makes available a written (including electronic) communication to more than 25 retail investors (even if they are existing retail customers) within a 30 calendar-day period, it is considered a retail communication.

In addition, the current definition of correspondence only covers written letters, electronic mail messages and market letters. Under FINRA Rule 2210, it covers any type of written communication. Thus, for example, a seminar handout provided to 25 or fewer retail investors within a 30 calendar-day period would be considered correspondence under the new definition.

Lastly, the new definition of correspondence no longer specifically refers to market letters, which are defined under NASD Rule 2211 as “any written communication excepted from the definition of ‘research report’ pursuant to [NASD] Rule 2711(a)(9)(A).”<sup>5</sup> Under FINRA Rule 2210, if a firm distributes a written communication that falls within the definition of “market letter” to more than 25 retail investors within a 30-calendar day period, the market letter will be considered a retail communication rather than correspondence.

Nevertheless, a firm still may supervise retail communications that fall within the current definition of “market letter” in the same manner as correspondence under the new rules, unless the communication makes any financial or investment recommendation. In this regard, FINRA Rule 2210(b)(1)(D)(i) excepts from the principal pre-use approval requirements retail communications that are excepted from the definition of “research report” pursuant to NASD Rule 2711(a)(9)(A) and that do not make a financial or investment recommendation. Under this exception, a firm must supervise and review such retail communications in the same manner as it supervises and reviews correspondence.

### **Institutional Communications**

NASD Rule 2211(a)(3) defines “institutional sales material” as “any communication that is distributed or made available only to institutional investors.” Under FINRA Rule 2210(a)(3), communications that currently qualify as “institutional sales material” generally fall within the definition of “institutional communication”—written (including electronic) communications that are distributed or made available only to institutional investors. However, FINRA is excluding from the definition of “institutional communication” a firm’s internal communications. In the past, FINRA has applied FINRA’s rules governing communications with the public to a firm’s internal communications.<sup>6</sup>

While FINRA Rule 2210 will not apply to a firm’s internal communications once it becomes effective, firms still must supervise these communications, including a firm’s internal communications that train or educate registered representatives. Under NASD Rule 3010, firms must establish, maintain and enforce written procedures to supervise the types of business in which they engage and to supervise associated persons’ activities that are reasonably designed to achieve compliance with applicable securities laws and regulations and with applicable FINRA rules, including the suitability rule and just and equitable principles of trade.<sup>7</sup> In this regard, a firm’s supervisory policies and procedures concerning internal training and education materials must be reasonably designed to ensure that such materials are fair, balanced and accurate. Firms must determine the extent to which the review of internal communications is necessary in accordance with the supervision of their business<sup>8</sup> and maintain records of all internal communications relating to their business as a broker-dealer.<sup>9</sup>

Firms should note, however, that sales scripts intended for use with retail customers are considered retail communications rather than internal communications. The current definition of “sales literature” in NASD Rule 2210 specifically includes telemarketing scripts, and under FINRA Rule 2210, the term “retail communication” includes telemarketing and other sales scripts used with more than 25 retail investors within a 30 calendar-day period.

### **“Reason to Believe” Standard**

The definition of “institutional investor” under both NASD Rule 2211(a)(3) and FINRA Rule 2210(a)(4) specifies that “[n]o member may treat 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.”<sup>10</sup> Although this standard also applies to the current definition of “institutional investor,” some commenters on proposed FINRA Rule 2210 expressed concern that the standard creates uncertainty for firms distributing institutional communications, particularly mutual fund underwriters.

The “reason to believe” standard does not impose an affirmative obligation on firms to inquire whether an institutional communication will be forwarded to retail investors every time such a communication is distributed. The “reason to believe” standard also does not make a fund underwriter responsible for supervising the associated persons of recipient broker-dealers (unless the person is also associated with the underwriter).

Rather, firms should have policies and procedures in place reasonably designed to prevent institutional communications from being forwarded to retail investors, and make appropriate efforts to implement such policies and procedures. Such procedures may include the use of legends warning the recipient of an institutional communication that it is for institutional investor use only.

However, to the extent that a firm becomes aware that a recipient institutional investor is forwarding or making available institutional communications to retail investors, the firm must treat future communications to such institutional investors as retail communications until it reasonably concludes that the improper practice has ceased. Similarly, if red flags indicate to a fund underwriter that a recipient broker-dealer has used or intends to use an institutional communication provided by the underwriter with retail investors, the underwriter must follow up those red flags and, if it determines that this is the case, treat institutional communications distributed to that recipient broker-dealer as retail communications (or cease distribution) until the underwriter reasonably concludes that the broker-dealer has adopted appropriate measures to prevent redistribution.

## **Approval, Review and Recordkeeping Requirements**

### **Principal Pre-Use Approval Requirements for Retail Communications**

Currently NASD Rule 2210(b)(1)(A) requires a registered principal of a firm to approve each advertisement, item of sales literature and independently prepared reprint before the earlier of its use or filing with FINRA. FINRA Rule 2210(b)(1)(A) requires an appropriately qualified registered principal of the firm to approve each retail communication before the earlier of its use or filing with FINRA. The principal registration required to approve particular communications depends upon the permissible activities for each principal registration category. The rule change eliminates Incorporated NYSE Rule 472(a)(1), which requires an “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>11</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. FINRA Rule 2210(b)(1)(B) expands the authority of supervisory analysts to approve certain other types of research-related retail communications. In addition to approving research reports on debt and equity securities, a Series 16 supervisory analyst may approve retail communications as described in NASD Rule 2711(a)(9) (list of research-related

communications that do not fall within the definition of “research report” under NASD Rule 2711), and other research that does not fall within NASD Rule 2711’s definition of “research report,” provided that the supervisory analyst has technical expertise in the particular product area. A supervisory analyst may not approve a retail communication that requires a separate registration (such as retail communications concerning options, security futures or municipal securities) unless the supervisory analyst also holds the other registrations.

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

#### **Exceptions From Principal Pre-Use Approval Requirements for Retail Communications**

NASD Rule 2210(b)(1)(D) provides an exception from the principal pre-use 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 firm intends to publish or distribute it: (i) another firm has filed it with FINRA and has received a letter from FINRA stating that it appears to be consistent with applicable standards; and (ii) the firm 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 Advertising Regulation Department’s letter. FINRA Rule 2210(b)(1)(C) preserves this exception for retail communications.

FINRA Rule 2210(b)(1)(D) excepts from the principal pre-use approval requirements of Rule 2210(b)(1)(A) three additional categories of retail communications, provided that the firm supervises and reviews the 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), unless the communication makes any financial or investment recommendation; (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 recommendation or otherwise promote a product or service of the firm.

As discussed above, 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 firms to supervise communications posted on interactive electronic forums in the same manner as is required for supervising correspondence.<sup>14</sup>

Currently firms are not required to have a principal approve prior to use 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 firm.<sup>15</sup> The third category applies this same standard to all retail communications, rather than just correspondence sent to existing retail customers. Accordingly, a firm will not be required to approve prior to use any retail communication that does not make any financial or investment recommendation or otherwise promote a product or service of the firm. Firms will still be required to supervise such retail communications in the same manner as correspondence.

FINRA expects firms to apply the same analysis used today to analyze correspondence regarding principal pre-use approval to all retail communications. For example, this exception would cover communications that are 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.

FINRA Rule 2210(b)(1)(E) allows FINRA, pursuant to the FINRA Rule 9600 Series, to grant an exemption from the principal pre-use 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. NASD Rule 2210 contains no similar authority. However, as a general matter, FINRA intends to employ this exemptive authority only in unique circumstances and on a case-by-case basis. Any exemptive relief that is granted under this provision will apply only to the firms that have applied for such relief. If FINRA determines that similar relief is appropriate for all firms, it will file a proposed rule change with the SEC to accomplish this result.<sup>16</sup>

FINRA Rule 2210(b)(1)(F) provides that, notwithstanding any other provision of FINRA Rule 2210, a registered principal must approve a communication prior to the firm filing it with the Advertising Regulation Department. FINRA Rule 2210(b)(1)(A) requires a principal to approve each retail communication before the earlier of its use or filing with FINRA, subject to certain exceptions. FINRA Rule 2210(b)(1)(F) is intended to clarify that an appropriately qualified principal must approve **any** communication that is filed with the Advertising Regulation Department, even if a communication otherwise would come under an exception to the principal pre-use approval requirements of FINRA Rule 2210(b)(1)(A).

#### **Correspondence and Institutional Communications**

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

### Recordkeeping Requirements

NASD Rule 2210(b)(2) requires firms 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 approval was not required pursuant to NASD Rule 2210(b)(1)(D); and
- (iii) for any communication for which principal pre-use approval was not required pursuant to NASD Rule 2210(b)(1)(D), the name of the other firm that filed the communication with FINRA and a copy of the corresponding Advertising Regulation Department review letter.

NASD Rule 2211(b)(2) requires firms to maintain records of institutional sales material for a period of three years from the date of last use, including the name of the person who prepared each of the communications.

FINRA Rule 2210(b)(4)(A) sets forth the recordkeeping requirements for retail and institutional communications; generally, these requirements mirror current recordkeeping requirements. This provision incorporates by reference the recordkeeping format, medium and retention period requirements of SEA Rule 17a-4.<sup>18</sup>

FINRA Rule 2210(b)(4)(A) specifies that such records must 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>19</sup>
- ▶ 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 paragraph (b)(1)(C), the name of the firm that filed the retail communication with FINRA and a copy of the Advertising Regulation Department's review letter.

FINRA Rule 2210(b)(4)(B) cross-references NASD Rule 3010(d)(3) and FINRA Rule 4511 with respect to correspondence recordkeeping requirements.

## **Filing Requirements and Review Procedures**

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

### **New Member Firm Filing Requirements**

NASD Rule 2210(c)(5)(A) currently requires a firm that previously has not filed advertisements with FINRA or another self-regulatory organization to file its initial advertisement with the Advertising Regulation Department at least 10 business days prior to use. This filing requirement continues for a year after the initial filing. Under FINRA Rule 2210(c)(1)(A) a new firm's one-year filing requirement begins on the date reflected in the Central Registration Depository (CRD<sup>®</sup>) system that the firm's FINRA membership becomes effective, rather than on the date a firm first files an advertisement with FINRA.

This new member firm filing requirement only applies to certain broadly disseminated retail communications, such as generally accessible websites, print media communications, and television and radio commercials. In addition, to the extent any retail communication that is subject to this filing requirement is a free writing prospectus that has been filed with the SEC pursuant to Securities Act Rule 433(d)(1)(ii), the firm may file the retail communication within 10 business days of first use rather than 10 business days prior to first use.

### **Advertising Regulation Department Authority to Require Firms to File Communications Prior to Use**

NASD Rule 2210(c)(5)(B) currently authorizes the Advertising Regulation Department to require a firm to file all of its advertisements and/or sales literature, or the portion of the firm's material that is related to any specific types or classes of securities or services, with FINRA at least 10 business days prior to use, if the Advertising Regulation Department determines that the firm has departed from NASD Rule 2210's standards. FINRA Rule 2210(c)(1)(B) authorizes the Advertising Regulation Department to require the firm to file prior to use all of the firm's communications (rather than just advertisements or sales literature) or a specified subset of the firm's communications.

### **Pre-Use Filing Requirements**

NASD Rule 2210(c)(4) currently requires firms 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 Advertising Regulation Department have been made. These communications include 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.

FINRA Rule 2210(c)(2) revises 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 firm.

#### **Concurrent With Use Filing Requirements**

NASD Rule 2210(c)(2) requires a firm to file within 10 business days of first use or publication:

- ▶ advertisements and sales literature concerning registered investment companies (including mutual funds, variable contracts, continuously offered closed-end funds and unit investment trusts) that do not include bond fund volatility ratings;
- ▶ advertisements and sales literature concerning public direct participation programs, as defined in NASD Rule 2810 (now FINRA Rule 2310);
- ▶ advertisements concerning government securities; and
- ▶ any template for written reports produced by, or advertisements and sales literature concerning, an investment analysis tool, as such term is defined in IM-2210-6.

FINRA Rule 2210(c)(3) revises the categories of communications that must be filed within 10 business days of first use or publication. Similar to NASD Rule 2210(c)(2), FINRA Rule 2210(c)(3) requires retail communications concerning registered investment companies and public direct participation programs to be filed within 10 business days of first use. However, FINRA Rule 2210(c)(3) requires that *all* retail communications concerning closed-end registered investment companies be filed with FINRA. Currently NASD Rule 2210 requires firms 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>20</sup> The new filing requirement also applies to retail communications that are distributed after a closed-end fund's IPO period.

NASD Rule 2210(c)(2)(C) requires firms to file within 10 business days of first use all advertisements concerning government securities. This filing requirement has been eliminated.

Consistent with current requirements, FINRA Rule 2210(c)(3)(C) requires firms to file within 10 business days of first use templates for written reports produced by, or retail communications concerning, an investment analysis tool, as it is defined in FINRA Rule 2214.<sup>21</sup>

FINRA Rule 2210(c)(3)(D) requires firms to file within 10 business days of first use retail communications concerning CMOs that are registered under the Securities Act of 1933. Currently firms are required only to file advertisements concerning CMOs, but must file them at least 10 business days prior to first use.<sup>22</sup>

FINRA Rule 2210(c)(3)(E) requires firms to file within 10 business days of first use all retail communications concerning any security that is registered under the Securities Act of 1933 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 sub-paragraphs (A) through (D) of paragraph (c)(3). No similar filing requirement exists under current rules. The purpose of this provision is to require the filing of retail communications concerning publicly offered structured or derivative 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 paragraph (c), such as retail communications concerning registered investment companies or public direct participation programs.<sup>23</sup>

#### **Other Filing Requirements**

NASD Rule 2210(c)(6) provides that, if a firm has filed a draft version or “story board” of a television or video advertisement pursuant to a filing requirement, then the firm also must file the final filmed version within 10 business days of first use or broadcast. FINRA Rule 2210(c)(4) maintains this standard.

NASD Rule 2210(c)(1) specifies that a firm must provide with each filing the actual or anticipated date of first use, the name and title of the registered principal who approved the advertisement or sales literature and the date that the approval was given. FINRA Rule 2210(c)(5) carries forward these requirements, while also requiring each filing to include the registered principal’s CRD number. The requirement to include a principal’s CRD number is consistent with current FINRA policy.

NASD Rule 2210(c)(7) provides that each firm’s written and electronic communications may be subject to a spot-check procedure, and that firms must submit requested material within the time frame specified by the Advertising Regulation Department. FINRA Rule 2210(c)(6) carries forward these requirements.

### Exclusions From Filing Requirements

FINRA Rule 2210(c)(7) generally duplicates the current exclusions from the filing requirements under NASD Rule 2210(c)(8), with certain modifications.

NASD Rule 2210(c)(8)(A) excludes from filing advertisements and sales literature that previously have been filed with FINRA and that are to be used without material change. FINRA Rule 2210(c)(7)(A) continues this exclusion for retail communications that meet these standards.

FINRA Rule 2210(c)(7)(B) adds an exclusion for retail communications that are based on templates that were previously filed with FINRA if the changes are limited to updates of more statistical or other non-narrative information. Although there is no similar express filing exclusion in NASD Rule 2210, this exclusion is based in part on an earlier staff interpretation concerning how NASD Rule 2210's approval, recordkeeping and filing requirements apply to statistical updates contained in pre-existing templates.<sup>24</sup>

NASD Rule 2210(c)(8)(B) excludes from filing advertisements and sales literature solely related to recruitment or changes in a firm'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 firm. This exclusion has been replaced by FINRA Rule 2210(c)(7)(C), which excludes retail communications that do not make any financial or investment recommendation or otherwise promote a product or service of the firm.<sup>25</sup>

NASD Rules 2210(c)(8)(C), (D), (F) and (G) exclude from filing advertisements and sales literature that do no more than identify a national securities exchange symbol of the firm or identify a security for which the firm is a registered market maker; advertisements and sales literature that do no more than identify the firm or offer a specific security 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. FINRA Rules 2210(c)(7)(D), (E), (G) and (H) carry forward these filing exclusions for retail communications that meet the same standards.

NASD Rule 2210(c)(8)(E) excludes from filing prospectuses and other documents that have been filed with the SEC or any state. The current filing exclusion does not cover investment company omitting prospectuses published pursuant to Securities Act Rule 482.

FINRA Rule 2210(c)(7)(F) modifies this filing exclusion by also not covering free writing prospectuses that are filed with the SEC pursuant to Securities Act Rule 433(d)(1)(ii).<sup>27</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 Rules 2210 and 2211 to apply to broker-prepared, widely disseminated free writing prospectuses.<sup>28</sup> Firms should note that FINRA requires firms to file the Management's Discussion of Fund

Performance (MDFP) and any non-required sales material that are contained in a mutual fund annual or semi-annual report if a firm intends to use the report to market the fund to prospective investors.

NASD Rule 2210(c)(8)(H) excludes from filing reprints of independently prepared articles or reports. FINRA Rule 2210(c)(7)(I) maintains the filing exclusion for retail communications that meet the same standards.<sup>29</sup>

NASD Rule 2210(c)(8)(I) and (J) exclude from filing correspondence and institutional sales material. FINRA Rules 2210(c)(7)(J) and (K) maintain these filing exclusions for correspondence and institutional communications.

NASD Rule 2210(c)(9) excludes from filing 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 firm. This provision has been replaced by FINRA Rule 2210(c)(7)(L), which excludes from filing communications that refer to types of investments solely as part of a listing of products or services offered by the firm.

FINRA Rule 2210(c)(7)(M) excludes from filing retail communications that are posted on online interactive electronic forums, such as an electronic bulletin board or an interactive forum that is contained on a social media website. Under NASD Rule 2210, posts on interactive electronic forums are considered public appearances.<sup>30</sup> Under FINRA Rule 2210, such posts will be considered retail communications, assuming the forum is available to retail investors. Nevertheless, FINRA is excluding these posts from Rule 2210's filing requirements.

FINRA Rule 2210(c)(7)(N) creates a new filing exception for press releases issued by closed-end investment companies listed on the NYSE that are subject to the "immediate release policy" under section 202.06 of the NYSE Listed Company Manual (or any successor provision).<sup>31</sup> Information required to be published under the immediate release policy may include, among other things, dividend announcements, which closed-end funds typically announce via press release. Such press releases are not subject to filing.

FINRA Rule 2210(c)(8) provides that communications excluded from the filing requirements pursuant to paragraphs (c)(7)(H) through (K) are deemed filed with FINRA for purposes of Section 24(b) of the Investment Company Act and Rule 24b3 thereunder. This provision is consistent with NASD Rule 2210(c)(8).

#### **Exemptive Authority**

NASD Rule 2210(c)(10) allows FINRA to exempt, pursuant to the FINRA Rule 9600 Series, a firm from the pre-use filing requirements of NASD Rule 2210(c) (*i.e.*, requirement for certain firms to file retail communications prior to first use) for good cause shown.<sup>32</sup> FINRA Rule 2210(c)(9)(A) carries forward this exemptive authority with respect to the pre-use filing requirement for new member firms under Rule 2210(c)(1)(A).

FINRA Rule 2210(c)(9)(B) allows FINRA to grant an exemption from the concurrent-with-use filing requirements of paragraph (c)(3) (*i.e.*, requirement to file certain retail communications) 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 is limited to the same extent as in FINRA Rule 2210(b)(1)(E), which authorizes FINRA to grant exemptive relief from the principal pre-use approval requirements in FINRA Rule 2210(b)(1)(A) for retail communications, subject to the same standards.

### Content Standards

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 apply to retail communications.

#### General Content Standards

NASD Rule 2210(d)(1)(A) requires all firm communications to be based on principles of fair dealing and good faith, to be fair and balanced, and to provide a sound basis for evaluating the facts in regard to any particular security or type of security, industry or service. It also prohibits a firm from omitting any material fact or qualification if the omissions, in light of the context of the material presented, would cause the communication to be misleading. FINRA Rule 2210(d)(1)(A) incorporates the same standards without change.

NASD Rule 2210(d)(1)(B) prohibits a firm from making any false, exaggerated, unwarranted or misleading statement or claim in any communication, and prohibits the publication, circulation or distribution of any communication that the firm knows or has reason to know contains any untrue statement of a material fact or is otherwise false or misleading. FINRA Rule 2210(d)(1)(B) incorporates the same standards as NASD Rule 2210(d)(1)(B) without change, other than expressly prohibiting promissory statements or claims. FINRA 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.

NASD Rule 2210(d)(1)(C) permits information to be placed in a legend or footnote only in the event that the placement would not inhibit an investor's understanding of the communication. FINRA Rule 2210(d)(1)(C) incorporates the standards of NASD Rule 2210(d)(1)(C) without change.

NASD IM-2210-1(1) requires firms to ensure that statements are not misleading within the context in which they are made, and that they provide balanced treatment of risks and potential benefits. It also requires communications to be consistent with the risks of fluctuating prices and the uncertainty of dividends, rates of return and yield inherent in investments. NASD IM-2210-1(3) requires firm communications to be clear. FINRA Rule 2210(d)(1)(D) generally incorporates these standards with only minor, non-substantive changes.

NASD IM-2210-1(2) generally requires firms to consider the nature of the audience to which a communication will be directed and to provide details and explanations appropriate to the audience. FINRA Rule 2210(d)(1)(E) incorporates these standards, although in a more abbreviated fashion.

#### **Predictions and Projections of Performance**

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.

FINRA Rule 2210(d)(1)(F) carries forward the current prohibition of performance predictions and projections, as well as the allowance for hypothetical illustrations of mathematical principles. The rule also clarifies 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>33</sup> Second, FINRA has permitted research reports on debt or equity securities to include price targets under certain circumstances.<sup>34</sup>

Accordingly, FINRA Rule 2210(d)(1)(F) clarifies 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. FINRA Rule 2210(d)(1)(F) also clarifies 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>35</sup>

#### **Comparisons and Disclosure of a Firm's Name**

NASD Rule 2210(d)(2)(B) requires any comparison in advertisements and sales literature between investments or services to disclose all material differences between them, including (as applicable) investment objectives, costs and expenses, liquidity, safety, guarantees or insurance, fluctuation of principal or return and tax features. FINRA Rule 2210(d)(2) incorporates these standards for retail communications without substantive change.

NASD Rule 2210(d)(2)(C) requires all advertisements and sales literature to (i) prominently disclose the name of the firm; (ii) reflect any relationship between the firm 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 firm. FINRA Rule 2210(d)(3) applies these standards to correspondence as well as to

retail communications. Firms are permitted to use the name under which it conducts its broker-dealer business as disclosed on the firm's Form BD, as well as a name by which a firm is commonly recognized or which is required by any state or jurisdiction.

### Tax Considerations

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. FINRA Rule 2210(d)(4)(A) carries 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. FINRA Rule 2210(d)(4)(B) carries forward this prohibition for all communications.

FINRA Rule 2210(d)(4)(C) adds new language concerning comparative illustrations of the mathematical principles of tax-deferred versus taxable compounding. The illustration:

- ▶ must 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;
- ▶ must use and identify actual federal income tax rates;
- ▶ is 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;
- ▶ if it is intended for a target audience, must reasonably reflect its tax bracket or brackets as well as the tax character of capital gains and ordinary income;
- ▶ must reflect the impact of taxes during any specific investment payout period identified in the illustration;
- ▶ may not assume an unreasonable period of tax deferral; and
- ▶ must 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;

- ▶ the fact that ordinary income tax rates will apply to withdrawals from a tax-deferred investment;
- ▶ its underlying assumptions;<sup>36</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>37</sup> By placing this rule language in 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>38</sup>

#### **Disclosure of Fees, Expenses and Standardized Performance**

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. FINRA Rule 2210(d)(5) maintains this standard for retail communications and correspondence.

#### **Testimonials**

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. 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 firm or its products to prominently disclose the fact that: (i) the testimonial may not be representative of the experience of other customers; (ii) the testimonial is no guarantee of future performance or success; and (iii) if more than a nominal sum is paid, it is a paid testimonial. 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.

### Recommendations

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

NASD IM-2210-1(6)(A) requires disclosure of certain specified conflicts of interest to the extent applicable. These disclosures include if the firm:

- (i) 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) 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) was manager or co-manager of a public offering of any securities of the issuer whose securities are recommended in the past 12 months.

FINRA Rule 2210(d)(7)(A) retains the first and third disclosure requirements, but modifies the second disclosure requirement. As revised, a retail communication that includes a recommendation of securities must disclose, if applicable, that the firm or any associated person directly and materially involved in the preparation of the content has a financial interest in any of the securities of the issuer whose securities are recommended, and the nature of the financial interest, 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 firms with numerous officers and partners.<sup>39</sup> Rule 2210(d)(7)(A) also carries forward the current requirement of NASD IM-2210-1(6)(A) to have a reasonable basis for the recommendation.

NASD IM-2210-1(6)(B) requires a firm 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. FINRA Rule 2210(d)(7)(B) carries forward these requirements without change.

FINRA Rule 2210(d)(7)(C) amends 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 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. FINRA Rule 2210(d)(7)(C), like Rule 206(4)-1(a)(2), generally prohibits retail communications from referring to past specific recommendations of the firm that were or would have been profitable to any person. The rule allows, 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 firm within the immediately preceding period of

not less than one year. The list must provide certain information regarding each recommended security and include a prescribed cautionary legend warning investors not to assume that future recommendations will be profitable.

FINRA Rule 2210(d)(7)(D) expressly excludes from the requirements of paragraph (d)(7) communications that meet the definition of “research report” for purposes of NASD Rule 2711 and that include all of the applicable disclosures required by that rule. FINRA Rule 2210(d)(7)(D) also excludes any communication that recommends only registered investment companies or variable insurance products, provided that such communications must have a reasonable basis for the recommendation.

#### **Prospectuses Filed With the SEC**

FINRA Rule 2210(d)(8) provides that prospectuses, preliminary prospectuses, fund profiles and similar documents that have been filed with the SEC are not subject to the content standards of FINRA Rule 2210(d); provided that its standards shall apply to investment company “omitting prospectuses” published pursuant to Securities Act Rule 482 and free writing prospectuses that have been filed with the SEC pursuant to Securities Act Rule 433(d)(1)(ii).<sup>40</sup> Firms should note, as discussed above, that FINRA applies its content standards to the MDFP and any non-required sales material that are contained in a mutual fund annual or semi-annual report if a firm intends to use the report to market the fund to prospective investors.

#### **Public Appearances**

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>41</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 firm file a public appearance with FINRA.

In the interest of simplification, the term “public appearance” is no longer a separate communication category. Nevertheless, FINRA Rule 2210(f) sets forth many of the same general standards that currently apply to public appearances. Public appearances must meet the general “fair and balanced” standards of paragraph (d)(1).

If an associated person recommends a security in a public appearance, the associated person must have a reasonable basis for the recommendation. The associated person also must disclose, as applicable:

- ▶ that the associated person has a financial interest in any of the securities of the issuer whose securities are recommended, and the nature of the financial interest, unless the extent of the financial interest is nominal; and
- ▶ any other actual, material conflict of interest of the associated person or firm of which the associated person knows or has reason to know at the time of the public appearance.<sup>42</sup>

Rule 2210(f) also requires firms 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 considered communications for purposes of FINRA Rule 2210.<sup>43</sup>

The disclosure requirements regarding securities recommendations in paragraph (f)(2) do not apply to a public appearance by a research analyst for purposes of NASD Rule 2711 that includes all of the applicable disclosures required by that rule. Paragraph (f)(2) also does not apply to a recommendation of investment company securities or variable insurance products, provided that the associated person must have a reasonable basis for the recommendation.<sup>44</sup>

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

FINRA Rule 2212 replaces NASD IM-2210-3 with regard to standards applicable to the use of investment company rankings in communications. The standards generally 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. FINRA Rule 2212 adds a new paragraph (h) that excludes from the rule's coverage reprints or excerpts of articles or reports that are excluded from filing requirements pursuant to FINRA Rule 2210(c)(7)(I).

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

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

### Requirements for the Use of Investment Analysis Tools

FINRA Rule 2214 replaces NASD IM-2210-6 with regard to standards applicable to the use of investment analysis tools. The standards generally remain the same with some minor changes. Currently NASD IM-2210-6 requires a firm that offers or intends to offer an investment analysis tool, within 10 days of first use, to provide the Advertising Regulation 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. FINRA Rule 2214(a) requires firms 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 FINRA Rule 2210(c).

FINRA Rule 2214 also relocates certain language that is currently contained either in NASD IM-2210-6's text or in footnotes to the rule. Supplementary Material 06 to FINRA Rule 2214 provides that a retail communication that contains only an incidental reference to an investment analysis tool does not have to include the disclosures otherwise required for retail communications that advertise an investment analysis tool, and does not have to be filed with FINRA unless otherwise required by FINRA Rule 2210.<sup>45</sup>

In addition, the Supplementary Material provides 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 must include only the disclosures required by paragraphs (c)(2) and (c)(4) of Rule 2214. Supplementary Material 07 to FINRA Rule 2214 provides additional detail regarding disclosure required by paragraph (c)(3) of FINRA Rule 2214. This language is currently found in footnote 4 to NASD 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 underwriter.

### Guidelines for Communications With the Public Regarding Security Futures

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

Portions of NASD IM-2210-7 apply only to advertisements. FINRA Rule 2215 applies these provisions to all retail communications.

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

FINRA Rule 2215 amends the provisions that require communications concerning security futures to be accompanied or preceded by the security futures risk disclosure document under certain circumstances.<sup>46</sup> As revised, a communication concerning security futures must be accompanied or preceded by the risk disclosure document if it contains the names of specific securities.

FINRA Rule 2215(b)(4)(D) clarifies 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

FINRA Rule 2216 replaces NASD IM-2210-8 with regard to standards applicable to retail communications concerning collateralized mortgage obligations. The standards remain the same as in NASD IM-2210-8.

## Endnotes

1. See Securities Exchange Act Release No. 66681 (March 29, 2012), 77 FR 20452 (April 4, 2012) (Notice of Filing of Amendment No. 3 and Order Granting Accelerated Approval of a Proposed Rule Change; File No. SR-FINRA-2011-035). The current FINRA rulebook consists of: (1) FINRA Rules; (2) NASD Rules; and (3) rules incorporated from NYSE (Incorporated NYSE Rules). 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. 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 03/12/03](#) (Rulebook Consolidation Process).
2. Incorporated NYSE Rule 472(a)(1).
3. Proposed FINRA Rule 2211 (Communications with the Public About Variable Insurance Products), which would replace NASD Interpretive Material 2210-2, will be the subject of a separate proposal.
4. FINRA has modified the definition of “institutional investor” in FINRA Rule 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.
5. NASD Rule 2211(a)(5). NASD Rule 2711(a)(9)(A) excludes from the definition of “research report” certain enumerated written research-related communications, such as discussions of broad-based indices, commentaries on economic, political or market conditions, and technical analyses concerning the demand and supply for a sector, index or industry based on trading

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- volume and price. FINRA revised the definition of “correspondence” to include market letters in February 2009 to allow firms 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](#) (SEC Approves Rule Relating to Supervision of Market Letters) (February 2009).
6. See, e.g., NASD *Regulatory & Compliance Alert*, “Ask the Analyst” (September 1998), (content standards of rules governing communications with the public apply to a member’s internal communications); see also letter from Barbara Z. Sweeney, NASD to Katherine A. England, Assistant Director, SEC (November 4, 2002) (letter responding to comments on prior proposed change to rules governing communications with the public making clear rules apply to internal communications), and Securities Exchange Act Release No. 47820 (May 9, 2003), 68 FR 27116 (May 19, 2003) (File No. SR-NASD-00-12) (noting these comments and the NASD’s response in SEC order approving the proposed rule change). FINRA also has settled a number of enforcement actions against members involving misleading internal educational and training materials that alleged violations of NASD Rules 2210 and 2211. See, e.g., NASD Letter of Acceptance, Waiver and Consent No. EAF0401000001 (MML Distributors, LLC) (Oct. 2005); NASD Letter of Acceptance, Waiver and Consent No. EAF0401240001 (AFSG Securities Corp.) (Oct. 2005); FINRA Letter of Acceptance, Waiver and Consent No. 20080130571 (US Bancorp Investments, Inc.) (Feb. 12, 2010); and FINRA Letter of Acceptance, Waiver and Consent No. 2008015443301 (UBS Financial Services, Inc.) (April 8, 2011).
  7. See NASD Rule 3010(b)(1).
  8. See [Regulatory Notice 07-59](#) (FINRA Provides Guidance Regarding the Review and Supervision of Electronic Communications) (December 2007). [Regulatory Notice 07-59](#) makes clear that a firm must have reasonably designed procedures for the supervisory review of those internal communications that are of a subject matter that require review under FINRA rules and the federal securities laws.
  9. See SEA Rule 17a-4(a)(4); FINRA Rule 4511(a).
  10. FINRA Rule 2210(a)(4).
  11. The term “allied member” was largely deleted from the Incorporated NYSE Rules in 2008, and thus is not being carried over as part of FINRA Rule 2210(b)(1)(A). See [Regulatory Notice 08-64](#) (Oct. 2008) (Amendments to Incorporated NYSE Rules to Reduce Regulatory Duplication).
  12. NASD Rule 1022(f)(1) requires every person engaged in the supervision of options and security futures sales practices to be registered as a Registered Options and Security Futures Principal. Approval of retail communications concerning security futures falls within this requirement.
  13. See NASD Rules 2211(a)(1), (a)(5) and (b)(1)(A); see also [Regulatory Notice 09-10](#) (SEC Approves Rule Relating to Supervision of Market Letters) (February 2009).
  14. See [Regulatory Notice 10-06](#) (Guidance on Blogs and Social Networking Web Sites) (January 2010).
  15. See NASD Rule 2211(b)(1)(A).
  16. See letter from Annette L. Nazareth, Director, Division of Market Regulation, SEC, to T. Grant Callery, Executive Vice President & General Counsel, National Association of Securities Dealers, re: SRO Exemption Authority (March 27, 2003).

17. These rules require each firm 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.
18. 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, 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.
19. To the extent clerical staff is employed in the preparation or distribution of the communication, the records should include the name of the person on whose behalf the communication was prepared or distributed.
20. See NASD *Regulatory & Compliance Alert*, "Ask the Analyst" (Winter 1999) p. 13.
21. See NASD Rule 2210(c)(2)(D).
22. See NASD Rule 2210(c)(4)(B).
23. This filing requirement also does not apply to options communications, which are governed by FINRA Rule 2220. FINRA Rule 2220 employs the same communications categories as NASD Rules 2210 and 2211. FINRA intends to amend Rule 2220 at a later date to conform its communications categories to those used in FINRA Rule 2210.
24. See Letter from Thomas M. Selman, NASD, to Forrest R. Foss, T. Rowe Price Associates, Inc. (January 28, 2002). If a member changed the template's presentation in any material respect, however, this exclusion would not apply.
25. This filing exception has the same scope as the 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 FINRA Rule 2210(b)(1)(D)(iii).
26. See NASD Rule 2210(c)(8)(E).
27. Securities Act Rule 433(d)(1)(ii) requires any offering participant, other than the issuer, to file with the SEC a free writing prospectus that 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.

28. See *Regulatory Notice 10-52* (Application of Rules on Communications with the Public and Institutional Sales Material and Correspondence to Certain Free Writing Prospectuses) (October 2010). This filing requirement does not apply to a free writing prospectus prepared by or on behalf of the issuer of securities. See 17 C.F.R. §§ 230.433(d)(1)(i) and 230.433(h)(1).
29. 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 also covers independently prepared investment company reports described in NASD Rule 2210(a)(6)(B).
30. See NASD Rule 2210(a)(5).
31. The NYSE Listed Company Manual requires listed companies to “release quickly to the public any news or information which might reasonably be expected to materially affect the market for its securities.” NYSE Listed Company Manual section 202.05. Section 202.06 of the Manual (the “immediate release policy”) requires this information to be disclosed by means of any Regulation FD compliant method, such as a press release.
32. This provision is consistent with NASD Rule 2210(c)(10).
33. See NASD IM-2210-6 (Requirements for the Use of Investment Analysis Tools). NASD IM-2210-6 will be codified as FINRA Rule 2214.
34. See NASD Rule 2711(h)(7).
35. These standards mirror those required for price targets contained in research reports on equity securities under NASD Rule 2711(h)(7).
36. 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.
37. See “NASD Reminds Members of Their Responsibilities Regarding Hypothetical Tax-Deferral Illustrations in Variable Annuity Illustrations,” *NASD Member Alert* (May 10, 2004).
38. See NASD IM-2210-2.
39. 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).
40. The content standards do not apply to a free writing prospectus prepared by or on behalf of the issuer of securities. See 17 C.F.R. §§ 230.433(d)(1)(i) and 230.433(h)(1).
41. NASD Rule 2210(a)(5).
42. FINRA Rule 2210(f)(2).
43. The requirement to establish supervisory policies and procedures for public appearances is consistent with NASD Rule 3010(b) and Incorporated NYSE Rule 472(l).
44. FINRA Rule 2210(f)(5).
45. This provision is consistent with footnote 3 to NASD IM-2210-6.
46. See NASD IM-2210-7(b).

## Simplified Arbitration

### SEC Approves Amendments to Arbitration Codes to Raise the Limit for Simplified Arbitration from \$25,000 to \$50,000

Effective Date: July 23, 2012

#### Executive Summary

FINRA Rules 12800 and 13800 (Simplified Arbitration) of the Customer and Industry Codes of Arbitration Procedure (Codes) provide streamlined arbitration procedures for claimants seeking damages of \$25,000 or less. The SEC approved amendments to the Codes to raise the dollar limit for simplified arbitration from \$25,000 to \$50,000.<sup>1</sup>

The amendments are effective on July 23, 2012, for all cases filed on or after the effective date.

The text of the amendments is set forth in Attachment A.

Questions concerning this *Notice* should be directed to:

- ▶ Richard W. Berry, Senior Vice President and Director of Case Administration and Regional Office Services, Dispute Resolution, at (212) 858-4307 or [richard.berry@finra.org](mailto:richard.berry@finra.org); or
- ▶ Margo A. Hassan, Assistant Chief Counsel, Dispute Resolution, at (212) 858-4481 or [margo.hassan@finra.org](mailto:margo.hassan@finra.org).

#### Background & Discussion

Currently, FINRA offers streamlined arbitration procedures for claimants seeking damages of \$25,000 or less. Under Rules 12800 and 13800 (simplified arbitration rules), unless a party requests a hearing, a single arbitrator resolves the dispute and issues an award based on the written submissions of the parties. In a customer case, only the customer has the option to request a hearing (an industry party may not request a hearing). In an industry case, only the claimant (whether a firm or an individual) has the option to request a hearing (other parties may not request a hearing). FINRA also streamlines discovery for cases administered under these rules.

The SEC approved amendments to the Codes to raise the limit for claims

#### June 2012

##### Notice Type

- ▶ Rule Amendment

##### Suggested Routing

- ▶ Compliance
- ▶ Legal
- ▶ Registered Representatives

##### Key Topics

- ▶ Arbitration
- ▶ Code of Arbitration Procedure
- ▶ Simplified Arbitration

##### Referenced Rules & Notices

- ▶ FINRA Rule 12401
- ▶ FINRA Rule 12800
- ▶ FINRA Rule 13401
- ▶ FINRA Rule 13800

eligible under the simplified arbitration rules from \$25,000 to \$50,000. However, if any pleading (such as a counterclaim) increases the amount in dispute to more than \$50,000, FINRA would no longer administer the claim under the simplified arbitration rules. FINRA also made conforming amendments to Rules 12401 and 13401 (Number of Arbitrators) to reflect that FINRA will administer claims up to \$50,000 under the simplified arbitration rules.

The higher limit under the simplified arbitration rules benefits forum users in a number of ways. First, parties benefit from reduced forum fees because they can avoid hearing session fees and hearing process fees. Second, parties save the time and expense of preparing for, scheduling and traveling to a hearing when an arbitrator decides a case on the pleadings. Third, customers who are unable to retain an attorney, or are uncomfortable appearing at a hearing without representation, now have the option of having their claims decided on their written submissions. Fourth, FINRA can expedite administration of cases under the simplified arbitration rules because the arbitrator and the parties do not need to schedule a hearing.

The amendments are effective for all cases filed on or after July 23, 2012.

## Endnote

1. See Securities Exchange Act Rel. No. 66913 (May 3, 2012), 77 Federal Register 27262 (May 9, 2012) (File No. SR-FINRA-2012-012).

## ATTACHMENT A

New language is underlined; deletions are in brackets

\* \* \* \* \*

### Customer Code

#### 12401. Number of Arbitrators

**(a) Claims of [~~\$25,000~~] \$50,000 or Less**

If the amount of a claim is [~~\$25,000~~] \$50,000 or less, exclusive of interest and expenses, the panel will consist of one arbitrator and the claim is subject to the simplified arbitration procedures under Rule 12800.

**(b) Claims of More Than [~~\$25,000~~] \$50,000 Up To \$100,000**

If the amount of a claim is more than [~~\$25,000~~] \$50,000 but not more than \$100,000, exclusive of interest and expenses, the panel will consist of one arbitrator unless the parties agree in writing to three arbitrators.

**(c) No change.**

\* \* \* \* \*

#### 12800. Simplified Arbitration

**a) Applicability of Rule**

This rule applies to arbitrations involving [~~\$25,000~~] \$50,000 or less, exclusive of interest and expenses. Except as otherwise provided in this rule, all provisions of the Code apply to such arbitrations.

**(b) – (d) No change.**

**(e) Increases in Amount in Dispute**

If any pleading increases the amount in dispute to more than [~~\$25,000~~] \$50,000, the arbitration will no longer be administered under this rule, and the regular provisions of the Code will apply. If an arbitrator has been appointed, that arbitrator will remain on the panel. If a three-arbitrator panel is required or requested under Rule 12401, the remaining arbitrators will be appointed by the Director in accordance with Rule 12403(c) or Rule 12403(d). If no arbitrator has been appointed, the entire panel will be appointed in accordance with the Neutral List Selection System.

**(f) No change.**

\* \* \* \* \*

## Industry Code

### 13401. Number of Arbitrators

#### (a) Claims of ~~[\$25,000]~~ \$50,000 or Less

If the amount of a claim is ~~[\$25,000]~~ \$50,000 or less, exclusive of interest and expenses, the panel will consist of one arbitrator and the claim is subject to the simplified arbitration procedures under Rule 13800.

#### (b) Claims of More Than ~~[\$25,000]~~ \$50,000 Up To \$100,000

If the amount of a claim is more than ~~[\$25,000]~~ \$50,000 but not more than \$100,000, exclusive of interest and expenses, the panel will consist of one arbitrator unless the parties agree in writing to three arbitrators.

#### (c) No change.

\* \* \* \* \*

### 13800. Simplified Arbitration

#### a) Applicability of Rule

This rule applies to arbitrations involving ~~[\$25,000]~~ \$50,000 or less, exclusive of interest and expenses. Except as otherwise provided in this rule, all provisions of the Code apply to such arbitrations.

#### (b) – (d) No change.

#### (e) Increases in Amount in Dispute

If any pleading increases the amount in dispute to more than ~~[\$25,000]~~ \$50,000, the arbitration will no longer be administered under this rule, and the regular provisions of the Code will apply. If an arbitrator has been appointed, that arbitrator will remain on the panel. If a three-arbitrator panel is required or requested under Rule 13401, the remaining arbitrators will be appointed by the Director in accordance with Rule 13406(b). If no arbitrator has been appointed, the entire panel will be appointed in accordance with the Neutral List Selection System.

#### (f) No change.

\* \* \* \* \*

## Trading Activity Fee (TAF)

### SEC Approves Increase in the TAF Rate for Sales of Covered Equity Securities

Effective Date: July 1, 2012

#### Executive Summary

Effective July 1, 2012, the Trading Activity Fee (TAF) rate for sales of covered equity securities will increase from \$0.000095 per share for each sale of a covered equity security to \$0.000119 per share, with a corresponding increase to the per-transaction cap for covered equity securities from \$4.75 to \$5.95.<sup>1</sup> The new rate applies to any sale of a covered equity security subject to the TAF occurring on or after July 1, 2012.

The text of the new rule is available in the online [FINRA Manual](#).

Questions concerning this *Notice* should be directed to:

- ▶ FINRA Finance at (240) 386-5397; or
- ▶ The Office of General Counsel at (202) 728-8071.

#### Background & Discussion

FINRA's primary member regulatory pricing structure consists of the Personnel Assessment, the Gross Income Assessment and the TAF. Revenue from these fees is used to fund FINRA's regulatory activities, including examinations; financial monitoring; and FINRA's policymaking, rulemaking and enforcement activities.<sup>2</sup>

As noted in Section 1 of Schedule A to FINRA's By-Laws, FINRA shall periodically review revenue from these fees in conjunction with the costs to FINRA of regulating its members to determine the applicable rate of the fees.<sup>3</sup> Beginning with trades occurring on or after March 1, 2012, the TAF rate for covered equity securities was increased to \$0.000095 per share for each sale of a covered equity security, with a maximum charge of \$4.75 per trade.<sup>4</sup> Given the trend for lower volume levels, however, FINRA's TAF projections for the year continue to indicate a shortfall, notwithstanding the rate change put into place effective March 1, 2012.

#### June 2012

##### Notice Type

- ▶ Rule Amendment

##### Suggested Routing

- ▶ Compliance
- ▶ Finance
- ▶ Internal Audit
- ▶ Legal
- ▶ Operations
- ▶ Senior Management
- ▶ Systems
- ▶ Trading

##### Key Topics

- ▶ Trading Activity Fee

##### Referenced Rules & Notices

- ▶ FINRA By-Laws, Schedule A, 1(a)
- ▶ Regulatory Notice 10-56
- ▶ Regulatory Notice 12-06

In light of the decreased volume of trading in the equity markets, and in order to stabilize revenue flows necessary to support FINRA's regulatory mission, the SEC recently approved an increase to the TAF rate for covered equity securities. Effective July 1, 2012, the TAF rate for sales of covered equity securities will increase from \$0.000095 per share to \$0.000119 per share, with a corresponding increase to the per-transaction cap for covered equity securities from \$4.75 to \$5.95. The new rate will apply to any sale of a covered equity security subject to the TAF occurring on or after July 1, 2012. The TAF Self-Reporting Form, available on FINRA's [website](#)<sup>5</sup>, will reflect this new rate beginning with TAF Self-Reporting Forms due on August 14, 2012,<sup>6</sup> which reflect trades subject to the TAF occurring in July 2012.<sup>7</sup>

## Endnotes

1. See Securities Exchange Act Release No. 67242 (June 22, 2012) (File No. SR-FINRA-2012-023).
2. See FINRA By-Laws, Schedule A, § 1(a).
3. *Id.*
4. See [Regulatory Notice 12-06](#) (January 2012).
5. FINRA maintains a [TAF page](#) on its website that provides firms with additional guidance on the TAF, including Frequently Asked Questions (FAQ), as well as applicable forms. See [Regulatory Notice 10-56](#) (October 2010).
6. The TAF is self-reported by firms on a monthly basis. See TAF FAQ 100.5. TAF Self-Reporting Forms should be submitted to FINRA by the tenth business day following the end of the month. See TAF FAQ 100.7.
7. The TAF is calculated based on trade date, not settlement date. See TAF FAQ 100.8.

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## Revised Fees

### Changes to Advertising, Corporate Financing, New Membership and Continuing Membership Application, Central Registration Depository and Branch Office Annual Registration Fees

#### Effective Dates:

July 2, 2012: Advertising and Corporate Financing fees

July 23, 2012: New Membership and Continuing Membership Application fees

January 2, 2013: Central Registration Depository fees and Branch Office Annual Registration fees and related waiver process

#### Executive Summary

Effective July 2, 2012, FINRA is increasing fees for (1) reviewing advertising material filed with FINRA and (2) filing offering documents pursuant to FINRA Rule 5110. Effective July 23, 2012, FINRA is increasing its new member application filing fee and imposing a new continuing membership application filing fee. Effective January 2, 2013, FINRA is changing fees relating to (1) the Central Registration Depository (CRD® or CRD system), including fees for initial/transfer registration, disclosure filing, system processing, fingerprint processing, mass transfer registration and late disclosure; and (2) branch office annual registration and related waiver process.

The text of the rule amendments effecting these fee changes is set forth in the following Attachments:

- Attachment A — Rule amendments regarding advertising fees
- Attachment B — Rule amendments regarding corporate financing fees
- Attachment C — Rule amendments regarding fees related to CRD
- Attachment D — Rule amendments regarding membership application process and branch office registration fees

#### June 2012

##### Notice Type

- ▶ Rule Amendment

##### Suggested Routing

- ▶ Advertising
- ▶ Compliance
- ▶ Corporate Finance
- ▶ Legal
- ▶ Operations
- ▶ Registered Representatives
- ▶ Registration
- ▶ Senior Management
- ▶ Systems

##### Key Topics

- ▶ Advertising Fees
- ▶ Branch Office Annual Registration Fees
- ▶ Central Registration Depository
- ▶ Continuing Membership Application Fees
- ▶ Corporate Financing Fees
- ▶ Disclosure Filing Fees
- ▶ Fingerprint Processing Fees
- ▶ Initial/Transfer Registration Fees
- ▶ Late Disclosure Fees
- ▶ Mass Transfer Registration Fees
- ▶ New Member Application Fees
- ▶ System Processing Fees

##### Referenced Rules & Notices

- ▶ FINRA Rules 2210, 2310, 5110 and 5121
- ▶ NASD Rules 1012, 1013, 1017 and 2210
- ▶ Sections 4, 6, 7 and 13 of Schedule A to the FINRA By-Laws
- ▶ Forms U4, U5 and BD
- ▶ Regulatory Notices 12-22 and 12-29

Questions concerning this *Notice* should be directed to:

- ▶ Amy C. Sochard, Director, Advertising Regulation, at (240) 386-4508 (regarding advertising fees);
- ▶ Paul Mathews, Director, Corporate Financing Department, or Joani Ward, Assistant Director, Corporate Financing Department, at (240) 386-4623 (regarding corporate financing fees);
- ▶ Mario DiTrapani, Vice President, Registration and Disclosure, at (240) 386-4796 (regarding fees related to CRD and branch office registration);
- ▶ Joseph J. Sheirer, Director and Counsel, Membership Application Program, at (212) 858-5132 (regarding membership application process fees);
- ▶ Office of Finance – Billing Department at (240) 386-5397; or
- ▶ Office of General Counsel at (202) 728-8071.

## Background & Discussion

### Advertising Fees

FINRA's Advertising Regulation Department evaluates member firms' advertisements, sales literature and other communications for compliance with applicable rules of FINRA, the SEC, the Municipal Securities Rulemaking Board and the Securities Investor Protection Corporation. Pursuant to NASD Rule 2210 and Interpretations issued thereunder, the Advertising Regulation Department helps to ensure that all FINRA member firms' communications are based on principles of fair dealing and good faith, are fair and balanced, and provide a sound basis for evaluating the facts in regard to any particular security or type of security, industry or service.<sup>1</sup> Among other things, FINRA rules prohibit member firm communications from including false, exaggerated, unwarranted or misleading statements or claims.

The rule change amends Section 13 of Schedule A to the FINRA By-Laws (Schedule A) by increasing the fee that the Advertising Regulation Department charges for reviewing advertisements, sales literature and other such material, whether in printed, video or other form, filed with or submitted to FINRA (except for items that are filed or submitted in response to a written request from the Advertising Regulation Department issued pursuant to the spot check procedures set forth in FINRA rules).<sup>2</sup> The fee for the review of printed material and video or audio media will be \$125 for the first ten pages or the first ten minutes, respectively, while the surcharge for lengthier materials will remain unchanged. The fee for expedited review will be \$600 per item for the first ten pages, and the fee for pages in excess of ten will be \$50 per page.

Despite rising costs to administer the filings program, this represents FINRA's first fee increase since 2005 in connection with the review of advertisements, sales literature and other such material. The volume of filings has increased substantially over that period, and FINRA has also upgraded its technology and hired additional staff to maintain the program's effectiveness and ensure reasonable turnaround times. Moreover, FINRA anticipates a continued increase in the volume of filings in future years.

The implementation date for the revised advertising review fees is July 2, 2012.

### Corporate Financing Fees

FINRA's Corporate Financing Department reviews the proposed underwriting terms and arrangements of proposed public offerings of securities for compliance with the requirements of FINRA Rule 5110 (Corporate Financing Rule—Underwriting Terms and Arrangements). The public offerings reviewed by the Corporate Financing Department include initial and secondary offerings of unseasoned issuers, best efforts offerings of direct participation programs (DPPs) and real estate investment trusts (REITs), but generally exclude public offerings of seasoned issuers that are not broker-dealers or their affiliates and offerings of investment grade securities.

The Corporate Financing Department's review is complementary to the SEC's registration process, which defers to FINRA to establish reasonable levels of underwriting compensation and adequate disclosure of the underwriting terms and conflicts. Pursuant to FINRA Rule 5110, no member firm or person associated with a member firm may participate in a public offering subject to the rule, or to FINRA Rules 5121 (Public Offerings of Securities With Conflicts of Interest) and 2310 (Direct Participation Programs), unless the documents and information specified in the rule have been filed with and reviewed by the Corporate Financing Department. Typically, the book-running manager for the offering files the documents on behalf of the participating member firms. The fee charged to member firms for this review is set forth in Section 7 of Schedule A.

In support of its reviews under FINRA Rule 5110 and other regulatory responsibilities, the rule change amends Section 7 of Schedule A to increase the rate and the fee cap for filings pursuant to FINRA Rule 5110.<sup>3</sup> FINRA is increasing the rate of the filing fee from .01 percent to .015 percent of the proposed maximum aggregate offering price or other applicable value of the securities, and increasing the maximum fee from \$75,500 to \$225,500. The fee changes will apply to initial filings and to the net increase in the maximum aggregate offering price of any amendment filings.

The filing fee rate has remained static since it was adopted in 1970, while the cap has been adjusted periodically, most recently in 2004.<sup>4</sup> However, the nature and complexity of offerings filed with the Corporate Financing Department have changed substantially since

the most recent adjustment. Many filings seek expedited review or “same day clearance” and FINRA has deployed (and continues to deploy) significant technology resources and process enhancements to accommodate those needs.<sup>5</sup> The Corporate Financing Department also has seen growth in filings of unlisted REITs, business development companies and other DPPs, which raise complex issues.

The implementation date for the revised Rule 5110 filing fee is July 2, 2012. Thus, the adjusted fees and fee cap will be effective for filings and amendments made on or after July 2, 2012.

### **Fees Related to CRD**

FINRA is amending Sections 4 and 6 of Schedule A to implement changes to certain fees relating to the CRD system.<sup>6</sup>

#### **Initial/Transfer Registration Fee**

FINRA is increasing from \$85 to \$100 the fee for each initial or transfer Form U4 (Uniform Application for Securities Industry Registration or Transfer) filed by a member firm in the CRD system to register an individual. In those cases where a member firm is transferring the registrations of individuals in connection with the acquisition of all or part of another member firm’s business, FINRA provides a discount to the fee, ranging from 10 to 50 percent, based on the number of registered personnel being transferred. FINRA is not changing the current discount schedule. This fee has been static since 1995.<sup>7</sup> Since 1995, FINRA has regularly enhanced the CRD system by adding features and functionality (*e.g.*, work queues, standard reports, email notifications) designed to make form filing more efficient for firms, and to otherwise help firms meet their reporting and related regulatory obligations. FINRA also has consistently made usability and navigational enhancements since deploying the Web-based CRD system in 1999. Finally, FINRA has increased the number of registration categories available to individuals, as well as the number of SROs and jurisdictions with which individuals and firms may register.

#### **Disclosure Filing Fees**

As part of the securities industry’s licensing and registration process, individuals and member firms are required to report certain disclosure events or proceedings to the CRD system. These disclosure matters include, for example, certain criminal charges and convictions, regulatory actions, investment-related civil judgments and injunctions and financial events such as bankruptcies and unsatisfied liens. Individuals report these disclosure events or proceedings through Form U4 or Form U5 (Uniform Termination Notice for Securities Industry Registration), while member firms report disclosure matters in which they or a control affiliate have been involved via Form BD (Uniform Application for Broker-Dealer Registration).

When a disclosure filing is made for either an individual or member firm, FINRA must, among other things, confirm that the matter is properly reported; review any documentation submitted and determine whether additional documentation is required; conduct any necessary independent research; and, depending on the matter reported, analyze whether the event or proceeding subjects the individual or member firm to a statutory disqualification pursuant to Section 3(a)(39) of the Securities Exchange Act of 1934 (Securities Exchange Act or SEA).<sup>8</sup>

FINRA is increasing from \$95 to \$110 the fee to process an initial or amended Form U4 or Form U5 that includes the initial reporting, amendment or certification of one or more disclosure events or proceedings. FINRA is also imposing a new fee of \$110 to process a Form BD that contains a disclosure event or proceeding. Reviewing disclosure information has become more complex, in part because Forms U4 and U5 have added further disclosure questions<sup>9</sup> and FINRA's By-Laws have been revised to expand the categories under which an individual or member firm can be subject to a statutory disqualification.<sup>10</sup> As a result, while costs to administer the CRD program have increased, those costs have not been offset by a commensurate increase in the current disclosure filing fee, which has remained static since 1995,<sup>11</sup> or the establishment of a fee to cover the costs associated with review of disclosure matters submitted on Form BD.

#### **System Processing Fee**

FINRA is increasing from \$30 to \$45 the annual system processing charge for each member firm's registered individuals. This fee has not been increased since January 2000.<sup>12</sup> Since 2000, FINRA's costs to operate, develop and maintain the CRD system (*e.g.*, investments in system infrastructure and data security) have increased.

#### **Fingerprint Fees**

FINRA processes fingerprints submitted by member firms on behalf of their associated persons who are required to be fingerprinted pursuant to Section 17(f)(2) of the Securities Exchange Act<sup>13</sup> and SEA Rule 17f-2.<sup>14</sup> Firms submit fingerprints to FINRA either electronically or via a hard copy fingerprint card. FINRA is increasing the processing fee for fingerprints submitted electronically from \$13 to \$15 and the fee for fingerprints submitted by a hard copy fingerprint card from \$13 to \$30.<sup>15</sup>

The fingerprint processing fee has not increased since 2003.<sup>16</sup> FINRA is adopting a two-tiered fingerprint processing fee structure in part to reflect that the costs associated with processing fingerprints submitted via a hard copy fingerprint card are much higher than those that are submitted electronically. Specifically, fingerprints submitted by a hard copy card require additional processing by FINRA, including adding a barcode, if necessary, to the card for tracking purposes; scanning the fingerprints and converting them to a digital image for submission to the FBI; and, for first-time registrants, entering the individual's personal and demographic information into the CRD system.

FINRA is also increasing from \$13 to \$30 the fee for processing and posting fingerprint results and identifying information submitted by a member firm that have been processed through another SRO. This fee has been static since 2003.<sup>17</sup> There are higher costs associated with the processing and posting of fingerprint results and identifying information from other SROs. In this regard, upon receipt of the fingerprint results and identifying information, FINRA images and stores the documents received, verifies and matches the fingerprint processing results to an existing record in the CRD system, if available, and manually posts the results to the CRD system.

#### **Mass Transfer Registration Fees**

FINRA's Mass Transfer Program allows for the bulk transfer of registration and fingerprint information within the CRD system when a member firm is involved in a business combination such as a merger, consolidation or reorganization with another member firm. A member firm that FINRA determines to be a successor organization to a predecessor member firm is not required to pay the fees for the re-registration of branch offices and personnel of the predecessor as part of the mass transfer. A non-successor member firm, however, is required to pay these re-registration fees.

FINRA is eliminating the exception to the payment of re-registration fees for successor member firms involved in a mass transfer. FINRA notes that a mass transfer, which is an optional service that FINRA makes available to member firms that engage in a business combination, involves significant work on FINRA's part, including reviewing transaction details; entering the mass transfer into the CRD system; addressing questions from firm personnel or, in certain circumstances, providing them with training; and post-mass transfer troubleshooting. The elimination of the exception will result in all member firms that participate in FINRA's Mass Transfer Program being assessed fees for the re-registration of branch offices and personnel of the predecessor member firm.

#### **Late Disclosure Fee**

FINRA charges a fee for each day that a new disclosure event or a change in the status of a previously reported disclosure event is not timely filed on an initial or amended Form U5 or an amended Form U4. This fee is assessed starting on the day following the last date on which the event or change in status was required to be reported. FINRA is increasing the late disclosure fee from \$10 per day to \$100 for the first day that an applicable disclosure event is not timely filed and \$25 for each subsequent day, up to a maximum of 60 days. The maximum amount of the late disclosure fee will increase from \$300 to \$1,575. The current late disclosure filing fee has been in effect and remained static since 2004.<sup>18</sup> Notwithstanding this fact, some firms and individuals still fail to timely report initial or updated disclosure events. While FINRA continues to address the issue of late disclosure filings through other avenues, including disciplinary actions, FINRA believes that it is appropriate to increase the late disclosure filing fee in part to help ensure that disclosure events are reported and updated in a timely manner.

The implementation date for the fees relating to the CRD system is January 2, 2013. Thus, the initial/transfer registration fee, disclosure filing, fingerprint and late disclosure fees will become effective for filings or fingerprints submitted on or after January 2, 2013; the changes to the mass transfer registration fees will become effective for mass transfers executed on or after January 2, 2013; and the system processing fee will become effective for the 2013 renewal program.<sup>19</sup>

### **Membership Application Process and Branch Office Registration Fees**

As discussed in further detail below, FINRA is amending Section 4 of Schedule A to (1) increase the branch office annual registration fee; (2) increase the new member application fee; and (3) assess a new fee for continuing membership applications. In connection with these amendments, FINRA is making corresponding amendments to NASD Rules 1012 (General Provisions), 1013 (New Member Application and Interview) and 1017 (Application for Approval of Change in Ownership, Control, or Business Operations) regarding the revised new member application fee and new continuing membership application fee, as well as increasing from \$350 to \$500 the processing fee for new member applications that are deemed not to be substantially complete and imposing a \$500 processing fee for continuing membership applications that are deemed not to be substantially complete.<sup>20</sup>

#### **Branch Office Fees**

Despite rising costs to administer the branch office registration and examination program, FINRA has not adjusted the \$75 branch office annual registration fee in Section 4(a) of Schedule A since 1994.<sup>21</sup> In support of its branch office registration and examination program and other regulatory responsibilities, FINRA has revised the branch office annual registration fee structure to implement a tiered regressive rate structure that assesses a per branch office annual registration fee ranging from \$75 to \$175 depending on the number of branch offices of the firm.<sup>22</sup>

FINRA will continue to waive, for one branch office per member firm per year, payment of the annual registration fee (and the \$20 annual branch office system processing fee), but increase the amount of the waiver from \$75 to \$175. Also, the amendments to Section 4(a) of Schedule A codify FINRA's current practice of waiving payment of the \$75 initial registration fee (and \$20 branch office system processing fee) for the first branch office registered by a member firm.

The implementation date for the branch office registration fee changes is January 2, 2013.<sup>23</sup>

### New Member Application Fee

Notwithstanding the increase in complexity of new member applications and the related resource demands, FINRA has not changed the new member application fee required by Section 4(e) of Schedule A since 1994.<sup>24</sup> To more closely reflect the resource demands associated with processing and reviewing new member applications, FINRA has revised the new member application fee structure to implement a fee structure that assesses fees ranging from \$7,500 to \$55,000 depending on the size of the new member applicant, as outlined in the table below.

Number of Registered Persons Associated with Applicant	Small	Medium	Large
Tier 1	1–10	151–300	501–1,000
Tier 2	11–100	301–500	1,001–5,000
Tier 3	101–150	N/A	>5,000

Application Fee per Tier	Small	Medium	Large
Tier 1	\$7,500	\$25,000	\$35,000
Tier 2	\$12,500	\$30,000	\$45,000
Tier 3	\$20,000	N/A	\$55,000

The revised fee structure also assesses an additional \$5,000 surcharge for a new member firm applicant that intends to engage in any clearing and carrying activities.

Additionally, FINRA has made conforming changes to NASD Rules 1012 and 1013 regarding the revised new member application fee, as well as increasing from \$350 to \$500 the processing fee for new member applications that are deemed not to be substantially complete.

The implementation date for the revised new member application fee and conforming amendments to NASD Rules 1012 and 1013 is July 23, 2012.

### Continuing Membership Application Fee

NASD Rule 1017 provides parameters for certain changes in a member firm's ownership, control, or business operations that would require a continuing membership application. Among other things, those changes include a merger of a member firm with another member firm, a direct or indirect acquisition by a member firm of another member firm, a change in equity ownership or partnership capital of a member firm that results in one person or entity directly or indirectly owning or controlling 25 percent or more of the equity or partnership capital, or a material change in business operations as defined in NASD Rule 1011(k) (Material Change in Business Operations).<sup>25</sup>

The membership program incurs substantial costs in reviewing continuing membership application materials and assessing whether the application meets the required standards. As a result, FINRA has amended Schedule A to require that an applicant submitting a continuing membership application pay an application fee based on the number of registered persons associated with the applicant and the type of change in ownership, control or business operations being contemplated. Since the effort required to review a continuing membership application generally depends on the facts and circumstances, with more complex changes and larger applicants requiring additional resources, FINRA believes that the new fee structure, as outlined in the table below, will be an effective means of assessing related fees.

Number of Registered Persons Associated with Applicant	Small	Medium	Large
Tier 1	1–10	151–300	501–1,000
Tier 2	11–100	301–500	1,001–5,000
Tier 3	101–150	N/A	>5,000

Application Fee per Tier and Application Type	Small	Medium	Large
<b>Merger</b>			
Tier 1	\$7,500	\$25,000	\$50,000
Tier 2	\$12,500	\$30,000	\$75,000
Tier 3	\$20,000	N/A	\$100,000
<b>Material Change</b>			
Tier 1	\$5,000	\$20,000	\$35,000
Tier 2	\$10,000	\$25,000	\$50,000
Tier 3	\$15,000	N/A	\$75,000
<b>Ownership Change</b>	\$5,000	\$10,000	\$15,000
<b>Transfer of Assets</b>	\$5,000	\$10,000	\$15,000
<b>Acquisition</b>	\$5,000	\$10,000	\$15,000

For instance, the fee structure will assess a member firm with only one to ten registered persons a fee ranging between \$5,000 and \$7,500, depending on the type of continuing membership application, whereas a member firm with 301 to 500 registered persons will be assessed a fee ranging between \$10,000 and \$30,000 depending on the type of continuing membership application. Further, if an applicant's request for approval of a change in ownership, control or business operations involves more than one type of change requiring a continuing membership application, the fee owed will be the highest of the applicable fees charged for those types of changes.

In addition, FINRA has made conforming changes to NASD Rules 1012 and 1017 regarding the new continuing membership application fee, as well as imposing a new \$500 processing fee for continuing membership applications that are deemed not to be substantially complete.

The implementation date for the new continuing membership application fee and conforming amendments to NASD Rules 1012 and 1017 is July 23, 2012.

## Endnotes

1. The SEC recently approved new consolidated FINRA communications with the public rules, including new FINRA Rule 2210, which maintains these principles. The new rules will become effective on February 4, 2013. See [Regulatory Notice 12-29](#) (June 2012).
2. See Securities Exchange Act Release No. 67239 (June 22, 2012), 77 FR 38692 (June 28, 2012) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2012-028).
3. See Securities Exchange Act Release No. 67241 (June 22, 2012), 77 FR 38698 (June 28, 2012) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2012-029).
4. See Securities Exchange Act Release No. 50984 (January 6, 2005), 70 FR 2440 (January 13, 2005) (Notice of Filing and Immediate Effectiveness of File No. SR-NASD-2004-177) (setting the maximum fee at \$75,500). The fees for automatically effective Form S-3 or F-3 offerings were added in 2007 without adjusting the existing rates. See Securities Exchange Act Release No. 55360 (February 27, 2007), 72 FR 9813 (March 5, 2007) (Notice of Filing and Immediate Effectiveness of File No. SR-NASD-2007-006).
5. See, e.g., [Regulatory Notice 12-22](#) (April 2012).
6. See Securities Exchange Act Release No. 67247 (June 25, 2012), 77 FR 38866 (June 29, 2012) (Notice of Filing and Immediate Effectiveness of SR-FINRA-2012-030). The CRD system is the central licensing and registration system for the U.S. securities industry. The CRD system enables individuals and firms seeking registration with multiple states and self-regulatory organizations (SROs) to do so by submitting a single form, fingerprint card and a combined payment of fees to FINRA. Through the CRD system, FINRA maintains the qualification, employment and disciplinary histories of registered associated persons of broker-dealers. Certain information reported to the CRD system is displayed in BrokerCheck®, an electronic system that provides the public with information on the professional background, business practices and conduct of FINRA member firms and their associated persons. Investors use BrokerCheck to help make informed choices about the individuals and firms with which they currently conduct or are considering conducting business.
7. See Securities Exchange Act Release No. 36025 (July 26, 1995), 60 FR 39200 (August 1, 1995) (Notice of Filing and Immediate Effectiveness of File No. SR-NASD-95-32).
8. 15 U.S.C. 78c(a)(39).
9. See Securities Exchange Act Release No. 59916 (May 13, 2009), 74 FR 23750 (May 20, 2009) (Order Approving File No. SR-FINRA-2009-008).
10. See Securities Exchange Act Release No. 56145 (July 26, 2007), File No. 72 FR 42169 (August 1, 2007) (Order Approving File No. SR-NASD-2007-023).
11. See *supra* note 7.
12. See Securities Exchange Act Release No. 41937 (September 28, 1999), 64 FR 53762 (October 4, 1999) (Notice of Filing and Immediate Effectiveness of File No. SR-NASD-99-43).
13. 15 U.S.C. 78q(f)(2).
14. 17 CFR 240.17f-2.
15. This fee is in addition to a fee that FINRA collects on behalf of the Federal Bureau of Investigation (FBI), consistent with FBI guidelines. The current FBI fee is \$14.50. See Revised User Fee Schedule, 76 FR 78950 (December 20, 2011).

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16. See Securities Exchange Act Release No. 48379 (August 20, 2003), 68 FR 51622 (August 27, 2003) (Notice of Filing and Immediate Effectiveness of File No. SR-NASD-2003-109).
17. *Id.*
18. See Securities Exchange Act Release No. 49224 (February 11, 2004), 69 FR 7833 (February 19, 2004) (Notice of Filing and Immediate Effectiveness of File No. SR-NASD-2003-192).
19. FINRA will begin invoicing for the 2013 system processing fees in November 2012.
20. See Securities Exchange Act Release No. 67240 (June 22, 2012), 77 FR 38694 (June 28, 2012) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2012-031).
21. See Securities Exchange Act Release No. 35074 (December 9, 1994), 59 FR 64827 (December 15, 1994) (Notice of Filing and Immediate Effectiveness of File No. SR-NASD-94-58) (increasing the branch office registration and annual fees from \$50 to \$75 to reflect increased costs for registration and regulatory oversight of branch offices). In 2006, Schedule A, Section 4(a) was amended to establish an annual branch office system processing fee to reflect the costs of developing and implementing the Form BR, as well as costs associated with the ongoing branch office system maintenance and enhancements. See Securities Exchange Act Release No. 53955 (June 7, 2006), 71 FR 34658 (June 15, 2006) (Notice of Filing and Immediate Effectiveness of File No. SR-NASD-2006-065).
22. Specifically, the amended annual registration fee requirement in Section 4(a) of Schedule A provides that each member shall be assessed an annual registration fee of: (1) \$175, for the first 250 branch offices registered by the member; (2) \$150, for branch offices 251 to 500 registered by the member; (3) \$125, for branch offices 501 to 1,000 registered by the member; (4) \$100, for branch offices 1,001 to 2,000 registered by the member; and (5) \$75, for every branch office greater than 2,000 registered by the member. Section 4(a) retains the \$20 annual branch office system processing fee per registered branch. Consistent with current practice, FINRA will assess each member firm's annual registration fee based on the firm's total number of branch offices registered at the end of each calendar year.
23. FINRA will begin invoicing for these fees in November 2012.
24. See Securities Exchange Act Release No. 33533 (January 27, 1994), 59 FR 5218 (February 3, 1994) (Notice of Filing and Immediate Effectiveness of File No. SR-NASD-94-05).
25. NASD Rule 1011(k) defines a "material change in business operations" as including, but not limited to: (1) removing or modifying a membership agreement restriction; (2) market making, underwriting, or acting as a dealer for the first time; and (3) adding business activities that require a higher minimum net capital under SEA Rule 15c3-1.

## Attachment A

Below is the text of the rule amendments regarding advertising fees pursuant to filing SR-FINRA-2012-028. New language is underlined; deletions are in brackets.

\* \* \* \* \*

### SCHEDULE A TO THE BY-LAWS OF THE CORPORATION

\* \* \* \* \*

#### **Section 13 — Review Charge for Advertisement, Sales Literature, and Other Such Material Filed or Submitted**

There shall be a review charge for each and every item of advertisement, sales literature, and other such material, whether in printed, video or other form, filed with or submitted to FINRA, except for items that are filed or submitted in response to a written request from FINRA's Advertising Regulation Department ("the Department") issued pursuant to the spot check procedures set forth in FINRA['s R]rules as follows: (1) for printed material reviewed, \$125[00].00, plus \$10.00 for each page reviewed in excess of 10 pages; and (2) for video or audio media, \$125[00].00, plus \$10.00 per minute for each minute of tape reviewed in excess of 10 minutes.

Where a member requests expedited review of material submitted to the [Advertising Regulation] Department there shall be a review charge of \$[5]600.00 per item plus \$50.00[25] for each page reviewed in excess of 10 pages. Expedited review shall be completed within three business days, not including the date the item is received by the [Advertising Regulation] Department, unless a shorter or longer period is agreed to by the [Advertising Regulation] Department. The [Advertising Regulation] Department may, in its sole discretion, refuse requests for expedited review.

\* \* \* \* \*

## Attachment B

Below is the text of the rule amendments regarding corporate financing fees pursuant to filing SR-FINRA-2012-029. New language is underlined; deletions are in brackets.

\* \* \* \* \*

### SCHEDULE A TO THE BY-LAWS OF THE CORPORATION

\* \* \* \* \*

#### Section 7 – Fees for Filing Documents Pursuant to the Corporate Financing Rule

(a) There shall be a fee imposed for the filing of initial documents relating to any offering filed with FINRA pursuant to the Corporate Financing Rule equal to: (1) \$500 plus .015%~~01%~~ of the proposed maximum aggregate offering price or other applicable value of all securities registered on an SEC registration statement or included on any other type of offering document (where not filed with the SEC), but shall not exceed \$225,500~~\$75,500~~; or (2) \$225,500~~\$75,500~~ for an offering of securities on an automatically effective Form S-3 or F-3 registration statement filed with the SEC and offered pursuant to Securities Act~~EC~~ Rule 415 by a Well-Known Seasoned Issuer as defined in Securities Act~~EC~~ Rule 405. The amount of the filing fee may be rounded to the nearest dollar.

(b) There shall be an additional fee imposed for the filing of any amendment or other change to the documents initially filed with FINRA pursuant to the Corporate Financing Rule equal to .015%~~01%~~ of the net increase in the maximum aggregate offering price or other applicable value of all securities registered on an SEC registration statement, or any related Securities Act Rule 462(b) registration statement, or reflected on any Securities Act Rule 430A prospectus, or included on any other type of offering document. However, the aggregate of all filing fees paid in connection with an SEC registration statement or other type of offering document shall not exceed \$225,500~~\$75,500~~.

\* \* \* \* \*

## Attachment C

Below is the text of the rule amendments regarding fees related to the Central Registration Depository pursuant to filing SR-FINRA-2012-030. New language is underlined; deletions are in brackets.

\* \* \* \* \*

### SCHEDULE A TO THE BY-LAWS OF THE CORPORATION

\* \* \* \* \*

#### Section 4 – Fees

(a) No Change.

(b) FINRA shall assess each member a fee of:

(1) [~~\$85.00~~] \$100.00 for each initial Form U[-]4 filed by the member with FINRA for the registration of a representative or principal, except that the following discounts shall apply to the filing of Forms U[-]4 to transfer the registration of representatives or principals in connection with acquisition of all or a part of a member’s business by another member:

Number of Registered Personnel Transferred	Discount
1,000–1,999	10%
2,000–2,999	20%
3,000–3,999	30%
4,000–4,999	40%
5,000 and over	50%

(2) \$40.00 for each initial Form U[-]5 filed by the member with FINRA for the termination of a registered representative or registered principal, plus a late filing fee of \$80.00 if the member fails to file the initial Form U[-]5 within 30 days after the date of termination;

(3) [~~\$95.00~~] \$110.00 for the additional processing of each initial or amended Form U[-]4, [or] Form U[-]5 or Form BD that includes the initial reporting, amendment, or certification of one or more disclosure events or proceedings;

(4) [~~\$13.00~~] \$15.00 for processing and posting to the CRD system each set of fingerprints submitted electronically by the member to FINRA, plus any other charge that may be imposed by the United States Department of Justice for processing each set of fingerprints;

(5) \$30.00 for processing and posting to the CRD system each set of fingerprint cards submitted in non-electronic format by the member to FINRA, plus any other

charge that may be imposed by the United States Department of Justice for processing each set of fingerprints;

([5]6) [~~\$13.00~~] \$30.00 for processing and posting to the CRD system each set of fingerprint results and identifying information that have been processed through another self-regulatory organization and submitted by a member to FINRA;

([6]7) [~~\$30.00~~] \$45.00 annually for each of the member's registered representatives and principals for system processing; and

([7]8) No Change.

(c) through (g) No Change.

(h) FINRA shall assess each member a fee of \$100.00 on the first day and [~~\$10~~] \$25.00 for each subsequent [per] day, up to a maximum of [~~\$300~~] \$1,575, [for each day] that a new disclosure event or a change in the status of a previously reported disclosure event is not timely filed as required by FINRA on an initial Form U5, an amendment to a Form U5, or an amendment to a Form U4, with such fee to be assessed starting on the day following the last date on which the event was required to be reported.

\* \* \* \* \*

#### **Section 6 – Assessments and Fees for New Members, Resigning Members and Successor Organizations**

(a) No Change.

(b) A member that is a successor organization to a previous member or members shall assume the unpaid balance of the assessments of its predecessor or predecessors and its next assessment shall be determined, if applicable, upon the assessment data of its predecessors. Such successor member shall not be required to re-register branch offices and personnel of predecessor members, but shall be required to [or] pay registration fees therefor. Whether a member is the successor organization to a previous member or members shall be determined by FINRA upon a consideration of the terms and conditions of the particular merger, consolidation, reorganization, or succession. A member that has simply acquired the personnel and offices of another member under circumstances that do not constitute the member a successor organization shall not be required to assume the unpaid assessments of the other member. Such non-successor member shall be required to re-register the branch offices and personnel acquired from the other member and pay applicable registration fees.

\* \* \* \* \*

## Attachment D

Below is the text of the rule amendments regarding membership application process and branch office registration fees pursuant to filing SR-FINRA-2012-031. New language is underlined; deletions are in brackets.

\* \* \* \* \*

### SCHEDULE A TO THE BY-LAWS OF THE CORPORATION

\* \* \* \* \*

#### Section 4 – Fees

(a)(1) Each member shall be assessed a registration fee of \$75.00 and a branch office system processing fee of \$20.00 upon the registration of each branch office, as defined in the By-Laws.

(2) FINRA shall waive, for the first branch office registered by a member, payment of the \$75.00 registration fee and the \$20.00 branch office system processing fee (where such fees have been assessed pursuant to paragraph (a)(1)).

(3) Each member also shall be assessed:

[(1)](A) an annual registration fee of:

- (i) \$175, for each of the first 250 branch offices registered by the member;
- (ii) \$150, for each of branch offices 251 to 500 registered by the member;
- (iii) \$125, for each of branch offices 501 to 1,000 registered by the member;
- (iv) \$100, for each of branch offices 1,001 to 2,000 registered by the member;
- (v) \$75, for every branch office greater than 2,000 registered by the member;

and

[in an amount equal to the lesser of (i) \$75.00 per registered branch, or (ii) the product of \$75.00 and the number of registered representatives and registered principals associated with the member at the end of FINRA's fiscal year; and (2)]

(B) an annual branch office system processing fee of \$20.00 per registered branch.

(4) [As of July 3, 2006,] FINRA shall waive, for one branch office per member per year, payment of the \$175[\$75.00] annual registration fee (where such fee has been assessed pursuant to paragraph (a)(3)(A)(i)[(a)(1)(i)]) and the \$20.00 annual branch office system processing fee assessed pursuant to paragraph (a)[(2)](3)(B).

(b) through (d) No Change.

(e)(1) In addition to any dues or fees otherwise payable, each applicant for membership shall be assessed an application fee, [as follows] based on the number of registered persons proposed to be associated with the applicant at the time the application is filed, as outlined in the tables below:

<u>Number of Registered Persons Associated with Applicant</u>	<u>Small</u>	<u>Medium</u>	<u>Large</u>
<u>Tier 1</u>	<u>1–10</u>	<u>151–300</u>	<u>501–1,000</u>
<u>Tier 2</u>	<u>11–100</u>	<u>301–500</u>	<u>1,001–5,000</u>
<u>Tier 3</u>	<u>101–150</u>	<u>N/A</u>	<u>&gt;5,000</u>

<u>Application Fee per Tier</u>	<u>Small</u>	<u>Medium</u>	<u>Large</u>
<u>Tier 1</u>	<u>\$7,500</u>	<u>\$25,000</u>	<u>\$35,000</u>
<u>Tier 2</u>	<u>\$12,500</u>	<u>\$30,000</u>	<u>\$45,000</u>
<u>Tier 3</u>	<u>\$20,000</u>	<u>N/A</u>	<u>\$55,000</u>

(2) Each applicant for membership also shall be assessed an additional \$5,000 if the applicant will be engaging in any clearing and carrying activity.

[(1) \$5,000, if the type of business in which the applicant proposes to engage will require it to calculate its net capital pursuant to section (a)(1), (a)(7), (a)(8) or (f) (1) of SEC Rule 15c3-1, or pursuant to sections 402.1(e) or 402.2(b) of the Treasury Regulations (“Treasury Regulations”) promulgated under Section 15C of the Act;]

[(2) \$3,000, if the type of business in which the applicant proposes to engage will require it to calculate its net capital pursuant to section (a)(2) of SEC Rule 15c3-1, or pursuant to section 402.2(c) of the Treasury Regulations; and]

[(3) for all other applicants, \$3,000.]

(f) through (h) No Change.

(i)(1) In addition to any dues or fees otherwise payable, each applicant submitting an application for approval of a change in ownership, control, or business operations shall be assessed an application fee, based on the number of registered persons associated with the applicant (including registered persons proposed to be associated with the applicant upon approval of the application) at the time the application is filed and the type of change in ownership, control, or business operations, as outlined in the tables below:

<u>Number of Registered Persons Associated with Applicant</u>	<u>Small</u>	<u>Medium</u>	<u>Large</u>
<u>Tier 1</u>	<u>1-10</u>	<u>151-300</u>	<u>501-1,000</u>
<u>Tier 2</u>	<u>11-100</u>	<u>301-500</u>	<u>1,001-5,000</u>
<u>Tier 3</u>	<u>101-150</u>	<u>N/A</u>	<u>&gt;5,000</u>

<u>Application Fee per Tier and Application Type</u>	<u>Small</u>	<u>Medium</u>	<u>Large</u>
<u>Merger</u>			
<u>Tier 1</u>	<u>\$7,500</u>	<u>\$25,000</u>	<u>\$50,000</u>
<u>Tier 2</u>	<u>\$12,500</u>	<u>\$30,000</u>	<u>\$75,000</u>
<u>Tier 3</u>	<u>\$20,000</u>	<u>N/A</u>	<u>\$100,000</u>
<u>Material Change</u>			
<u>Tier 1</u>	<u>\$5,000</u>	<u>\$20,000</u>	<u>\$35,000</u>
<u>Tier 2</u>	<u>\$10,000</u>	<u>\$25,000</u>	<u>\$50,000</u>
<u>Tier 3</u>	<u>\$15,000</u>	<u>N/A</u>	<u>\$75,000</u>
<u>Ownership Change</u>	<u>\$5,000</u>	<u>\$10,000</u>	<u>\$15,000</u>
<u>Transfer of Assets</u>	<u>\$5,000</u>	<u>\$10,000</u>	<u>\$15,000</u>
<u>Acquisition</u>	<u>\$5,000</u>	<u>\$10,000</u>	<u>\$15,000</u>

(2) If an applicant’s application for approval of a change in ownership, control, or business operations involves more than one type of application identified in the “application fee per tier and application type” table in paragraph (i)(1) of this section, the application fee shall be the highest amount of the applicable fees (e.g., the application fee for an applicant associated with 1-10 registered persons filing an application involving a merger and material change would be \$7,500).

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## 1000. MEMBERSHIP, REGISTRATION AND QUALIFICATION REQUIREMENTS

\* \* \* \* \*

### 1010. Membership Proceedings

\* \* \* \* \*

### 1012. General Provisions

#### **(a) Filing by Applicant or Service by FINRA**

(1) An Applicant for membership shall file an application in the manner prescribed in Rule 1013, including the timely submission of an application fee pursuant to Schedule A to the FINRA By-Laws.

(2) An Applicant seeking approval of a change of ownership, control, or business operations shall file an application in the manner prescribed in Rule 1017, including the timely submission of an application fee pursuant to Schedule A to the FINRA By-Laws.

(3) through (5) No Change.

#### **(b) Lapse of Application**

(1) No Change.

(2) If an Applicant wishes to continue to seek membership or approval of a change in ownership, control, or business operations, then the Applicant shall be required to submit a new application in the manner prescribed in [and fee under] Rule 1013 or 1017, respectively, including the timely submission of an application fee pursuant to Schedule A to the FINRA By-Laws. FINRA shall not refund any fee for a lapsed application.

(c) through (e) No Change.

### 1013. New Member Application and Interview

#### (a) Filing of Application

##### (1) How to File

An Applicant for FINRA membership shall file its application in the manner prescribed by FINRA with the Department of Member Regulation (“the Department”). An Applicant shall submit an application that includes:

(A) through (D) No Change;

[(E) payment of the appropriate fee;]

(F) through (S) renumbered as (E) through (R).

(2) No Change.

##### (3) Rejection of Application That Is Not Substantially Complete

If the Department determines within 30 days after the filing of an application that the application is not substantially complete, the Department may reject the application and deem it not to have been filed. In such case, within the 30 day period, the Department shall serve a written notice on the Applicant of the Department’s determination and the reasons therefor. FINRA shall refund the application fee, less \$500[350], which shall be retained by FINRA as a processing fee. If the Applicant determines to continue to seek membership, the Applicant shall submit a new application [and fee] under this Rule and fee pursuant to Schedule A to the FINRA By-Laws.

(4) No Change.

(b) No Change.

\* \* \* \* \*

**1017. Application for Approval of Change in Ownership, Control, or Business Operations**

(a) through (c) No Change.

**(d) Rejection Of Application That Is Not Substantially Complete**

If the Department determines within 30 days after the filing of an application that the application is not substantially complete, the Department shall reject the application and deem it not to have been filed. In such case, within the 30 day period, the Department shall serve a written notice on the Applicant of the Department's determination and the reasons therefor. FINRA shall refund the application fee, less \$500, which shall be retained by FINRA as a processing fee. If the Applicant determines to continue to apply for approval of a change in ownership, control, or business operations, the Applicant shall submit a new application under this Rule and fee pursuant to Schedule A to the FINRA By-Laws.

(e) through (j) No Change.

**(k) Lapse or Denial of Application for Approval of Change in Ownership**

If an application for approval of a change in ownership lapses, or is denied and all appeals are exhausted or waived, the member shall, no more than 60 days after the lapse or exhaustion or waiver of appeal:

(1) submit a new application under this Rule and fee pursuant to Schedule A to the FINRA By-Laws;

(2) through (3) No Change.

For the protection of investors, the Department may shorten the 60-day period. For good cause shown by the member, the Department may lengthen the 60-day period. The Department shall serve written notice on the Applicant of any change in the 60-day period and the reasons therefor. During the 60-day or other imposed period, the Department may continue to place interim restrictions on the member for the protection of investors.

\* \* \* \* \*