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November 20, 2009

Via E-mail: pubcom@finra.org

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

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

Dear Ms. Asquith:

Wells Fargo Advisors (“WFA”) appreciates this opportunity to comment briefly on FINRA’s rule filing that proposes to replace current NASD and NYSE rules and interpretations concerning communications with the public. WFA fully supports the care and effort with which FINRA has undertaken to reorganize the rules to make them clearer and easier to follow. In particular, reducing the general categories of communications from six to three will benefit the industry, investors, and the regulators alike. We file this comment letter to highlight some concerns with certain provisions of the rules as proposed.

WFA consists of brokerage operations that administer over \$900 billion in client assets. It accomplishes this task through 15,600 full-service financial advisors in 1,100 branch offices in

all 50 states and 5,900 licensed financial specialists in 6,610 retail bank branches in 39 states.¹ Given this size, WFA manages thousands of communications annually that will be subject to FINRA's proposed rule.

Three Basic Categories

The key to the FINRA rule changes is that it reduces the current communications categories from six to three. The first new category is "institutional communication" which will cover those communications that are designed for distribution only to institutional investors. Giving a clearly defined category for institutional communications will make the regulation of this area much clearer.

The next category is "retail" communications. The category would cover any written communication, including electronic ones, delivered to more than 25 retail investors. A "retail" investor would be any investor that is not an institutional account. In addition, it would count investors that are existing or potential customers. The final category is "correspondence," defined as written communications to 25 retail customers or fewer, again whether they are existing or potential customers.

WFA supports the reduction to only three categories of communications. The rule thus eliminates some of the old definitions applied to "advertisement," "sales literature," "institutional sales material," "public appearance," and "independently prepared reprint." By using the "correspondence" category definition, firms will cover a variety of communications that may not be specified today, but would otherwise meet the standards of the types of communications one wants covered by the correspondence definition.

Approval, Review and Recordkeeping Requirements

The proposed rule sets standards for the approval, review and recordkeeping of the three categories. As it relates to institutional communications and correspondence, FINRA has struck an appropriate balance concerning the need for supervision and review. The rule will require approval by a qualified firm principal of each retail communication. While there is an exception from the principal approval requirement for those retail communications that are "solely administrative," FINRA does not specify the administrative categories in the rule as was done under former NASD Rule 2210(c)(8)(B). It will be important that FINRA not interpret the universe of administrative communications to be limited to those contained in the former rule. There might also be a need for FINRA to better define the type of registrations that it feels makes a reviewer "appropriately qualified."

¹ WFA includes a number of brokerage operations that have combined as the result of the 2008 purchase of Wachovia Corporation by Wells Fargo & Company. For the ease of discussion, this letter will use WFA to refer to all of those brokerage operations.

Filing Requirements and Review Procedures

The proposed rule maintains most of the current regulation's filing requirements. WFA is concerned, however, with the expansion of the category of communications that a firm must file with FINRA and withhold from use until the firm makes FINRA's recommended changes. The rule for the first time would now include a pre-filing requirement for retail communications concerning any publicly offered securities derived or based on a single security, a basket of securities, an index, a commodity, a debt issuance or a foreign currency. The proposal also revises the requirements for retail communications involving closed-end funds. Current rules require that for closed-end fund initial public offerings ("IPOs") and for continuously offered closed-end funds, firms must file within 10 days of first use advertisements and sales literature distributed during the IPO or continuously offered period. The proposed rule changes this scheme by requiring a firm to file all retail communications concerning closed-end funds, including those distributed after the IPO. FINRA should reverse this rule change. Trading of closed-end funds in the secondary market simply does not raise the same concerns presented at the IPO stage. While ETFs and open end mutual funds are always sold by prospectus, closed-end funds are sold by prospectus only during the IPO. After that, they trade in the secondary market on the exchange and their price (either premium to or discount from NAV) strictly flows from supply and demand conditions. In essence, the marketplace has had an opportunity to fully digest information concerning the closed-end fund and acts as a protection for the retail investor. FINRA's rationale for the change, that investors after the IPO deserve the same protections, fails to account for this important difference. In addition, the additional costs to implement this rule change likely far outweigh any perceived benefit in treating the secondary closed-end market the same as the IPO stage. Requiring the pre-filing of structured products for retail consumers would put them at a disadvantage as institutional investors would be able to hear of upcoming offerings while retail investors could not be informed until FINRA comments are received.

Under the new proposed rules, "market letters" would now fit the definition of retail communications when sent to more than 25 retail clients. Under the current rules, such market letters are subject to a post-review if aimed at retail customers. By fitting them under the proposed rule, all market letters sent to more than 25 retail consumers will require a pre-review. These letters often are both low-risk and time-sensitive. Forcing them into a pre-review system is certain to be costly, and by forcing firms to wait until the completion of the principal review, the information quickly could become stale and of little benefit to the customer. FINRA should reconsider the treatment of market letters and the requirement for pre-approval.

Content Standards

In setting forth the rule proposal, FINRA has also revised in part the content standards for the three categories of communications with the public. In many instances, the content standards revisions are appropriate and improve the rule's utility. It will be important to understand how FINRA proposes to treat past recommendations. The Regulatory Notice 09-55 mentions that the new standards regarding recommendations in proposed FINRA Rule 2210(d)(7)(A) mirror those found in Rule 206(4)-1(a)(2) under the Investment Advisers Act of 1940, which apply to

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investment advisor advertisements that contain past recommendations. We think this is a step in the right direction. We recommend that FINRA further harmonize its position with that expressed by the SEC in its various interpretive positions. (See generally, The TCW Group, Inc., SEC Staff No-Action Letter November 7, 2008, holding that distribution of past recommendations to prospective clients is permitted under certain circumstances).

Thank you for providing WFA the opportunity to comment. We support FINRA's efforts to improve the rules governing communications with the public. Some minor changes likely would make the rule more workable for all. If you have any questions regarding this comment letter, please do not hesitate to contact me.

Sincerely,

Ronald C. Long
Director, Regulatory Affairs