



*Alexander C. Gavis  
FMR LLC Legal Department*

November 20, 2009

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

***RE: Request for Comment on Proposed New Rules Governing Communications with the Public (FINRA Regulatory Notice 09-55)***

Dear Ms. Asquith:

Fidelity Investments<sup>1</sup> appreciates the opportunity to comment on proposed new FINRA rules governing communications with the public, which would replace or revise National Association of Securities Dealers (“NASD”) Rules 2210 and 2211, certain Interpretive Materials and New York Stock Exchange (“NYSE”) Rule 472.<sup>2</sup>

Fidelity generally agrees with the views expressed by the Investment Company Institute (“ICI”) in its comment letter to FINRA dated November 19, 2009. We submit this letter to supplement the ICI’s letter, on specific issues.

FINRA is undertaking a lengthy and arduous process of combining and consolidating the rules of the former NASD and NYSE self-regulatory organizations. Fidelity supports FINRA in conducting this much needed effort. We recommend that FINRA also use this as an opportunity to consider revisions to the rules to address new types of communications between member firms and their customers, clients and the public. We believe that FINRA should strive to enhance and revise its regulations for continuous improvement. The following are significant highlights of our recommendations:

- The proposed rules should list the structured products that would require pre-filing of communications and should broaden the scope of exceptions from filing;
- The proposed modification for the source of disclosure for sales charge and expense ratio information should not be adopted;

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<sup>1</sup> Fidelity Investments is composed of a group of financial services companies, including several FINRA registered broker-dealers as well as the largest mutual fund complex in the United States.

<sup>2</sup> See *FINRA Regulatory Notice 09-55 (September 2009)*; [www.finra.org/notices/09-55](http://www.finra.org/notices/09-55) (regulatory notice and text of the proposed rules).

- The proposed rules should be modified to include a new category of communications called “Interactive Electronic Communications” to address member firms’ increasing use of social and interactive media, and further electronic media guidance should be provided by FINRA on third-party postings, supervision and record keeping issues;
- Communication with investors through wireless mobile devices should be addressed under rules by allowing firms to use principles based judgments in providing disclosures;
- The investment analysis tools rule language should be revised to clarify the permissible use of educational materials;
- The requirement for disclosure of financial interests when persons make a recommendation should be revised to include a “direct and material” threshold;
- The definition of “Retail communications” should be revised to exclude non-promotional material sent to existing customers;
- The definition of “Institutional Investor” should be revised to include a broader group of retirement plan sponsors and institutional investors;
- The filing exclusion for press releases used solely with the press should be maintained, along with broadening the exclusion for other press materials;
- The rule allowing FINRA to make determinations that firms must pre-file materials for violations of standards should be accompanied by a statement of the administrative process; and
- The rule change that requires public appearances to comply with regulations for written securities recommendations should not be adopted.

These recommendations and several others are discussed in more detail below.

## **I. Structured Products**

FINRA proposes to require member firms to file 10 business days prior to use all retail communications concerning “publicly offered securities derived from or based on a single security, a basket of securities, an index, a commodity, a debt issuance or a foreign currency.”<sup>3</sup> FINRA states that the proposed rule language is derived from a description of the term

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<sup>3</sup> FINRA Proposed Rule 2210(c)(2)(B).

“structured product” in prior NASD guidance in 2005 on the sale of structured products.<sup>4</sup> No other explanation is provided in support of this change.<sup>5</sup> Presumably, FINRA believes that, since the guidance was issued in 2005, it will now serve investor interests by requiring that such communications materials be pre-filed by firms 10 business days prior to use and to restrict members from using the communications until any changes specified by the staff have been made.

Fidelity supports FINRA’s efforts to ensure that communications materials are compliant with applicable regulations. However, we have several concerns with the rule proposal. First, we believe that, if FINRA adopts this rule proposal, the staff should be prepared to provide a list to members of what it considers to be structured products in the marketplace. In its 2005 guidance, FINRA acknowledges that there is no standard definition of structured products in the securities laws.<sup>6</sup> We are concerned that member firms will not necessarily be aware of the types of securities that FINRA believes to be structured products and may risk using a communication before filing it with the staff. Further, we recommend that FINRA specifically provide a clarifying statement in its regulatory notice that all investment company products, including mutual funds, exchange traded funds and unregistered investment pools, which may be comprised of or based on a basket of securities, indices or baskets of debt securities or foreign currencies, are not considered structured products within the meaning of the regulatory text.<sup>7</sup>

Second, we strongly recommend that FINRA consider broadening the filing exception “for retail communications in which the only reference to options or securities futures is contained in a listing of the services of a member.”<sup>8</sup> We believe that this exception should include retail investor communications that do not contain investment recommendations for or promotional material about structured securities. This would include communications that are designed to provide investors with factual information about these products, including, for example, research reports, fact sheets, stock screener programs or spreadsheets with financial information. Further, we believe that FINRA should exempt communications from pre-filing if they have been previously filed with the Securities and Exchange Commission (“SEC”), Commodities Futures Trading Commission or another federal regulatory agency. The proposed

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<sup>4</sup> *Id.*, at footnote 7; see *Notice to Members 05-59 (September 2005)*.

<sup>5</sup> The *FINRA Regulatory Notice* accompanying the rule proposals only mentions that the purpose of this additional filing requirement is “to require the filing of retail communications concerning publicly offered structured products, such as exchange traded notes, that currently are not required to be filed.” *Regulatory Notice 09-55 (September 2009)*, at 7.

<sup>6</sup> *Notice to Members 05-59 (September 2005)*, at footnote 1.

<sup>7</sup> Although the proposal mentions that it applies to “publicly offered” securities, we also recommend that FINRA consider explicitly stating that products that are not required to be registered under the Securities Act of 1933 are excluded, including private placements.

<sup>8</sup> Proposed Rule 2210(c)(2)(B)(ii).

rule exemption only mentions the exemption for communications submitted to “another self-regulatory organization having comparable standards pertaining to such retail communications.”

Finally, we are concerned that there will be a substantial increase in the FINRA Advertising Regulation Department’s handling of filings and in the complexity of filings for review. This may have an adverse affect on the staff’s ability to handle filings of other communications materials, including investment company, options and variable annuity filings. We strongly recommend that FINRA study how this new requirement will affect the filings process and consider delaying implementation of this part of the proposals until adequate resources can be put in place.

We are also concerned that the proposed rule change could potentially subject these communications to merit based regulation, through the advertising review process. For example, if an FINRA analyst determines that a structured security should be examined more closely, the analyst may take his or her time in reviewing advertising and sales material for the security – thus slowing down the launch process. Delay in review of this material may also likely have a downstream effect on other communications filed with FINRA; therefore, not only affecting the review of the communication piece in question, but other materials as well. Accordingly, Fidelity recommends that the rule proposal be revised to say that members may use these communications, which are required to be filed 10 business days prior to use, if after the 10<sup>th</sup> business day there is no response from the FINRA staff.

## **II. Sales Charges and Expense Ratio Disclosures**

NASD Rule 2210(d)(3) became effective in April 2007 and requires non-institutional communications with the public for non-money market funds to disclose a fund’s Total Annual Operating Expenses from the fund’s most recent prospectus each time a fund’s performance is shown. Proposed Rule 2210(d)(5)(A) would require all Retail communications and Correspondence to rely on the fund’s prospectus or annual report for that purpose, whichever is more current. The proposed requirement is not only unduly burdensome for the mutual fund industry, it is also likely to lead to significant investor confusion.

Form N-1A requires a fund to disclose in the prospectus its Total Annual Operating Expenses based on amounts incurred during a fund’s most recent fiscal year. If there have been any changes in expenses that would materially affect the fees shown, the Form requires that the prospectus reflect a restated expense ratio using the current fees as if they had been in effect during the prior fiscal year. As such, the prospectus Total Annual Operating Expense is forward looking and estimates the fees shareholders should expect to bear. In contrast, the Total Annual Operating Expense from a fund’s Annual Report is backward looking and reflects strictly the actual expenses charged during the prior fiscal year, not taking into account any anticipated changes to those fees. Sourcing expense ratios from the most recent document at any given time would prevent investors – especially retirement plan participants and mutual fund supermarket investors but also the public in general – from being able to compare funds in a fair and balanced

manner, as some funds would show forward-looking estimated and some backward looking actual expense ratios at any given time.

In addition, the Total Annual Operating Expenses from a fund's prospectus fee table and annual report are likely to differ in the case of funds-of-funds. While the prospectus fee table for such products will include Acquired Fund Fees and Expenses, the annual report does not. Therefore, fund companies that produce prospectuses and annual reports on different dates would be required to show the fund's Total Annual Operating Expenses at times with and at times without the Acquired Fund Fees. The difference can be significant.

The mutual fund industry invested significant resources to ensure compliance with NASD Rule 2210(d)(3) in 2007. Web sites, system feeds, databases required significant updates and ongoing supervision to ensure accurate data is provided at all times not only within each mutual fund company, but also across supermarkets and third party service providers. The current rule ensures a fair comparison across funds while at the same time allowing mutual funds to include net expense ratio in addition to a fund's gross expense ratio when warranted. Therefore, requiring a repeated restructuring of relevant systems would expose the fund industry to unnecessary costs without any clear benefit to shareholders.

In addition, Rule 2210(d)(5)(B) as proposed requires the maximum sales charge and expense ratio information to be placed in a prominent text box in any print advertisement. However, the term "advertisement" is no longer defined under the rule proposal, and the text box rule requirement could be interpreted to apply to all print Retail communications under 2210(d)(5)(A). We request clarification that the text box rule provision of proposed rule 2210(d)(5)(B) applies only to print advertisements such as print newspaper, magazine or periodicals<sup>9</sup> and encourage FINRA to adopt 2210(d)(3)(A) with no additional material change.

### **III. Electronic Communications**

FINRA proposes to revise its communications rules from defining six separate categories of communications by member firms to three: institutional and retail communications and correspondence. This rule simplification effort is coming about as a result of the rulebook consolidation project to combine the former NASD and NYSE rules regarding broker-dealer communications. We strongly support FINRA's efforts in rule simplification, particularly as it may lead to streamlining firms' efforts in complying with complicated and sometimes outdated rules.

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<sup>9</sup> *NASD Notice to Members 06-48* had stated that the "text box requirement applies only to advertisements that appear in print advertisements, such as a print newspaper, magazine or other periodical. The text box requirement does not apply to printed sales literature, such as fund fact sheets, brochures or form letters, nor does it apply to Web sites, television or radio commercials, or any other electronic communication." We request similar clarification as FINRA adopts FINRA Rule 2210(d)(5).

The FINRA communication rules have evolved over the past ten years. The most significant reorganization and revision of definitions last occurred in 2002, when FINRA created a rule category for institutional sales material. We believe that this change to the rule requirements has worked well for many firms that serve retirement plan administrators and sponsors and other institutional investors and clients. At that time, the then-NASD worked with the securities industry to accomplish a significant step in addressing many of the outdated and unworkable aspects of its communications rules, especially as they related to materials prepared for institutional and sophisticated audiences.

Fidelity believes that the time has come again for FINRA to update its communications rules to address the new communications channels used by member firms with prospective investors, clients and customers. Since the last major revision to the rules, many of the most consistent and progressive changes in the securities industry have come in the area of electronic communications. Practically all securities firms have established web sites that are a primary, if not the primary, means of communication with millions of retail and institutional investors and intermediaries. Moreover, recent studies by the Investment Company Institute and others confirm that investors have embraced digital and electronic communications.<sup>10</sup> Securities regulations continue to be updated to embrace these developments, such as in the recent adoption of the mutual fund summary prospectus rules by the SEC.<sup>11</sup>

Fidelity has been a leader in advancing new ways of communicating with retail and institutional mutual fund and brokerage investors. Through our web sites and operations, Fidelity serves millions of retail and retirement customers and institutional and intermediary clients with full transactions capabilities, daily account balances information, market news and commentary, investing ideas, research and other relevant information about investing.<sup>12</sup> While our web sites and operations continue to be a primary communications channel for our firm, along with telephone and investors centers, there are two new electronic areas that have rapidly become established communications channels for investors. First, investors are embracing and using social media sites that provide a means for them in real time to connect with millions of other investors and participating companies and entities. Second, mobile wireless communications are rapidly becoming a standard way in which millions of investors access information, conduct business and perform transactions.

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<sup>10</sup> *Ownership of Mutual Funds and Use of the Internet, 2006, Investment Company Institute Research Fundamentals, October 2006*, at [www.ici.org/pdf/fm-v15n6.pdf](http://www.ici.org/pdf/fm-v15n6.pdf).

<sup>11</sup> *See Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-Ended Management Investment Companies*, SEC Release Nos. 33-8998 and IC-28584 (Jan. 13, 2009), at [www.sec.gov/rules/final/2009/33-8998.pdf](http://www.sec.gov/rules/final/2009/33-8998.pdf)

<sup>12</sup> These communications constitute various forms of advertisements, sales literature, correspondence, reprints and research reports under the current FINRA rules.

**A. Social Media**

According to a recent report by the Pew Internet and American Life Project, 46% of online American adults have used a social media site in the past year, which is up from 8% in 2005.<sup>13</sup> Other studies have shown that use of social media sites by businesses to communicate with customers and the public has grown significantly in the past few years.<sup>14</sup>

Social media sites provide businesses with an ability in real-time to publish relevant and timely content, respond to inquiries and questions from investors, obtain feedback from investors and provide responses and further information. Some of these sites revolve around one type of communication, such as Twitter.com, which is a real-time micro-blogging site. While others provide individuals and firms with the ability to establish homepages with static and dynamic content, including videos, web blogs, interactive chats and links to other sites.

Financial services firms, including mutual funds, investment advisors, broker-dealers and banks, are now using social media as a communications channel to reach prospective and current investors. In October 2009, for example, Fidelity launched a web page at [www.Twitter.com/Fidelity](http://www.Twitter.com/Fidelity) as a new communications channel for investors. FINRA regulations predate the rise of social media sites, and there is uncertainty in a number of areas about the application of the current FINRA regulations to this new media. Fidelity supports recent initiatives by FINRA to examine its regulations in light of this new and important development, including the establishing of a Social Networking Task Force made up of representatives from a broad cross section of member firms.<sup>15</sup> We strongly recommend that FINRA act to change regulations in several important areas to address member firms' use of social media. These suggested changes are important to eliminate uncertainty regarding the application of FINRA regulations to social media and to assist the securities industry in serving investors through this rapidly developing electronic communications channel.

We recommend that FINRA change its communications rule proposal specifically to address interactive electronic communications and that FINRA in the meantime develop

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<sup>13</sup> See Amanda Lenhart, Pew Internet and American Life Project, *The Democratization of Social Networks*, (October 8, 2009), at [www.pewinternet.org/Presentations/2009/41--The-Democratization-of-Online-Social-Networks.aspx](http://www.pewinternet.org/Presentations/2009/41--The-Democratization-of-Online-Social-Networks.aspx).

<sup>14</sup> Sharon Gaudin, *Business use of Facebook, Twitter exploding*, Computerworld (November 9, 2009) (citing a study by Palo Alto Group), at [www.computerworld.com/s/article/9140579/Business\\_use\\_of\\_Twitter\\_Facebook\\_exploding](http://www.computerworld.com/s/article/9140579/Business_use_of_Twitter_Facebook_exploding)

<sup>15</sup> See Richard Ketchum, Securities Industry and Financial Markets Association (SIFMA) Annual Meeting, New York, NY (October 27, 2009) (“We have formed a Social Networking Task Force comprised of industry participants to explore how regulation can embrace technological advancements in ways that improve the flow of information between firms and their customers—without compromising investor protection.”). A Fidelity representative is serving on the Task Force.

interpretive guidance through a *Regulatory Notice*, which would address this and other important areas including hosting of third-party content, supervision and record keeping. FINRA staff should consider pre-announcing this interpretive guidance in its upcoming Webinar on social media issues scheduled for December 17, 2009.

- ***“Interactive Electronic Communications” Category***

As early as 1999, FINRA staff recognized that certain types of electronic communications might be considered real-time public appearances and therefore not subject to the prior approval and filing requirements.<sup>16</sup> FINRA’s current “public appearance” definition stated, in part, that it covers a “participation in a seminar, forum (*including an interactive electronic forum*) . . . .”<sup>17</sup> This notion of interactivity in communication has followed along through the years to the present, with FINRA staff continuing to refer to the “fast paced environment” of chat rooms in both its *Guide to the Internet for Registered Representatives* and more in recently published podcasts on electronic communications.<sup>18</sup> In addition, in its 2007 interpretive release, the SEC acknowledged that companies are increasingly using interactive technologies:

We note that companies are increasingly using their Web sites to take advantage of the latest interactive technologies for communicating over the Internet with various stakeholders, from customers to vendors and investors. These communications can take various forms, ranging from “blogs” to “electronic shareholder forums.”<sup>19</sup>

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<sup>16</sup> *NASD Ask the Analyst—Electronic Communications* (March 1999), at [www.finra.org/Industry/Regulation/Guidance/RCA/p015326](http://www.finra.org/Industry/Regulation/Guidance/RCA/p015326). FINRA staff at that time appropriately recognized that, if a firm permits its representatives to discuss securities in chat rooms or bulletin boards, its procedures must reflect how the firm will supervise the activity.

<sup>17</sup> NASD Rule 2210(a)(5).

<sup>18</sup> *Guide to the Internet for Registered Representatives*, at [www.finra.org/Industry/Issues/Advertising/p006118](http://www.finra.org/Industry/Issues/Advertising/p006118); *FINRA Podcast: Electronic Communications: Blogs, Bulletin Boards, and Chat Rooms* (February 23, 2009), at [www.finra.org](http://www.finra.org).

<sup>19</sup> See SEC Interpretation, Release Nos. 34-58288 (August 7, 2008), at [www.sec.gov/rules/interp/2007/34-58288fr.pdf](http://www.sec.gov/rules/interp/2007/34-58288fr.pdf). The SEC also recognized the distinctions of interactive communications in its 2000 Interpretive Release:

Another distinguishing characteristic of the Internet is its facility for interactive discussion. This discussion can, and does, cover virtually any subject, including issuers and their securities. In the corporate context, at least three different means of Internet “discussions” have evolved. First, many web sites offer moderated discussion forums, typically led by a real-time moderator and featuring a guest “expert.” Other web sites contain “bulletin boards,” cyberspace message centers where comments concerning issuers, securities or industries can be posted and saved for viewing



FINRA has thus recognized that certain types of electronic communications may be analogous to public appearances, since they are conducted real-time or through fast paced communications. Fidelity recommends that FINRA use this concept to develop a fourth category of communications called "Interactive Electronic Communications." Interactive Electronic Communications could be defined as: "***an electronic communication the purpose of which the member firm reasonably believes is to respond to, or interact with, Retail or Institutional Investors in real-time.***" Firms should be allowed to adopt written procedures identifying the types of communications that they intend to designate as Interactive Electronic Communications. Further, FINRA would provide guidance on what types of communications could be included in this category, similar to what it has done in the past with public appearances. Current examples might include micro-blogs (such as tweets), chats, immediate bulletin boards, text messages and other similar types of media that involve communicating or interacting at or in real-time with Retail or Institutional Investors.

We also recommend that FINRA provide that Interactive Electronic Communications be covered under the supervision requirements that apply to correspondence. This means that firms would not have to adopt prior approval procedures for Interactive Electronic Communications, but would be responsible for adopting risk based surveillance of these communications after they have been used. Moreover, firms would continue to be required to file Interactive Electronic Communications that are covered under the current filing requirements. This would continue to allow for FINRA review of material, while easing the burden of pre-use approval for communications that are fast paced and usually published in real-time throughout the day. FINRA used this approach very recently for Market Letters, allowing firms to treat timely published letters on market events under the risk based rules for correspondence.<sup>20</sup>

For firms currently using social media, the prior approval requirement is proving to be a challenging and costly process to maintain. We believe that there is a better way to handle this process by allowing firms to accept any regulatory risk of allowing Interactive Electronic Communications to be published with supervision occurring under a risk based after-publication model. Of course, if a firm does not wish to adopt this type of model for its Interactive Electronic Communications, it would be free to adopt a prior approval process as in current requirements. We also recognize that FINRA may wish to include a requirement that firms adopt written procedures that are reasonably designated to ensure that the firm will comply with the supervision and risk based review processes.

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over an extended period of time. Finally, numerous web sites host discussion groups, or "chat rooms," with real-time postings and viewing by participants on a wide variety of topics.

Use of Electronic Media, Release Nos. 33-7856, 34-42728, IC-24426 (April 28, 2000), at [www.sec.gov/rules/interp/34-42728.htm#seciib1](http://www.sec.gov/rules/interp/34-42728.htm#seciib1).

<sup>20</sup> Market Letters, *Regulatory Notice 09-10* (February 2009).

We believe that this approach for Interactive Electronic Communications would also address situations in which individual representatives might create social media pages for professional purposes. While member firms or their representatives may wish to establish a web page or home page on a social media site, we believe that any content on these pages that is not interactive in nature would continue to fall under the Retail or Institutional Communications categories and, accordingly, would require prior approval and filing if necessary. Content that falls under the definition of Interactive Electronic Communication would be subject to risk-based process. We believe that this will help to ensure that published static non-interactive content used in social media sites goes through an approval process that is the same as for advertising and sales literature under FINRA's current rules.

Finally, we believe that FINRA should not wait until the adoption of the proposed rules changes to consider addressing social media issues. We recommend that FINRA consider issuing an interpretive notice in the meantime that would provide guidance that certain types of social media communications would fall under the "interactive electronic forum" part of the definition of "public appearance" under current FINRA rules. Included with this guidance, FINRA might consider updating Regulatory Notice 07-59 to discuss and address these types of communications under the FINRA supervisory and record keeping regulations, as discussed below.

- ***Responsibility for Third-Party Content***

An important issue for member firms who may consider sponsoring interactive communications is whether or not they are responsible, under the securities laws, for content (including statements and information) that third parties post to a web site that the firm sponsors. We recommend that FINRA clarify that firms do not have responsibility for such content as long as the firms neither adopt the content nor are entangled in the content's creation. As such, third party content would not be subject to FINRA's communications review and filing requirements. We believe that this approach would be consistent with prior guidance provided by the SEC in the context of corporate issuers' regarding interactive web site features.<sup>21</sup> FINRA should follow the SEC's lead in developing guidance that articulates when a firm might be found to adopt or be entangled in the creation of content.

If content is under the control of the member firm or the firm has adopted or is entangled in its creation, then we believe that the securities laws including FINRA rules should apply to the content. As mentioned above, FINRA should require that firms adopt reasonable procedures regarding supervision and oversight of the firms' social media communications and procedures

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<sup>21</sup> See SEC Interpretation, Release Nos. 34-58288 (August 7, 2008), at [www.sec.gov/rules/interp/2007/34-58288fr.pdf](http://www.sec.gov/rules/interp/2007/34-58288fr.pdf) ("A company is not responsible for the statements that third parties post on a Web site the company sponsors, nor is a company obligated to respond to or correct misstatements made by third parties. The company remains responsible for its own statements made (including statements made on its behalf) in a blog or a forum.").

designed to mitigate legal and compliance risks. FINRA's guidance might also say that firms should establish risk screening procedures for third party content. For example, firms may choose to screen third party postings to mitigate any perception that third-party posts are adopted by the firms, particularly with possible testimonials, endorsements, recommendations or rumors, or to handle privately what might appear to be public or customer complaints or disputes.<sup>22</sup> These procedures may also involve screening content in order to assist in compliance with the "Good Samaritan blocking and screening" safe harbor under the Communications Decency Act<sup>23</sup> to protect the firm from general liability for third party postings. In addition, firms may establish "content take down" notices under the Digital Millennium Copyright Act of 1996 to obtain safe harbor protection from copyright infringement claims regarding content posted by third parties. These objective screening measures might be delineated by firms in either a terms of use or disclosure language on their social media web pages. Accordingly, FINRA should consider in its interpretive guidance that such screening measures do not constitute adoption of the third-party content or entanglement in its publication, as interpreted under the securities laws.

Finally, we recommend that FINRA clarify that third-party content such as banner or other advertisements that may appear on a member firm's social media page and that are not controlled by the member firm, should not be the responsibility of the firm as long as there is no adoption or entanglement.

- *Supervision of Employees' Social Media Use*

Another important issue facing member firms is how to handle registered employees' use of social media communications under FINRA's supervision regulations. The current prevailing social media web sites are not under the control of financial services companies. This means that in order to conduct any of the required FINRA functions for communications, including review, approval, supervision and record keeping, firms are dependent upon the functionality of the sites. In many cases the social media sites do not allow for corporate access or oversight over an individual's social media page. Further, these sites have not been designed to operate in conjunction with corporate surveillance systems or record keeping programs. Firms must either develop innovative work-around solutions or consider hiring vendors to assist in regulatory compliance.

Given these constraints regarding social media sites, we recommend that FINRA work closely with the securities industry to develop guidance for firms regarding supervision of registered employees' use of these sites. We recommend that the guidance encourage firms to develop creative technical solutions for supervision and record keeping. This might include exploring the use of aggregation technologies to "screen scrape" information from an employee's

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<sup>22</sup> With respect to customer complaints, we recommend that FINRA clarify that firms do not have responsibility for handling as complaints communications that are anonymously posted or sent without any identification.

<sup>23</sup> See 18 U.S.C. § 230.

business social media page. Another possibility might be to allow firms to establish reasonable policies and procedures regarding employee's establishing their own sub-pages within the firm's overall social media site. These pages would allow the firm access for supervision, surveillance and record keeping purposes. We encourage FINRA staff and the Social Networking Task Force to develop the framework for this interpretive guidance.

- ***Record Keeping***

Social media usually involves interactive and dynamic content posted to web pages, which often changes continuously. Since social media sites are usually sponsored by third parties, there is an important issue as to what content on these sites must be record kept by member firms. We recommend that FINRA work with the SEC to adopt an approach to record keeping that serves to protect investors and that is reasonable in light of the medium. In our opinion, FINRA and the SEC should require firms to retain their own records and not require retention of third party content unless the firm believes that it is necessary to provide context for the firm's content or otherwise required to be maintained under law.

We agree with the ICI's example that if a firm posts its own content and also responds or engages in interactive conversations with third parties regarding the content, both the firm's content and the content of the third parties would be required to be maintained. Alternatively, if the firm does not respond to the third party's post or adopts or is entangled in the creation of the post, the firm should not have record keeping responsibility for the third party posts, even if the post is on the firm's social media page.

## **B. Wireless Mobile Communications**

Many investors are conducting business through mobile communications, including cellular telephones with full Internet accessibility. Consumer demand for access to web sites through mobile devices is growing and many recent innovations in smart phone technology and phone displays are allowing investors to conduct business dealings through mobile devices, outside of using desktop or laptop computers.<sup>24</sup> Recent estimates indicate that there are over 250 million U.S. mobile subscribers, correlating to about 80 percent of the U.S. population.<sup>25</sup> Wireless devices are increasingly allowing users to access the Internet or download specific applications that provide computer-like capabilities. A significant challenge for FINRA and the securities industry will be to develop regulations that support the development of mobile

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<sup>24</sup> In a recent report on the mobile marketplace, the Federal Trade Commission staff states: "[t]oday, consumers use their mobile devices for myriad purposes including 'chatting' through text messaging, taking pictures, browsing the Web, making purchases, listening to music, viewing videos, playing games across cyberspace, and keeping track of friends and relatives." *Mapping the Mobile Marketplace*, Federal Trade Commission Staff Report (April 2009).

<sup>25</sup> *Id.*, at p. 4.

commerce while maintaining the investor protection disclosure principles of the communications rules.

Fidelity has recognized this development and responded to its customers needs by introducing a series of wireless applications. Our *Fidelity Anywhere*® program provides our investors with up-to-the-minute market news, quotes, account balances and trading functionality via cellular telephones, including Blackberry devices. Further, we have developed specialized programs (widgets and gadgets) for smart phones, such as the iPhone and other wireless devices. Our products are representative examples of wireless programs offered by securities firms to the public. There are several ways that securities firms may build web sites and software applications for wireless devices. For some wireless carriers, firms may build web pages that may be accessed and rendered on the wireless device. Building these pages involves scaling down the firm's overall web activities to fit within the wireless device's screen. This process involves determining, among others, how best to render required contracts, disclaimers and disclosures through the device.

An alternative development process involves building software that will be downloaded on the actual device. An example of this would be the developing of a software application or "Ap" for use on an iPhone or similar device. In this situation, the device carrier or sponsor may have specific standards and a certification process for the software Ap. The standards can range from disallowing click-through agreements/terms of use on entry to the software or requiring that links or disclosures follow certain style guides. Prior to launching the software Ap, the securities firm must submit the software program to the wireless device provider for approval.

While mobile commerce may not yet have reached the point where many wireless users abandon their desktop Internet connections when communicating with securities firms, that time may be rapidly approaching. Accordingly, Fidelity recommends that FINRA propose interpretive guidance with principles that member firms may follow when developing mobile communications for investors. These principles would allow firms to apply FINRA standards in a manner reasonably designed to convey required communications disclosures under the securities laws while recognizing the nature of these communications. We recommend that the principles also allow firms to establish disclosure standards that are reasonably based on the size and structure of the communications. A firm that wishes to use such standards could be required to develop written procedures for mobile communications that would be used with each such application.

Accordingly, we recommend that FINRA consider developing principles in the following three areas.

- ***Disclosure of Member's Name in Mobile Communications***

FINRA should allow member firms to use reasonable judgment in determining how and where to place disclosure of the member's name in a communication designed to be read on a

mobile device. FINRA might provide examples of what it deems reasonably appropriate placement, including situations in which the member name might be placed on a member's mobile device application instead of within each communication on the device, or through innovative use of textual graphics or links within display screens.

- ***Disclosures Regarding Comparisons, Rankings, Tax Considerations, Testimonials and Other Specified FINRA Rules***

FINRA should encourage member firms in its interpretive guidance to use innovative means to deliver required disclosure for mobile devices as long as the firm has a reasonable belief that such delivery would not compromise investor protection or be misleading. We recommend that FINRA's rules specifically acknowledge that firms may innovate based on the type of communication channel, allowing for full use of the technology offered through the communications channel or device.

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

FINRA should work with the SEC to articulate a principle that would allow firms flexibility to make reasonable determination when it is appropriate to provide standardized performance through a relational link, window or other disclosure process that may be available through wireless devices or web technology.

#### **IV. Investment Analysis Tools**

NASD Rule 2210(d)(1)(D) prevents member communications from predicting or projecting performance, with the exception of hypothetical illustrations of mathematical principles, provided that those do not predict or project the performance of an investment or investment strategy. NASD IM-2210(6) provides a limited exception to 2210(d)(1)(D) by allowing for the use of Investment Analysis Tools, defined as interactive technological tools that produce "simulations and statistical analyses that present the likelihood of various investment outcomes if certain investments are made or certain investment strategies or styles are undertaken, thereby serving as an additional resource to investors in the evaluation of the potential risks and returns of investment choices."

NASD IM-2210(6) acknowledges that reports based on such investment analysis tools may be used with the public, and the tools may or may not interface with shareholders<sup>26</sup>. FINRA Rule 2214 adopts NASD IM-2210(6) without material changes.

Since the introduction of NASD IM-2210(6) in 2005, member firms have developed various educational materials that allow investors to understand the concepts behind interactive

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<sup>26</sup> IM-2210-6(a) speaks to tools "whether customers use the members' too independently or with assistance from the member."

investment tools. These materials typically explain the nature of Monte Carlo simulations; the types of multiple return and/or withdrawal scenarios that allow shareholders to consider the statistical probabilities and implications of various investment strategies. Such presentations may not provide direct access to a tool where the exact same scenarios presented in the educational materials could be replicated. Recent comments from FINRA staff have asserted that the lack of a directly linked “interactive” tool disqualifies these educational materials from the exemption granted under NASD IM-2210(6). However, presentations within these educational pieces are often outputs of such tools and allow investors to consider multiple scenarios in one piece of collateral and therefore meet the core requirements of NASD IM-2210(6) without misleading shareholders or exposing them to undue risk.

Based on more recent informal input from FINRA staff, it appears that the original intent of NASD 2210 IM-2210(6) was to require an “interactive” tool in order to prevent members from presenting a single product or specific strategy without allowing shareholders to consider alternative scenarios. The most commonly used Monte-Carlo based educational pieces in fact do not address specific products, while they do allow investors to consider various investment outcomes. In fact, these pieces tend to be generic and may not necessarily link to a specific tool specifically because the first step in investor education is to draw attention to the importance of considering different strategies; not to sell a specific product. It is often not possible to determine the most appropriate tool for any given investor in an initial, educational context.

We recommend, therefore, to clarify proposed Rule 2214 by omitting “interactive” from the definition of an investment analysis tool under Rule 2214(b), and by expanding Rule 2214(a) to expressly include educational materials produced based on an investment analysis tool, provided such illustrations are hypothetical in nature, do not predict or project the performance of any specific investment product, and allow shareholders to consider the likelihood of various investment outcomes. To ensure that such educational materials are produced in an appropriate manner, Supplementary Material 2214.02 could require members to provide access to the underlying tool to FINRA staff at its request.

## **V. Securities Recommendations**

Proposed FINRA Rule 2210(d)(7) states that retail communications, correspondence and public appearances that include a recommendation of securities must disclose, if applicable, “that the member or any associated person with the ability to influence the substance of the communication has a financial interest in any of the securities of the issuer whose securities are recommended, and the nature of the financial interest (including, without limitation, whether it consists of any option, right, warrant, future, long or short position).”

The rule change replaces the words “officers or partners” with the words “associated persons with the ability to influence the substance of the communication.” In its *Regulatory Notice*, FINRA states that the rule change “would substantially narrow the number of parties whose financial interests have to be disclosed,” since large firms have numerous officers and

partners.<sup>27</sup> This addition of the words “associated person” adds significant ambiguity under to the rules, as the term associated person may have different connotations under FINRA and SEC regulations. For example, it is unclear whether the change would apply not only to employees of the broker-dealer, but also to any person directly or indirectly controlling, controlled by, or under common control with such broker or dealer under the Securities Exchange Act of 1934.<sup>28</sup> Accordingly, we recommend that either FINRA clarify that associated person in this context means direct employees of the broker-dealer or refine the rule change to cover only the registered persons of the member firm.

Fidelity also believes that the phrase -- ability to influence the substance of the communication -- adds further ambiguity to the rule change, as compliance with the rule change would require firms to investigate the facts and circumstances surrounding each prepared communication for a list of individuals involved in its preparation. Within financial services firms, many employees (and possibly outside agencies and vendors) are involved in the development and creation of communications materials used by representatives with customers and clients. Furthermore, firms often solicit feedback and comments from representatives in the field concerning communications materials, and this information is used to make revisions or develop new materials. In complying with the rule change, firms might need to maintain and continuously update a working list of individuals involved in the preparation of communications materials, particularly if those individuals might later meet with clients or customers to discuss securities recommendations. We believe this is an unnecessarily broad requirement.

Accordingly, we recommend that FINRA revise the added phrase to read: “*who is directly and materially involved in the preparation of the communication.*” It is our opinion that this phrase more closely aligns with the public interest of having certain individuals disclose their financial interest in the securities discussed in a communications piece.

Finally, we are concerned that the disclosure requirement is overbroad in requiring that individuals disclose financial interests in any security of the issuer, whether or not it is a material financial interest in the issuer. If a representative uses a communication with a securities recommendation, and he or she holds a non-material securities position in an actively traded Fortune 500 company, for example, it is unclear, as a policy matter, why it is important to disclose to a customer the fact that the representative has an interest in the security. Further, if the representative has a financial interest in a mutual fund that in turn holds a financial interest in a security, it is unclear why that interest should be covered by the proposed rule. We recommend that FINRA address these situations by adding the words “material direct” in front of “financial interest” in the regulatory text.

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<sup>27</sup> See *FINRA Regulatory Notice 09-55* (September 2009).

<sup>28</sup> See Securities Exchange Act, Section 3(a)(18).



In summary, we recommend that FINRA revise the proposed regulation text to add the following language (in italics):

(ii) that the member or any *of its registered persons who is directly and materially involved in the preparation of the communication* has a *direct and material* financial interest in any of the securities of the issuer whose securities are recommended, and the nature of the financial interest (including, without limitation, whether it consists of any option, right, warrant, future, long or short position); and . . . .

## **VI. Filing and Principal Review Requirements**

### **A. Retail Communications**

Under the proposed rule changes, Retail communications would include any written and electronic communication that is distributed or made available to more than 25 retail investors. “Retail investor” would be defined to include any person other than an institutional investor, notwithstanding whether that person is an existing or prospective customer.

The new category of Retail communications is overbroad and changes the nature of how communications have been regulated by FINRA and the SEC for years. Under traditional SEC rules, sales literature has been defined to “include any communication (whether in writing, by radio, or by television) used by any person to offer to sell or induce the sale of securities of any investment company.”<sup>29</sup> In this context, the SEC has established a link between selling efforts through sales material and the offer of a particular security. FINRA’s rule proposal eliminates the concept that the regulated communication will be connected to a selling or promotional effort. Instead, the new Retail communication category sweeps in all communications (as “Communications is defined to include correspondence, retail and institutional communications”), whether or not related to a promotional or sales effort, into the definition and subjects all communications to more than 25 retail investors to FINRA’s principal approval and filing requirements. FINRA proposes an exclusion for principal approval and filing requirements for “any retail communication that is solely administrative in nature.”

If FINRA were to implement this rule change, member firms would be required to significantly change their processes for handling non-promotional communications. Presently, firms do not necessarily subject those communications either to principal review or filing, as they may either fall under the current definitions of correspondence or institutional material, or may not be covered under the current definitions of advertisement or sales literature. Under the

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<sup>29</sup> Rule 156 of the Securities and Exchange Act of 1934.

proposal, there may be many types of Retail communications that would not fall under FINRA's pre-approval exclusion for communications that are "solely administrative in nature."<sup>30</sup> These could include, among others, shareholder letters, account activity letters, account statements, customer agreements, account and fee notices and updates, privacy statements, and many other shareholder or customer electronic or paper notices and communications. Further, under the proposed rule change, member firms would substantially increase the number of filings of these material, which would drive up firm costs without any commensurate investor protection benefits, since the FINRA staff rarely reviews these types of non-promotional materials. We doubt whether FINRA intended this to be the result of the proposed rule change and wonder whether the review staff would be prepared for the increased filing volumes.

Accordingly, Fidelity recommends that that FINRA amend the proposed pre-approval and filing exclusions for administrative communications to include non-promotional Retail communications sent to existing customers and clients. This would align the rules with existing practices. We are not aware of, nor does FINRA mention, any investor protection reasons for making a change to the existing treatment of such non-promotional Retail communications.

**B. "Institutional Investor" Definition**

The proposed rule changes do not suggest revisions to the definition of "Institutional Investor," which was adopted in 2002. Fidelity recommends that FINRA adopt changes to the definition. As we commented to the SEC when the Institutional Investor definition was first proposed,<sup>31</sup> we believe that FINRA should reconsider the requirement that plans have at least 100 participants to satisfy the definition. Additionally we believe the requirement that entities have assets of at least \$50 million should be reduced to \$5 million. We recommend that FINRA take a closer look at the standards for this definition in light of having administered the rules over the past seven years.

All retirement plan sponsors – without regard to the amount of assets in, or participants of, the plan – have a fiduciary duty under the Employee Retirement Income Security Act of 1974 to choose and monitor the options offered under their retirement plans. This statutory responsibility requires these fiduciaries to have an in-depth understanding of investment concepts

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<sup>30</sup> Proposed FINRA Rule 2210(c)(7) exempts: "Retail communications that are solely administrative in nature." NASD Rule 2210(c)(8)(B) has a similar exemption, but does not mention the word administrative, and instead states "related to recruitment or changes in a member'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."

<sup>31</sup> Fidelity submitted a comment letter, dated February 15, 2002, to the Securities and Exchange Commission on the proposed changes to Rules Governing Communications with the Public (File No. SR-NASD-00-12).

and of the products chosen as retirement plan options. Plan sponsors supplement their investment knowledge and remain abreast of current financial trends through regular contact with their investment providers. Plan sponsors work closely with relationship managers and sometimes third-party consultants on important issues such as plan design, selection of investment options and the creation of educational materials for plan participants.

We are unaware of a measurable correlation between the level of sophistication of a plan sponsor and the size of the company, as measured by plan participants, for which he or she works. Retirement plans with fewer than 100 participants often include, for example, professional services firms (*e.g.*, law, accounting, consulting or engineering firms). In these firms, as with most others, the plan sponsor may be just as sophisticated as the sponsor of a larger plan. Moreover, the 100 participant standard is very difficult to administer in practice because member firms may need to track the number of plan participants in each of their clients' plans in order to confirm that each plan meets the definition of institutional investor before institutional sales material is distributed.

Plan sponsors are increasingly demanding sophisticated sales material that addresses specific questions and concerns related to the investment process. We believe that FINRA rules should encourage the distribution of the most useful information available to plan sponsors of all sizes and that a 100 participant standard appears to be an arbitrary threshold that is currently difficult to administer.

Should FINRA not remove the requirement that plans have at least 100 participants, we believe FINRA should consider allowing members to aggregate the number of plan participants across plans offered by a single plan sponsor. Further, to the extent a plan sponsor offers plans in addition to those specified in proposed Rule 2210(a)(4)<sup>32</sup>, we believe this aggregation should be allowed across all plan types offered by the employer. Under the current definition, there are instances where communications to such a plan sponsor regarding one plan may qualify as institutional sales material, while communications regarding another plan offered by the same plan sponsor may not.

Fidelity also continues to recommend that the \$50 million threshold be broadened to include any person or entity with total assets of at least \$5 million. A \$5 million asset threshold has been recognized by the Securities and Exchange Commission under Regulation D as an appropriate level of sophistication for limited offers of securities and would be appropriate in this context.

Finally, the proposed rule contains sufficient protections to allow for these recommended changes. As in the current rule IM 2210-1(2), proposed rule 2210(d)(1) would require member firms that prepare institutional sales material to "consider the nature of the audience to which the

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<sup>32</sup> Proposed rule 2210(a)(4) includes Section 403(b) and Section 457 of the Internal Revenue Code and qualified plans as defined in Section 3(a)(12)(C) of the Exchange Act.

communication will be directed and [must] provide details and explanations appropriate to the audience.” We continue to believe that this requirement, along with the fundamental duty of a member firm to communicate fairly with the public as seen in the general content standards for the FINRA rules, is sufficient to protect investors and supports a broader institutional investor definition.

### **C. *Press Release Exclusion***

The FINRA rule proposals would eliminate a filing exclusion provided for press releases made available only to members of media.<sup>33</sup> FINRA’s rationale for this change is based on the premise that a majority of member firms post press releases on their respective web sites and therefore treat them as public communications. Fidelity recommends that FINRA not adopt this rule change.

Fidelity typically determines with each announcement whether it will provide a release solely to the press and also whether to post it on one or more of our public web sites. A decision is usually based on a number of factors including whether the firm intends to make a broad public announcement or instead solely to alert the media. In some cases, we may decide to provide a press release to the press and later to post the communication to our web sites. We do not believe this approach to handling press releases is unique in the industry. Therefore, we recommend that FINRA not eliminate the filing exclusion.

Moreover, we believe that communications provided solely to the media should not be considered communications regulated by FINRA since they are not used with customers, clients or the public. In many situations, member firms provide background and educational materials concerning products, services and market information to the media. The purpose is to educate the media on investing concepts and alert them to new research, products and services. We understand that, if these communications were to be used with the public, then they could be covered by the rules. However, if the materials are provided only to the media, we do not see a reason why FINRA should regard these material as requiring the same level of investor protections as communications to customers, clients or the public. Accordingly, we recommend that FINRA consider broadening the rule proposal to exclude communications with the media from the definition of communications.

## **VII. Requirement for Certain Members to File Retail Communications Prior to Use**

Proposed FINRA Rule 2210(c)(1) states that “if the [Advertising Regulation] Department determines that a member has departed from the standards of this Rule, it may require that such member file all communications, or the portion of such member’s communications that is related to any specific types or classes of securities or services, with the Department at least 10 businesses days prior to use.” The rule proposal also says that the

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<sup>33</sup> See Rule 2210(c)(8)(G).

Department will notify the member in writing of the type of communications to be filed and the length of time such requirement is in effect.

If a member firm is required by the staff to file certain communications 10 days in advance of use, the firm may effectively be barred from communicating with the public or institutional investors. A determination by the staff may essentially amount to a punitive action against a firm. We believe that before the staff uses this significant measure, it should be required to follow a specific administrative process that allows for notice and comment by the member firm before action is taken.

We are concerned that neither the current rule, nor the proposed change, articulates an administrative process for a member firm that may be subject to a determination by the staff that it must pre-file certain material. Accordingly, we recommend that, before FINRA adopts this rule change, it be required to delineate the administrative process that the FINRA staff will use in making determinations that certain material does not meet FINRA's regulatory standards and requires pre-filing.

#### **VIII. Public Appearances**

FINRA's proposed changes to Rule 2210(f) would require that public appearances meet the general content standards set forth in the communications rules, and specifically the standards applicable to recommendations if the public appearance includes a recommendation of a security. While we agree that public appearances should comply with the general content standards, we echo the ICI's argument that the proposed additional disclosure should not be applicable to recommendations of securities that are made by a presenter spontaneously. We do not believe that it is necessary or practical for a presenter who is an associated person to comply with the standards applicable to recommendations.

We believe that it is entirely unworkable to subject oral communications that may contain a recommendation to the same content requirements as for written communications. Oral communications are most often conversational in nature and not susceptible to monitoring and review by member firms. Interviews of member firm representatives on television, radio or through the Web, for example, are often unscripted and extemporaneous. It would be extremely difficult, if not impossible, for member firms actively to monitor these conversations or communications for instances of recommendations, without inhibiting free communication or ideas and the broadcasting medium. Moreover, it is difficult for the person giving the communications or interview to monitor his or her remarks, particularly if the public appearance is in an interview format or is subject to a time limit. Accordingly, we believe that this provision is an unworkable standard that may have a chilling effect on member firm communications. FINRA offers no countervailing reasons or rationale for the new proposal, and we can think of no benefits derived from its adoption to the investing public or member firms.

## IX. Templates

To help investors compare and contrast fund investments in a standardized, easy to read format and to create cost efficiencies that can benefit investors, member firms often communicate mutual fund performance and other fund information in a standardized, templated format in a variety of media, including hardcopy and electronic. These templates range from basic to complex. Most templates include basic information about a mutual fund, such as the fund's name, a description of the fund (typically its objective, principle strategy and principle risks), performance information, fees and portfolio manager. More complex templates might include fund holdings and composition information, corresponding information about a fund's benchmark as well as common industry measures and ratios such as Alpha, Beta, Standard Deviation, Sharpe Ratio, among others.

Once a member firm has determined an appropriate template format, it may be used to communicate information on one or more mutual funds. The templates are updated based on the type of template and its contents. Fund fact sheet templates, for example, are generally updated quarterly to reflect the most recent quarter-end performance. On the other hand, a retirement plan enrollment guide template might be populated or updated each time a new plan is added or converted to the member firm's platform or each time a plan changes its investment options. When templates are updated, generally only the data associated with a templated field is revised, so that field titles, fund descriptions and applicable disclosures are not changed. The data update is typically statistical in nature; an example of this is fund performance or fund expense data.

Currently, FINRA staff requires filing of each template (assuming it contains fileable content) the first time it is used with the public. Subsequent filings of templates are required only if there are material changes to the templates. Updates of performance and other financial data do not trigger a re-filing requirement.<sup>34</sup>

The wording of the proposed rule limits non-material changes to only statistical and other non-narrative information. The proposed rule states:

A) [Advertisements and sales literature] Retail communications that previously have been filed and that are to be used without material change, including retail communications that are based on templates that were previously filed with the Department the changes to which are limited to updates of ***more recent statistical or other non-narrative information.***<sup>35</sup>

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<sup>34</sup> NASD Interpretive Letter to Forrest R. Foss, T. Rowe Price Associates, Inc., dated January 28, 2002.

<sup>35</sup> Proposed Rule 2210(c)(7)(A) (emphasis added).

This proposed language does not reflect an important need to make changes to non-material narrative data in templates and implies that all narrative changes are material. Examples of non-material narrative changes in templates might include (1) the names listed under the field for the fund's portfolio manager(s), and (2) updated benchmark names (for example, the renaming of the numerous Lehman Brothers indices to Barclays Capital indices). In addition, Fidelity recommends that the proposed rule accommodate alternative narrative language in templates where such alternative language was previously filed with FINRA. For example, a template for a retirement plan enrollment guide might include a section listing a particular plan's investment options. Where the individual fund descriptions included in the guide have previously been filed with FINRA, it should not be necessary to file each populated template merely because the enrollment guide for plan X lists funds A through F, while the one for Plan Y lists funds G through M.

Member firms that service retirement plans or provide access to a mutual fund supermarket type program may provide voluminous aggregate data on the funds they distribute. To provide important fund information in a cost-efficient manner, templates are not only necessary, but effective in presenting comparative data about different investment options. The burden of filing of every populated template with non-material narrative changes would be cost prohibitive and would also impose significant burdens on FINRA review staff. Reviewing non-material changes, be they numeric or narrative will not serve to further investor protection, but will only add to costs that would likely be passed along to investors. Accordingly, Fidelity recommends that the proposed rule be revised to permit non-material changes to both statistical/numeric and narrative data as well as to permit the use of alternate narrative data where such alternate data was previously filed with FINRA and its placement and use in the template does not alter its meaning from that which was filed with FINRA.

## **X. Record Keeping Requirements**

Proposed FINRA Rule 2210(b)(4)(A) sets forth the record-keeping requirements for Retail and Institutional communications. This provision incorporates by reference the record-keeping form and time period requirements of Securities Exchange Act Rule 17a-4. FINRA has proposed revisions to this rule to require firms to keep a record of the name of the person who prepared or distributed the communication.

While we support a requirement to keep the name of the individual who prepared a particular communication, Fidelity does not support the proposal to include a record of the names of the person or persons who distributed the communication. In many cases, the person who prepares material will not be the same person who distributes the communication. In fact, it is quite often the case that many individuals may distribute a particular communication. This requirement to include individuals who distribute a communication is overbroad, and it will be difficult for firms to manage in practice, since communications may be used over months. Keeping track of all the persons who distributed a communication will be a daunting task, and

will also involve training of firm personnel to keep records. This is sure to drive up the cost of distribution of materials, without a commensurate benefit to investor protection.

We note that the record keeping requirements include a requirement to include the source of any statistical table, chart, graph or other illustration used in the communication. Fidelity generally includes a reference to the source directly below tables, charts, graphs or other illustrations. Fidelity would like to confirm that the proposed rule is not imposing any additional requirements with respect to sources.

#### **XI. Transition Period**

FINRA has not proposed a specific implementation time period for the proposed rule proposal. Fidelity recommends that FINRA provide a six-month compliance period for firms to implement the rules. This will allow an appropriate time period for firms to change their communications workflow and record keeping systems to reflect the new categories of content. Further, if FINRA adopts a pre-filing requirement for structured products, we recommend a compliance time period of nine months in order to allow firms to change their compliance procedures and policies and conduct employee trainings and outreach regarding the handling and filing of the content. Similarly, if the requirements for sales charge and expense ratio data sourcing change, we believe a minimum of nine months implementation period is essential due to the significant complexity of related technological challenges.

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Fidelity appreciates the opportunity to comment on this important rule proposal. If you have any questions about our comments or need additional information, please contact the undersigned, or Joseph DeAngelis, Director, or Monika Garofano, Director, at 617-563-7000.

Sincerely yours,

*/s/ Alexander C. Gavis*

Alexander C. Gavis  
Vice President & Associate General Counsel



Ms. Marcia E. Asquith  
November 20, 2009  
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