

November 20, 2009

Marcia E. Asquith  
Senior Vice President and Corporate Secretary  
Office of the Corporate Secretary  
FINRA  
1735 K Street, NW  
Washington, DC 20006-1500

RE: Regulatory Notice 09-55, Communications with the Public

Dear Ms. Asquith,

On September 21, 2009, the Financial Industry Regulatory Authority (FINRA) published Regulatory Notice 09-55 seeking comments on its proposal to rework its rules governing communications with the public (Proposed Rule)<sup>1</sup>. The Proposed Rule seeks to streamline the existing advertising rules by reducing the number of communications categories from six (advertisement, sales literature, correspondence, institutional sales material, independently prepared reprint, and public appearance) to three (institutional communication, retail communication, and correspondence). The Financial Services Institute<sup>2</sup> (FSI) generally supports FINRA's Proposed Rule as a helpful improvement to the existing requirements of NASD Rules 2210<sup>3</sup> and 2211<sup>4</sup>, the Interpretive Materials that follow NASD Rule 2210<sup>5</sup>, and portions of Incorporated NYSE Rule 472<sup>6</sup>. We commend FINRA for their efforts.

#### Background on FSI Members

The independent broker-dealer (IBD) community has been an important and active part of the lives of American investors for more than 30 years. The IBD business model focuses on comprehensive financial planning services and unbiased investment advice. IBD firms also share a number of other similar business characteristics. They generally clear their securities business on a fully disclosed basis; primarily engage in the sale of packaged products, such as mutual funds and variable insurance products; take a comprehensive approach to their clients' financial goals and objectives; and provide investment advisory services through either affiliated registered investment adviser firms or such firms owned by their registered representatives. Due to their

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<sup>1</sup> See FINRA Regulatory Notice 09-55 at

<http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p120005.pdf>

<sup>2</sup> The Financial Services Institute, Voice of Independent Broker-Dealers and Independent Financial Advisors, was formed on January 1, 2004. Our members are broker-dealers, often dually registered as federal investment advisers, and their independent contractor registered representatives. FSI has 116 Broker-Dealer member firms that have more than 152,000 affiliated registered representatives serving more than 14 million American households. FSI also has more than 11,000 Financial Advisor members.

<sup>3</sup> NASD Rule 2210 available at

[http://finra.complinet.com/en/display/display.html?rbid=2403&record\\_id=10467&element\\_id=3617&highlight=2210#r10467](http://finra.complinet.com/en/display/display.html?rbid=2403&record_id=10467&element_id=3617&highlight=2210#r10467)

<sup>4</sup> NASD Rule 2211 available at

[http://finra.complinet.com/en/display/display\\_main.html?rbid=2403&element\\_id=3626](http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=3626)

<sup>5</sup> NASD Rule IM-2210-1 through IM-2210-8 available at

[http://finra.complinet.com/en/display/display\\_main.html?rbid=2403&element\\_id=3618](http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=3618)

<sup>6</sup> NYSE Rule 472 available at

<http://rules.nyse.com/NYSETools/PlatformViewer.asp?searched=1&selectednode=chp%5F1%5F6%5F1%5F2&CiRrestriction=472&manual=%2Fnyse%2Frules%2Fnyse%2Drules%2F>

unique business model, IBDs and their affiliated financial advisors are especially well positioned to provide middle-class Americans with the financial advice, products, and services necessary to achieve their financial goals and objectives.

In the U.S., approximately 98,000 independent financial advisors – or approximately 42.3% percent of all practicing registered representatives – operate in the IBD channel.<sup>7</sup> These financial advisors are self-employed independent contractors, rather than employees of the IBD firms. These financial advisors provide comprehensive and affordable financial services that help millions of individuals, families, small businesses, associations, organizations, and retirement plans with financial education, planning, implementation, and investment monitoring. Clients of independent financial advisors are typically “main street America” – it is, in fact, almost part of the “charter” of the independent channel. The core market of advisors affiliated with IBDs is clients who have tens and hundreds of thousands as opposed to millions of dollars to invest. Independent financial advisors are entrepreneurial business owners who typically have strong ties, visibility, and individual name recognition within their communities and client base. Most of their new clients come through referrals from existing clients or other centers of influence.<sup>8</sup> Independent financial advisors get to know their clients personally and provide them investment advice in face-to-face meetings. Due to their close ties to the communities in which they operate their small businesses, we believe these financial advisors have a strong incentive to make the achievement of their clients’ investment objectives their primary goal.

FSI is the advocacy organization for IBDs and independent financial advisors. Member firms formed FSI to improve their compliance efforts and promote the IBD business model. FSI is committed to preserving the valuable role that IBDs and independent advisors play in helping Americans plan for and achieve their financial goals. FSI’s mission is to ensure our members operate in a regulatory environment that is fair and balanced. FSI’s advocacy efforts on behalf of our members include industry surveys, research, and outreach to legislators, regulators, and policymakers. FSI also provides our members with an appropriate forum to share best practices in an effort to improve their compliance, operations, and marketing efforts.

#### Comments on the Proposed Rule

As stated above, FSI generally supports FINRA’s Proposed Rule as an effort to streamline the existing rules by reducing the number of communications categories from six to three and making other helpful improvements to the existing requirements. We do, however, offer several suggested improvement to the Proposed Rule.

1. **Solely Administrative Exemption** - Proposed Rule section (b)(1)(D) would exempt from the principal-approval requirement any “retail communication” that is “solely administrative in nature.”<sup>9</sup> Endnote 6 of the Regulatory Notice offers the following additional guidance: “This exception to the principal-approval requirement for administrative communications is similar to the current exclusion from FINRA’s filing requirements for advertisements and sales literature solely related to recruitment or changes in a firm’s name, personnel, electronic or postal address, ownership, offices,

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<sup>7</sup> Cerulli Associates Quantitative Update: Advisor Metrics 2007, Exhibit 2.04. Please note that this figure represents a subset of independent contractor financial advisors. In fact, more than 138,000 financial advisors are affiliated with FSI member firms. Cerulli Associates categorizes the majority of these additional advisors as part of the bank or insurance channel.

<sup>8</sup> These “centers of influence” may include lawyers, accountants, human resources managers, or other trusted advisors.

<sup>9</sup> Proposed Rule 2210(b)(1)(D) available at

<http://www.finra.org/web/groups/arbitrationmediation/documents/industry/p120006.pdf>

business structure, partners, telephone and teletype numbers, or concerning a merger with, or acquisition by, another firm. *See* NASD Rule 2210(c)(8)(B)."

While we are generally supportive of a rule change that would exempt administrative communications from the principal-approval requirements, we are concerned that FINRA is contemplating a very limited range of administrative communications. We urge FINRA to clarify that the rule allows firms to determine if a "retail communication" is "solely administrative in nature." For example, firms would like greater clarity that the Proposed Rule grants them the freedom to categorize the following, non-exhaustive list of administrative communications as solely administrative:

- client requests for duplicate account statements,
- communications regarding cost basis information,
- client request for transaction history of their accounts,
- confirmation of variable annuity policy changes such as ownership, address, beneficiary, allocation changes, fund transfers; or surrender periods,
- other type of traditional customer communications that are intended to confirm a customer's knowledge about their account with the firm.

FSI urges FINRA to expand the "solely administrative in nature" exception to include other nonspecific routine communications sent by firms to existing account holders that are not contemplated in the Proposed Rule. Moreover, FINRA should draft the rule in a way to provide firms with flexibility in determining if a "retail communication" is "solely administrative in nature."

2. **Social Networking** – We recommend that FINRA provide guidance in the Proposed Rule on the emerging area of social networking. We are aware that FINRA has released podcasts related to the use of social networking websites, blogs, bulletin boards and chat rooms. We are also aware that there is a FINRA Webinar on the topic of social networking scheduled for December 2009. However, we feel that FINRA should capitalize on the opportunity presented by the Proposed Rule to incorporate guidance related to communications made via social networking web sites.

As FINRA is aware, social networking presents many compliance and supervisory challenges for broker-dealer firms and registered representatives. These challenges include: the proliferation of social networking web sites and tools; the lack of software or other tools to facilitate the proper supervision of these web sites in conformance with NASD Rules 2010 (Standards of Commercial Honor and Principals of Trade), 2210 (Communications with the Public), 3010 (Supervision), and 3110 (Books and Records); and attempting to apply rules that were initially designed for written communications to the digital age.

We would find it extremely helpful if FINRA were to address social networking in the Proposed Rule, and provide member firms with further guidance. We would be interested and willing to participate in any working group or task force that FINRA may create to address any of these concerns.

3. **Recordkeeping for Retail and Institutional Communications** – Proposed Rule section (b)(4)(A) provides that retail communications and institutional communications must be

maintained in compliance with Securities Exchange Act Rule 17a-4.<sup>10</sup> Proposed Rule section (b)(4)(A)(iv) provides that these files must include “the source of any statistical table, chart, graph or other illustration used in the communication.”<sup>11</sup>

We seek further clarification and guidance from FINRA relating to the retention of the source of statistical tables, charts, graphs or other illustrations used in a communication. Specifically, we would like to know if the Proposed Rule requires merely documenting a cite or reference to where the data was obtained, or does the Proposed Rule contemplate that each member retain the actual material that was relied upon for the table, chart, graph or other illustration. FSI believes that the Proposed Rule should require a clear and specific citation to the underlying data that was relied upon to create the table, chart, graph or other illustration. We feel that it would be extremely onerous to expect firms to print and maintain hard or electronic copies of the underlying data that was relied upon to create a table, chart, graph or other illustration. As a result, FSI requests that FINRA provide further clarification and guidance on the retention of the source of statistical tables, charts, graphs or other illustrations used in a communication.

4. **Expanded Disclosure Requirements Regarding Recommendations** – Proposed Rule section (d)(7) would require a registered representative, when making a recommendation in retail communications, correspondence or a public appearance to disclose, (if applicable) that the member or any associated person with the ability to influence the substance of the communication, has a financial interest in any of the securities of the issuer whose securities are being recommended and the nature of the financial interest.<sup>12</sup>

FSI requests clarification on how far this obligation runs through the supervisory chain. For example, is disclosure required by a registered representative if the registered representative’s manager had a financial interest in a security that the registered representative was presenting to a client? Would it stop with that registered representative’s direct manager, or would the disclosure obligation run to the manager’s manager and so on up the supervisory chain to the chief compliance officer? FSI believes that the financial interests of the firm’s registered representatives would be extremely difficult to track on a real-time basis. Accordingly, we request further clarification from FINRA on how far the registered representative’s disclosure obligation runs.

### Conclusion

In summary, we feel that the Proposed Rule is a meaningful effort to streamline and clarify the existing requirements related to communications with the public. As a result, we generally support the Proposed Rule’s adoption, but seek clarification related to the “solely administrative in nature” exemption set out in section (b)(1)(D) of the Proposed Rule, request further guidance related to communications made via social networking media, request clarification on the retention of the source of statistical tables, charts, graphs and other illustrations, and clarification on how far the disclosure obligation runs.

We are committed to constructive engagement in the regulatory process and, therefore, welcome the opportunity to work with you to enhance investor protection and broker-dealer compliance efforts.

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<sup>10</sup> Proposed Rule 2210(b)(4)(A) available at <http://www.finra.org/web/groups/arbitrationmediation/documents/industry/p120006.pdf>

<sup>11</sup> *Id.* at 2210(b)(4)(A)(iv).

<sup>12</sup> *Id.* at 2210(d)(7).

Thank you for your consideration of our comments. Should you have any questions, please contact me at 770 980-8487.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Dale Brown". The signature is fluid and cursive, with the first name "Dale" and the last name "Brown" clearly distinguishable.

Dale E. Brown, CAE  
President & CEO