

Free Writing Prospectuses

Application of Rules on Communications With the Public and Institutional Sales Material and Correspondence to Certain Free Writing Prospectuses

Executive Summary

The content standards, the principal review requirements and applicable filing requirements in NASD Rules 2210 (Communications with the Public) and 2211 (Institutional Sales Material and Correspondence) shall apply to free writing prospectuses distributed by broker-dealers in a manner reasonably designed to lead to their broad unrestricted dissemination, as described in Securities Act Rule 433. By this Notice, FINRA is withdrawing, in part, previous interpretive guidance that excluded free writing prospectuses from the requirements of NASD Rules 2210 and 2211.

Questions regarding this *Notice* should be directed to:

- Joseph E. Price, Senior Vice President, Corporate Financing/Advertising Regulation, at (240) 386-4623; or
- Gary L. Goldsholle, Vice President and Associate General Counsel, Office of General Counsel, at (202) 728-8104.

Background and Discussion

This *Notice* addresses the application of NASD Rules 2210 and 2211 to free writing prospectuses distributed by broker-dealers in a manner reasonably designed to lead to their broad unrestricted dissemination, as described in Securities Act Rule 433.

Securities Act Rule 405 defines a free writing prospectus as a written communication, including an electronic communication, that constitutes an offer to sell or a solicitation to buy securities in a registered offering by means other than the statutory prospectus.¹ The free writing prospectus was introduced as part of the SEC's Securities Offering Reform² and was intended to provide issuers with greater flexibility in the use of

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Notice Type

- Guidance

Suggested Routing

- Advertising
- Compliance
- Legal
- Operations
- Registered Representatives
- Senior Management

Key Topics

- Communications With the Public
- Free Writing Prospectus
- Supervision

Referenced Rules & Notices

- FINRA Rule 5110
- FINRA Rule 5120
- NASD Rule 2210
- NASD Rule 2211
- Securities Act Rule 164
- Securities Act Rule 405
- Securities Act Rule 433

communications during the registered offering process. A free writing prospectus may include information that is not included in the registration statement, but it may not conflict with information in the filed registration statement, including any prospectus and any Securities Exchange Act reports incorporated by reference.³ A free writing prospectus must contain a legend advising investors that:

- ▶ the issuer has filed a registration statement (including a prospectus) with the SEC for the offering to which the communication relates;
- ▶ before investing, the investor should read the prospectus and other documents filed by the issuer; and
- ▶ copies of these documents can be obtained for free through the SEC's website or from the issuer or any underwriter or dealer participating in the offering.⁴

Securities Act Rule 433 requires any offering participant other than the issuer to file any free writing prospectus that is distributed by or on behalf of the offering participant in a manner reasonably designed to lead to its broad unrestricted dissemination.⁵ Previously, FINRA issued interpretive guidance excluding free writing prospectuses from the requirements of NASD Rules 2210 and 2211.⁶ These NASD rules establish standards for the content of communications with the public by broker-dealers, which are designed to ensure that the communications are fair, balanced and not misleading. Rule 2210(b)(1) requires a registered principal to review and approve each advertisement and item of sales literature before it is distributed; this provision has helped ensure compliance with the content standards. Rule 2210(c)(2) requires that firms file advertisements and sales literature regarding certain types of securities, such as registered investment companies and public direct participation programs, with FINRA within 10 business days of first use.

Withdrawal of Previous Interpretive Guidance

By this *Notice*, FINRA is withdrawing previous interpretive guidance on free writing prospectuses that are distributed by a broker-dealer in a manner reasonably designed to lead to broad unrestricted dissemination.⁷ Since FINRA issued that guidance it has become apparent that a free writing prospectus that is distributed by a broker-dealer in a manner reasonably designed to lead to its broad unrestricted dissemination as described by Rule 433 presents the same investor protection concerns as communications regulated by NASD Rules 2210 and 2211. For example, FINRA has seen sales material that seemed to be in serious noncompliance with the content standards of Rule 2210, but was excluded from the application of that rule merely because the broker-dealer asserted that it constituted a free writing prospectus.

While our interpretive guidance was intended to promote the objectives of Rule 433, it has led to inconsistent regulatory treatment of communications that present similar investor protection concerns. For example, investment companies registered under the Investment Companies Act of 1940 are not eligible to use a free writing prospectus under Securities Act Rule 164(f). Thus, a communication concerning an exchange traded fund (ETF) that is a registered investment company must comply with the content, registered principal approval and filing requirements of Rule 2210. On the other hand, a free writing prospectus concerning an ETF that is not a registered investment company would be exempt from the application of Rule 2210.

Therefore, FINRA now interprets Rules 2210 and 2211 to apply to free writing prospectuses distributed by a broker-dealer in a manner reasonably designed to lead to broad unrestricted dissemination. These requirements include the content standards, the principal review requirement and any applicable filing requirement.⁸ FINRA notes that broker-dealers are already required to file such free writing prospectuses with the SEC, and, therefore, filing them with FINRA will not cause delays in the offering process.⁹

Scope of “Broad Unrestricted Dissemination”

The SEC has provided guidance concerning the meaning of the term “broad unrestricted dissemination” and FINRA explicitly incorporates that guidance. Specifically, the SEC has noted that examples of broad unrestricted dissemination of a free writing prospectus by a broker-dealer would include posting such prospectus on an unrestricted website or releasing it to the media.¹⁰ Conversely, the SEC has stated that a broker-dealer does not make a broad unrestricted dissemination if a free writing prospectus is posted to a restricted website or sent directly to its customers, regardless of the number of customers.¹¹

Endnotes

- 1 17 CFR 230.405.
- 2 Securities Exchange Act Release No. 52056 (July 19, 2005), 70 FR 44722 (August 3, 2005) (Order Approving SEC File No. S7-38-04, Securities Offering Reform).
- 3 17 CFR 230.433(c)(1).
- 4 17 CFR 230.433(c)(2).
- 5 17 CFR 230.433(d)(1)(ii). Well-known seasoned issuers and their offering participants, including underwriters, are permitted to use free writing prospectuses at any time. Other eligible issuers and their offering participants may use a free writing prospectus after a registration statement has been filed. Participants in offerings of the securities of non-reporting and unseasoned issuers are required in some instances to accompany or precede the free writing prospectus with the most recent statutory prospectus.
- 6 See Letter from Lisa C. Horrigan, Assistant General Counsel, NASD, to Eileen Ryan, Vice President and Associate General Counsel, Securities Industry Association, and Sarah Starkweather, Regulatory Counsel, The Bond Market Association (August 1, 2006), available at www.finra.org/Industry/Regulation/Guidance/InterpretiveLetters/P017285.
- 7 This *Notice* does not withdraw the guidance in that letter pertaining to any free writing prospectus that is distributed by a broker-dealer in a manner that is *not* reasonably designed to lead to its broad unrestricted dissemination. Accordingly, free writing prospectuses continue to be exempt from the provisions of NASD Rules 2210 and 2211 to the extent they are *not* part of a broad unrestricted dissemination. This *Notice* also does not withdraw the guidance in that letter pertaining to NASD Rules 2710 and 2720 (now FINRA Rules 5110 and 5120).
- 8 For example, if a member uses such a free writing prospectus on behalf of a public direct participation program, the member must file the free writing prospectus with FINRA within 10 business days of first use. Free writing prospectuses for ETFs that are not registered investment companies are not subject to the filing requirements.
- 9 Rule 433(d)(1)(ii) requires filing with the SEC no later than the date of first use. When applicable, Rule 2210(c) generally requires filing with FINRA within 10 business days after first use or publication.
- 10 Securities Exchange Act Release No. 52056, *supra* at 2.
- 11 *Id.*