

Communications With the Public

SEC Approves New Rules Governing Communications With the Public

Effective Date: February 4, 2013

Executive Summary

The SEC approved FINRA's proposed rule change to adopt NASD Rules 2210 and 2211 and NASD Interpretive Materials 2210-1 and 2210-3 through 2210-8 as FINRA Rules 2210 and 2212 through 2216 (collectively, the Communications Rules), and to delete certain provisions of Incorporated NYSE Rule 472 and certain Supplementary Material and Rule Interpretations related to NYSE Rule 472.¹ The Communications Rules become effective on February 4, 2013.

The text of the Communications Rules can be found at www.finra.org/notices/12-29.

Questions concerning this *Notice* should be directed to:

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Background & Discussion

Current Rules Governing Communications With the Public

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

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Notice Type

- ▶ Consolidated Rulebook
- ▶ New Rules

Suggested Routing

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

Key Topics

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

Referenced Rules & Notices

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



NASD Rule 2210 divides communications into six separate categories, as follows:

- ▶ **Advertisement** generally includes written (including electronic) retail communications that do not have a limited audience, such as newspaper, magazine, television and radio advertisements, billboards and websites.
- ▶ **Sales literature** generally includes written (including electronic) retail communications that have a more targeted audience, such as brochures, performance reports, telemarketing scripts, seminar scripts and form letters.
- ▶ **Correspondence** includes written letters, electronic mail, instant messages and market letters sent to (i) one or more existing retail customers; and (ii) fewer than 25 prospective retail customers within a 30 calendar-day period.
- ▶ **Institutional sales material** includes communications that are distributed or made available only to institutional investors. NASD Rule 2211 defines the term “institutional investor” generally to include registered investment companies, insurance companies, banks, registered broker-dealers, registered investment advisers, certain retirement plans, governmental entities, and individual investors and other entities with at least \$50 million in assets.
- ▶ **Independently prepared reprint** includes reprints of articles from independent publications, as well as reports published by independent research firms.
- ▶ **Public appearance** includes unscripted participation in live events, such as interviews, seminars and call-in television and radio shows.

These definitions are important because certain of the principal pre-use approval, filing and content standards may apply differently to each category. For example, members generally must have a principal approve all advertisements, sales literature and independently prepared reprints prior to use. This pre-use approval requirement does not apply to: (1) institutional sales material; (2) public appearances; or (3) correspondence, unless it is sent to 25 or more existing retail customers within a 30 calendar-day period and includes an investment recommendation or promotes a product or service of the firm. While such communications do not require principal pre-use approval, firms still must establish and maintain policies and procedures to supervise them for compliance with applicable standards.

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

Incorporated NYSE Rule 472 requires an “allied member, supervisory analyst or qualified person” to approve prior to use each advertisement, sales literature or other similar type of communication.² The Incorporated NYSE Rule 472 definitions of “advertisement” and “sales literature” are similar to those used in NASD Rule 2210.

The communications rules include both general and specific content standards. Certain general standards apply to all communications, such as requirements that communications be fair and balanced, and provide a sound basis for evaluating the facts in regard to any particular security, industry or service, and prohibitions on omitting material facts whose absence would make the communication misleading. More particular content standards apply to specific issues or securities.

Reorganization of Rules

New FINRA Rule 2210 encompasses, subject to certain changes, the provisions of current NASD Rules 2210 and 2211, NASD Interpretive Materials 2210-1 and 2210-4, and the provisions of Incorporated NYSE Rule 472 that do not pertain to research analysts and research reports. Each of the other Interpretive Materials that follow NASD Rule 2210, except IM-2210-2 (Communications with the Public About Variable Life Insurance and Variable Annuities), have been assigned separate FINRA rule numbers and adopt the same communication categories used in FINRA Rule 2210.³

Communication Categories

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

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

Communications that currently qualify as advertisements and sales literature generally fall under the definition of “retail communication.” In addition, to the extent that a firm distributes or makes available a communication that currently qualifies as an independently prepared reprint to more than 25 retail investors within a 30 calendar-day period, the communication also falls under the definition of “retail communication.”

Correspondence

As discussed above, the definition of “correspondence” has changed in several key respects. Currently, NASD Rule 2211(a)(1) defines “correspondence” as “any written or electronic mail message and any market letter distributed by a member to: (A) one or more of its existing retail customers; and (B) fewer than 25 prospective retail customers within any 30 calendar day period.”

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

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

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

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

Institutional Communications

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

While FINRA Rule 2210 will not apply to a firm’s internal communications once it becomes effective, firms still must supervise these communications, including a firm’s internal communications that train or educate registered representatives. Under NASD Rule 3010, firms must establish, maintain and enforce written procedures to supervise the types of business in which they engage and to supervise associated persons’ activities that are reasonably designed to achieve compliance with applicable securities laws and regulations and with applicable FINRA rules, including the suitability rule and just and equitable principles of trade.⁷ In this regard, a firm’s supervisory policies and procedures concerning internal training and education materials must be reasonably designed to ensure that such materials are fair, balanced and accurate. Firms must determine the extent to which the review of internal communications is necessary in accordance with the supervision of their business⁸ and maintain records of all internal communications relating to their business as a broker-dealer.⁹

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

“Reason to Believe” Standard

The definition of “institutional investor” under both NASD Rule 2211(a)(3) and FINRA Rule 2210(a)(4) specifies that “[n]o member may treat a communication as having been distributed to an institutional investor if the member has reason to believe that the communication or any excerpt thereof will be forwarded or made available to any retail investor.”¹⁰ Although this standard also applies to the current definition of “institutional investor,” some commenters on proposed FINRA Rule 2210 expressed concern that the standard creates uncertainty for firms distributing institutional communications, particularly mutual fund underwriters.

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

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

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

Approval, Review and Recordkeeping Requirements

Principal Pre-Use Approval Requirements for Retail Communications

Currently NASD Rule 2210(b)(1)(A) requires a registered principal of a firm to approve each advertisement, item of sales literature and independently prepared reprint before the earlier of its use or filing with FINRA. FINRA Rule 2210(b)(1)(A) requires an appropriately qualified registered principal of the firm to approve each retail communication before the earlier of its use or filing with FINRA. The principal registration required to approve particular communications depends upon the permissible activities for each principal registration category. The rule change eliminates Incorporated NYSE Rule 472(a)(1), which requires an “allied member, supervisory analyst, or qualified person” to approve in advance each advertisement, sales literature or other similar type of communication by an NYSE member firm.¹¹

NASD Rule 2210(b)(1)(B) permits a Series 16 supervisory analyst approved pursuant to Incorporated NYSE Rule 344 to approve research reports on debt and equity securities. FINRA Rule 2210(b)(1)(B) expands the authority of supervisory analysts to approve certain other types of research-related retail communications. In addition to approving research reports on debt and equity securities, a Series 16 supervisory analyst may approve retail communications as described in NASD Rule 2711(a)(9) (list of research-related

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

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

Exceptions From Principal Pre-Use Approval Requirements for Retail Communications

NASD Rule 2210(b)(1)(D) provides an exception from the principal pre-use approval requirements of NASD Rule 2210(b)(1)(A) for an advertisement, item of sales literature or independently prepared reprint, if, at the time that a firm intends to publish or distribute it: (i) another firm has filed it with FINRA and has received a letter from FINRA stating that it appears to be consistent with applicable standards; and (ii) the firm using the communication in reliance on this exception has not materially altered it and will not use it in a manner that is inconsistent with the conditions of the Advertising Regulation Department’s letter. FINRA Rule 2210(b)(1)(C) preserves this exception for retail communications.

FINRA Rule 2210(b)(1)(D) excepts from the principal pre-use approval requirements of Rule 2210(b)(1)(A) three additional categories of retail communications, provided that the firm supervises and reviews the communications in the same manner as required for supervising and reviewing correspondence pursuant to NASD Rule 3010(d). These communications include: (i) any retail communication that is excepted from the definition of “research report” pursuant to NASD Rule 2711(a)(9)(A), unless the communication makes any financial or investment recommendation; (ii) any retail communication that is posted on an online interactive electronic forum; and (iii) any retail communication that does not make any financial or investment recommendation or otherwise promote a product or service of the firm.

As discussed above, the first category generally carries forward a current exception from the principal pre-use approval requirements for market letters.¹³ The second category codifies a current interpretation of the rules governing communications with the public that allows firms to supervise communications posted on interactive electronic forums in the same manner as is required for supervising correspondence.¹⁴

Currently firms are not required to have a principal approve prior to use correspondence that is sent to 25 or more existing retail customers within any 30 calendar-day period and that does not make any financial or investment recommendation or otherwise promote a product or service of the firm.¹⁵ The third category applies this same standard to all retail communications, rather than just correspondence sent to existing retail customers. Accordingly, a firm will not be required to approve prior to use any retail communication that does not make any financial or investment recommendation or otherwise promote a product or service of the firm. Firms will still be required to supervise such retail communications in the same manner as correspondence.

FINRA expects firms to apply the same analysis used today to analyze correspondence regarding principal pre-use approval to all retail communications. For example, this exception would cover communications that are administrative or informational in nature, such as communications that inform investors that their account statement is available online or the date on which a security in an investor's portfolio is expected to pay a dividend.

FINRA Rule 2210(b)(1)(E) allows FINRA, pursuant to the FINRA Rule 9600 Series, to grant an exemption from the principal pre-use approval requirements of paragraph (b)(1)(A) for good cause shown after taking into consideration all relevant factors, provided that the exemption is consistent with the purposes of FINRA Rule 2210, the protection of investors and the public interest. NASD Rule 2210 contains no similar authority. However, as a general matter, FINRA intends to employ this exemptive authority only in unique circumstances and on a case-by-case basis. Any exemptive relief that is granted under this provision will apply only to the firms that have applied for such relief. If FINRA determines that similar relief is appropriate for all firms, it will file a proposed rule change with the SEC to accomplish this result.¹⁶

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

Correspondence and Institutional Communications

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

Recordkeeping Requirements

NASD Rule 2210(b)(2) requires firms to maintain all advertisements, sales literature and independently prepared reprints in a separate file for a period beginning on the date of first use and ending three years from the date of last use. The file must include:

- (i) a copy of the communication and the dates of first and last use;
- (ii) the name of the registered principal who approved the communication and the date approval was given, unless approval was not required pursuant to NASD Rule 2210(b)(1)(D); and
- (iii) for any communication for which principal pre-use approval was not required pursuant to NASD Rule 2210(b)(1)(D), the name of the other firm that filed the communication with FINRA and a copy of the corresponding Advertising Regulation Department review letter.

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

FINRA Rule 2210(b)(4)(A) sets forth the recordkeeping requirements for retail and institutional communications; generally, these requirements mirror current recordkeeping requirements. This provision incorporates by reference the recordkeeping format, medium and retention period requirements of SEA Rule 17a-4.¹⁸

FINRA Rule 2210(b)(4)(A) specifies that such records must include:

- ▶ a copy of the communication and the dates of first and (if applicable) last use;
- ▶ the name of any registered principal who approved the communication and the date that approval was given;
- ▶ in the case of a retail communication or institutional communication that is not approved prior to first use by a registered principal, the name of the person who prepared or distributed the communication;¹⁹
- ▶ information concerning the source of any statistical table, chart, graph or other illustration used in the communication; and
- ▶ for retail communications that rely on the exception under paragraph (b)(1)(C), the name of the firm that filed the retail communication with FINRA and a copy of the Advertising Regulation Department's review letter.

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

Filing Requirements and Review Procedures

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

New Member Firm Filing Requirements

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

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

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

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

Pre-Use Filing Requirements

NASD Rule 2210(c)(4) currently requires firms to file certain communications at least 10 business days prior to first use and to withhold them from use until any changes specified by the Advertising Regulation Department have been made. These communications include advertisements and sales literature for certain registered investment companies that include self-created rankings, advertisements concerning collateralized mortgage obligations (CMOs) and advertisements concerning security futures.

FINRA Rule 2210(c)(2) revises the categories of communications that fall within this pre-use filing requirement. These include retail communications concerning any registered investment company that include self-created rankings, retail communications concerning security futures and retail communications that include bond mutual fund volatility ratings. The requirement to file retail communications concerning security futures prior to first use would not apply to (i) retail communications that are submitted to another self-regulatory organization having comparable standards pertaining to such communications, and (ii) retail communications in which the only reference to security futures is contained in a listing of the services of a firm.

Concurrent With Use Filing Requirements

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

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

FINRA Rule 2210(c)(3) revises the categories of communications that must be filed within 10 business days of first use or publication. Similar to NASD Rule 2210(c)(2), FINRA Rule 2210(c)(3) requires retail communications concerning registered investment companies and public direct participation programs to be filed within 10 business days of first use. However, FINRA Rule 2210(c)(3) requires that *all* retail communications concerning closed-end registered investment companies be filed with FINRA. Currently NASD Rule 2210 requires firms to file within 10 business days of first use advertisements and sales literature concerning closed-end funds that are distributed during the fund's initial public offering (IPO) period, as well as all advertisements and sales literature concerning continuously offered (interval) closed-end funds.²⁰ The new filing requirement also applies to retail communications that are distributed after a closed-end fund's IPO period.

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

Consistent with current requirements, FINRA Rule 2210(c)(3)(C) requires firms to file within 10 business days of first use templates for written reports produced by, or retail communications concerning, an investment analysis tool, as it is defined in FINRA Rule 2214.²¹

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

FINRA Rule 2210(c)(3)(E) requires firms to file within 10 business days of first use all retail communications concerning any security that is registered under the Securities Act of 1933 and that is derived from or based on a single security, a basket of securities, an index, a commodity, a debt issuance or a foreign currency, not included within the requirements of paragraphs (c)(1), (c)(2) or sub-paragraphs (A) through (D) of paragraph (c)(3). No similar filing requirement exists under current rules. The purpose of this provision is to require the filing of retail communications concerning publicly offered structured or derivative products, such as exchange-traded notes or registered grantor trusts, that currently are not required to be filed. This provision excludes retail communications that are already subject to a separate filing requirement found elsewhere in paragraph (c), such as retail communications concerning registered investment companies or public direct participation programs.²³

Other Filing Requirements

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

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

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

Exclusions From Filing Requirements

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

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

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

NASD Rule 2210(c)(8)(B) excludes from filing advertisements and sales literature solely related to recruitment or changes in a firm's name, personnel, electronic or postal address, ownership, offices, business structure, officers or partners, telephone or teletype numbers, or concerning a merger with or acquisition by, another member firm. This exclusion has been replaced by FINRA Rule 2210(c)(7)(C), which excludes retail communications that do not make any financial or investment recommendation or otherwise promote a product or service of the firm.²⁵

NASD Rules 2210(c)(8)(C), (D), (F) and (G) exclude from filing advertisements and sales literature that do no more than identify a national securities exchange symbol of the firm or identify a security for which the firm is a registered market maker; advertisements and sales literature that do no more than identify the firm or offer a specific security at a stated price; certain "tombstone" advertisements governed by Securities Act Rule 134; and press releases that are made available only to members of the media. FINRA Rules 2210(c)(7)(D), (E), (G) and (H) carry forward these filing exclusions for retail communications that meet the same standards.

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

FINRA Rule 2210(c)(7)(F) modifies this filing exclusion by also not covering free writing prospectuses that are filed with the SEC pursuant to Securities Act Rule 433(d)(1)(ii).²⁷ As discussed in [Regulatory Notice 10-52](#), FINRA is concerned that broadly disseminated free writing prospectuses present the same investor protection concerns as communications regulated by NASD Rules 2210 and 2211. Accordingly, FINRA interprets Rules 2210 and 2211 to apply to broker-prepared, widely disseminated free writing prospectuses.²⁸ Firms should note that FINRA requires firms to file the Management's Discussion of Fund

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

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

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

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

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

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

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

Exemptive Authority

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

FINRA Rule 2210(c)(9)(B) allows FINRA to grant an exemption from the concurrent-with-use filing requirements of paragraph (c)(3) (*i.e.*, requirement to file certain retail communications) for good cause shown after taking into consideration all relevant factors, provided that the exemption is consistent with the purposes of Rule 2210, the protection of investors and the public interest. Generally this relief is limited to the same extent as in FINRA Rule 2210(b)(1)(E), which authorizes FINRA to grant exemptive relief from the principal pre-use approval requirements in FINRA Rule 2210(b)(1)(A) for retail communications, subject to the same standards.

Content Standards

FINRA Rule 2210(d) reorganizes but largely incorporates the current content standards applicable to communications with the public that are found in NASD Rule 2210(d), NASD IM-2210-1, NASD IM-2210-4 and Incorporated NYSE Rules 472(i) and (j), subject to certain changes. Content standards that currently apply to advertisements and sales literature generally apply to retail communications.

General Content Standards

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

NASD Rule 2210(d)(1)(B) prohibits a firm from making any false, exaggerated, unwarranted or misleading statement or claim in any communication, and prohibits the publication, circulation or distribution of any communication that the firm knows or has reason to know contains any untrue statement of a material fact or is otherwise false or misleading. FINRA Rule 2210(d)(1)(B) incorporates the same standards as NASD Rule 2210(d)(1)(B) without change, other than expressly prohibiting promissory statements or claims. FINRA staff already interprets NASD Rule 2210(d)(1)(B) to prohibit promissory language in member communications, and Incorporated NYSE Rule 472(i) specifically prohibits promissory statements.

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

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

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

Predictions and Projections of Performance

NASD Rule 2210(d)(1)(D) currently prohibits communications from predicting or projecting performance, implying that past performance will recur or making any exaggerated or unwarranted claim, opinion or forecast. This provision permits, however, a hypothetical illustration of mathematical principles, provided that it does not predict or project the performance of an investment or investment strategy.

FINRA Rule 2210(d)(1)(F) carries forward the current prohibition of performance predictions and projections, as well as the allowance for hypothetical illustrations of mathematical principles. The rule also clarifies that FINRA allows two additional types of projections of performance in communications with the public that are not reflected in the text of NASD Rule 2210(d)(1)(D). First, FINRA allows projections of performance in reports produced by investment analyst tools that meet the requirements of NASD IM-2210-6.³³ Second, FINRA has permitted research reports on debt or equity securities to include price targets under certain circumstances.³⁴

Accordingly, FINRA Rule 2210(d)(1)(F) clarifies that it does not prohibit an investment analysis tool, or a written report produced by such a tool, that meets the requirements of FINRA Rule 2214. FINRA Rule 2210(d)(1)(F) also clarifies that it does not prohibit a price target contained in a research report on debt or equity securities, provided that the price target has a reasonable basis, the report discloses the valuation methods used to determine the price target, and the price target is accompanied by disclosure concerning the risks that may impede achievement of the price target.³⁵

Comparisons and Disclosure of a Firm's Name

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

NASD Rule 2210(d)(2)(C) requires all advertisements and sales literature to (i) prominently disclose the name of the firm; (ii) reflect any relationship between the firm and any non-member or individual who is also named in the communication; and (iii) if the communication includes other names, reflect which products and services are offered by the firm. FINRA Rule 2210(d)(3) applies these standards to correspondence as well as to

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

Tax Considerations

NASD IM-2210-1(5) specifies that in advertisements and sales literature, references to tax-free or tax-exempt income must indicate which income taxes apply, or which do not, unless income is free from all applicable taxes, and provides an example of income from an investment company investing in municipal bonds that is free from federal income tax but subject to state or local income taxes. FINRA Rule 2210(d)(4)(A) carries forward this rule for all retail communications and correspondence.

NASD IM-2210-1(4) prohibits communications with the public from characterizing income or investment returns as tax-free or exempt from income tax when tax liability is merely postponed or deferred, such as when taxes are payable upon redemption. FINRA Rule 2210(d)(4)(B) carries forward this prohibition for all communications.

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

- ▶ must depict both the taxable investment and the tax-deferred investment using identical investment amounts and identical assumed gross investment rates of return, which may not exceed 10 percent per annum;
- ▶ must use and identify actual federal income tax rates;
- ▶ is permitted (but not required) to reflect an actual state income tax rate, provided that the communication prominently discloses that the illustration is applicable only to investors that reside in the identified state;
- ▶ if it is intended for a target audience, must reasonably reflect its tax bracket or brackets as well as the tax character of capital gains and ordinary income;
- ▶ must reflect the impact of taxes during any specific investment payout period identified in the illustration;
- ▶ may not assume an unreasonable period of tax deferral; and
- ▶ must include the following disclosures, as applicable:
 - ▶ the degree of risk in the investment's assumed rate of return, including a statement that the assumed rate of return is not guaranteed;
 - ▶ the possible effects of investment losses on the relative advantage of the taxable versus tax-deferred investments;
 - ▶ the extent to which tax rates on capital gains and dividends would affect the taxable investment's return;

- ▶ the fact that ordinary income tax rates will apply to withdrawals from a tax-deferred investment;
- ▶ its underlying assumptions;³⁶
- ▶ the potential impact resulting from federal or state tax penalties (*e.g.*, for early withdrawals or use on non-qualified expenses); and
- ▶ that an investor should consider his or her current and anticipated investment horizon and income tax bracket when making an investment decision, as the illustration may not reflect these factors.

Much of this language reflects previous guidance that FINRA has provided regarding tax-deferral illustrations.³⁷ By placing this rule language in FINRA Rule 2210, FINRA is clarifying that these standards apply to any illustration of tax-deferred versus taxable compounding, regardless of whether it appears in a communication promoting variable insurance products or some other communication, such as one discussing the benefits of investing through a 401(k) retirement plan or individual retirement account. Of course, any communication concerning variable insurance products also must comply with standards specifically applicable to such communications.³⁸

Disclosure of Fees, Expenses and Standardized Performance

NASD Rule 2210(d)(3) currently requires communications with the public, other than institutional sales material and public appearances, that present the performance of a non-money market mutual fund, to disclose the fund's maximum sales charge and operating expense ratio as set forth in the fund's current prospectus fee table. FINRA Rule 2210(d)(5) maintains this standard for retail communications and correspondence.

Testimonials

NASD Rule 2210(d)(1)(E) currently provides that, if any testimonial in a communication with the public concerns a technical aspect of investing, the person making the testimonial must have the knowledge and experience to form a valid opinion. FINRA Rule 2210(d)(6)(A) carries forward this standard for communications.

NASD Rule 2210(d)(2)(A) requires any advertisement or sales literature that includes a testimonial concerning the investment advice or investment performance of a firm or its products to prominently disclose the fact that: (i) the testimonial may not be representative of the experience of other customers; (ii) the testimonial is no guarantee of future performance or success; and (iii) if more than a nominal sum is paid, it is a paid testimonial. FINRA Rule 2210(d)(6)(B) carries forward these disclosure requirements for retail communications and correspondence, and requires disclosure regarding payment if more than \$100 in value (rather than a "nominal sum") is paid for the testimonial.

Recommendations

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

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

- (i) was making a market in the recommended securities, or the underlying security if the recommended security is an option or security future, or that the member or associated person will sell to or buy from customers on a principal basis;
- (ii) and/or its officers or partners have a financial interest in the securities of the recommended issuer and the nature of the financial interest, unless the extent of the financial interest is nominal; and
- (iii) was manager or co-manager of a public offering of any securities of the issuer whose securities are recommended in the past 12 months.

FINRA Rule 2210(d)(7)(A) retains the first and third disclosure requirements, but modifies the second disclosure requirement. As revised, a retail communication that includes a recommendation of securities must disclose, if applicable, that the firm or any associated person directly and materially involved in the preparation of the content has a financial interest in any of the securities of the issuer whose securities are recommended, and the nature of the financial interest, unless the extent of the financial interest is nominal. This change would substantially narrow the number of parties whose financial interests have to be disclosed, particularly for large firms with numerous officers and partners.³⁹ Rule 2210(d)(7)(A) also carries forward the current requirement of NASD IM-2210-1(6)(A) to have a reasonable basis for the recommendation.

NASD IM-2210-1(6)(B) requires a firm to provide, or offer to furnish upon request, available investment information supporting the recommendation, and if the recommendation is for an equity security, to provide the price at the time the recommendation is made. FINRA Rule 2210(d)(7)(B) carries forward these requirements without change.

FINRA Rule 2210(d)(7)(C) amends the provisions governing communications that include past recommendations, which are currently found in NASD IM-2210-1(6)(C) and (D) and Incorporated NYSE Rule 472(j)(2). The new standards mirror those found in Rule 206(4)-1(a)(2) under the Investment Advisers Act of 1940, which apply to investment adviser advertisements that contain past recommendations. FINRA Rule 2210(d)(7)(C), like Rule 206(4)-1(a)(2), generally prohibits retail communications from referring to past specific recommendations of the firm that were or would have been profitable to any person. The rule allows, however, a retail communication or correspondence to set out or offer to furnish a list of all recommendations as to the same type, kind, grade or classification of securities made by the firm within the immediately preceding period of

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

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

Prospectuses Filed With the SEC

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

Public Appearances

Currently, a “public appearance” is defined as “participation in a seminar, forum (including an interactive electronic forum), radio or television interview, or other public appearance or public speaking activity.”⁴¹ Public appearances are a separate category of communications within the broader term “communications with the public.” As such, public appearances must meet the same standards that apply to all communications with the public, such as the requirements that they be fair and balanced and not include false or misleading statements. However, public appearances are not subject to the principal pre-use approval requirements of NASD Rule 2210(b)(1)(A), nor must a firm file a public appearance with FINRA.

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

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

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

Rule 2210(f) also requires firms to establish appropriate written policies and procedures to supervise public appearances, and makes clear that scripts, slides, handouts or other written (including electronic) materials used in connection with public appearances are considered communications for purposes of FINRA Rule 2210.⁴³

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

Use of Investment Company Rankings in Retail Communications

FINRA Rule 2212 replaces NASD IM-2210-3 with regard to standards applicable to the use of investment company rankings in communications. The standards generally remain the same. FINRA has revised the standards applicable to investment company rankings for more than one class of an investment company with the same portfolio. Such rankings also must be accompanied by prominent disclosure of the fact that the investment companies or classes have different expense structures. FINRA Rule 2212 adds a new paragraph (h) that excludes from the rule's coverage reprints or excerpts of articles or reports that are excluded from filing requirements pursuant to FINRA Rule 2210(c)(7)(I).

Requirements for the Use of Bond Mutual Fund Volatility Ratings

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

Requirements for the Use of Investment Analysis Tools

FINRA Rule 2214 replaces NASD IM-2210-6 with regard to standards applicable to the use of investment analysis tools. The standards generally remain the same with some minor changes. Currently NASD IM-2210-6 requires a firm that offers or intends to offer an investment analysis tool, within 10 days of first use, to provide the Advertising Regulation Department access to the tool and file with the department any template for written reports produced by, or advertisements and sales literature concerning, the tool. FINRA Rule 2214(a) requires firms to provide the department with access to the tool and to file any template for written reports produced by, or any retail communication concerning, the tool within 10 *business* days of first use. This revision makes the access and filing requirement time frame consistent with other filing requirements under FINRA Rule 2210(c).

FINRA Rule 2214 also relocates certain language that is currently contained either in NASD IM-2210-6's text or in footnotes to the rule. Supplementary Material 06 to FINRA Rule 2214 provides that a retail communication that contains only an incidental reference to an investment analysis tool does not have to include the disclosures otherwise required for retail communications that advertise an investment analysis tool, and does not have to be filed with FINRA unless otherwise required by FINRA Rule 2210.⁴⁵

In addition, the Supplementary Material provides that, if a retail communication refers to an investment analysis tool in more detail but does not provide access to the tool or the results generated by the tool, the communication must include only the disclosures required by paragraphs (c)(2) and (c)(4) of Rule 2214. Supplementary Material 07 to FINRA Rule 2214 provides additional detail regarding disclosure required by paragraph (c)(3) of FINRA Rule 2214. This language is currently found in footnote 4 to NASD IM-2210-6. However, FINRA has added a specific requirement to disclose whether the investment analysis tool is limited to searching, analyzing or in any way favoring securities in which the member serves as underwriter.

Guidelines for Communications With the Public Regarding Security Futures

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

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

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

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

FINRA Rule 2215(b)(4)(D) clarifies that communications that contain the historical performance of security futures must disclose all relevant costs, which must be reflected in the performance.

Communications With the Public About Collateralized Mortgage Obligations

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

Endnotes

1. See Securities Exchange Act Release No. 66681 (March 29, 2012), 77 FR 20452 (April 4, 2012) (Notice of Filing of Amendment No. 3 and Order Granting Accelerated Approval of a Proposed Rule Change; File No. SR-FINRA-2011-035). The current FINRA rulebook consists of: (1) FINRA Rules; (2) NASD Rules; and (3) rules incorporated from NYSE (Incorporated NYSE Rules). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE. The FINRA Rules apply to all FINRA members, unless such rules have a more limited application by their terms. For more information about the rulebook consolidation process, see [Information Notice 03/12/03](#) (Rulebook Consolidation Process).
2. Incorporated NYSE Rule 472(a)(1).
3. Proposed FINRA Rule 2211 (Communications with the Public About Variable Insurance Products), which would replace NASD Interpretive Material 2210-2, will be the subject of a separate proposal.
4. FINRA has modified the definition of “institutional investor” in FINRA Rule 2210 to clarify that the term includes multiple employee benefit plans and multiple qualified plans offered to employees of the same employer, provided that the plans in the aggregate have at least 100 participants.
5. NASD Rule 2211(a)(5). NASD Rule 2711(a)(9)(A) excludes from the definition of “research report” certain enumerated written research-related communications, such as discussions of broad-based indices, commentaries on economic, political or market conditions, and technical analyses concerning the demand and supply for a sector, index or industry based on trading

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- volume and price. FINRA revised the definition of “correspondence” to include market letters in February 2009 to allow firms to send market letters to traders and other investors who base their decisions on timely market analysis without having to have a principal approve them in advance. Previously, members were required to approve market letters prior to use. See [Regulatory Notice 09-10](#) (SEC Approves Rule Relating to Supervision of Market Letters) (February 2009).
6. See, e.g., NASD *Regulatory & Compliance Alert*, “Ask the Analyst” (September 1998), (content standards of rules governing communications with the public apply to a member’s internal communications); see also letter from Barbara Z. Sweeney, NASD to Katherine A. England, Assistant Director, SEC (November 4, 2002) (letter responding to comments on prior proposed change to rules governing communications with the public making clear rules apply to internal communications), and Securities Exchange Act Release No. 47820 (May 9, 2003), 68 FR 27116 (May 19, 2003) (File No. SR-NASD-00-12) (noting these comments and the NASD’s response in SEC order approving the proposed rule change). FINRA also has settled a number of enforcement actions against members involving misleading internal educational and training materials that alleged violations of NASD Rules 2210 and 2211. See, e.g., NASD Letter of Acceptance, Waiver and Consent No. EAF0401000001 (MML Distributors, LLC) (Oct. 2005); NASD Letter of Acceptance, Waiver and Consent No. EAF0401240001 (AFSG Securities Corp.) (Oct. 2005); FINRA Letter of Acceptance, Waiver and Consent No. 20080130571 (US Bancorp Investments, Inc.) (Feb. 12, 2010); and FINRA Letter of Acceptance, Waiver and Consent No. 2008015443301 (UBS Financial Services, Inc.) (April 8, 2011).
 7. See NASD Rule 3010(b)(1).
 8. See [Regulatory Notice 07-59](#) (FINRA Provides Guidance Regarding the Review and Supervision of Electronic Communications) (December 2007). [Regulatory Notice 07-59](#) makes clear that a firm must have reasonably designed procedures for the supervisory review of those internal communications that are of a subject matter that require review under FINRA rules and the federal securities laws.
 9. See SEA Rule 17a-4(a)(4); FINRA Rule 4511(a).
 10. FINRA Rule 2210(a)(4).
 11. The term “allied member” was largely deleted from the Incorporated NYSE Rules in 2008, and thus is not being carried over as part of FINRA Rule 2210(b)(1)(A). See [Regulatory Notice 08-64](#) (Oct. 2008) (Amendments to Incorporated NYSE Rules to Reduce Regulatory Duplication).
 12. NASD Rule 1022(f)(1) requires every person engaged in the supervision of options and security futures sales practices to be registered as a Registered Options and Security Futures Principal. Approval of retail communications concerning security futures falls within this requirement.
 13. See NASD Rules 2211(a)(1), (a)(5) and (b)(1)(A); see also [Regulatory Notice 09-10](#) (SEC Approves Rule Relating to Supervision of Market Letters) (February 2009).
 14. See [Regulatory Notice 10-06](#) (Guidance on Blogs and Social Networking Web Sites) (January 2010).
 15. See NASD Rule 2211(b)(1)(A).
 16. See letter from Annette L. Nazareth, Director, Division of Market Regulation, SEC, to T. Grant Callery, Executive Vice President & General Counsel, National Association of Securities Dealers, re: SRO Exemption Authority (March 27, 2003).

17. These rules require each firm to establish written procedures that are appropriate to its business, size, structure and customers for the review by a registered principal of correspondence and institutional sales material. The procedures must be in writing and be designed to reasonably supervise each registered representative. Where such procedures do not require review of all such communications prior to use or distribution, they must include provision for the education and training of associated persons as to the member's procedures, documentation of such education and training, and surveillance and follow-up to ensure that such procedures are implemented and adhered to. Evidence of such implementation must be maintained and made available to FINRA upon request.
18. SEA Rule 17a-4(b) requires broker-dealers to preserve certain records for a period of not less than three years, the first two in an easily accessible place. Among these records, pursuant to SEA Rule 17a-4(b)(4), are "[o]riginals of all communications received and copies of all communications sent (and any approvals thereof) by the member, broker or dealer (including inter-office memoranda and communications) relating to its business as such, including all communications which are subject to rules of a self-regulatory organization of which the member, broker or dealer is a member regarding communications with the public. As used in this paragraph, the term communications includes sales scripts." SEA Rule 17a-4(f) permits broker-dealers to maintain and preserve these records on "micrographic media" or by means of "electronic storage media," as defined in the rule and subject to a number of conditions.
19. To the extent clerical staff is employed in the preparation or distribution of the communication, the records should include the name of the person on whose behalf the communication was prepared or distributed.
20. *See NASD Regulatory & Compliance Alert, "Ask the Analyst" (Winter 1999) p. 13.*
21. *See NASD Rule 2210(c)(2)(D).*
22. *See NASD Rule 2210(c)(4)(B).*
23. This filing requirement also does not apply to options communications, which are governed by FINRA Rule 2220. FINRA Rule 2220 employs the same communications categories as NASD Rules 2210 and 2211. FINRA intends to amend Rule 2220 at a later date to conform its communications categories to those used in FINRA Rule 2210.
24. *See Letter from Thomas M. Selman, NASD, to Forrest R. Foss, T. Rowe Price Associates, Inc. (January 28, 2002).* If a member changed the template's presentation in any material respect, however, this exclusion would not apply.
25. This filing exception has the same scope as the exception from the principal pre-use approval requirements for retail communications that do not make any financial or investment recommendation or otherwise promote a product or service of the member. *See FINRA Rule 2210(b)(1)(D)(iii).*
26. *See NASD Rule 2210(c)(8)(E).*
27. Securities Act Rule 433(d)(1)(ii) requires any offering participant, other than the issuer, to file with the SEC a free writing prospectus that is used or referred to by such offering participant and distributed by or on behalf of such person in a manner reasonably designed to lead to its broad unrestricted dissemination.

28. See *Regulatory Notice 10-52* (Application of Rules on Communications with the Public and Institutional Sales Material and Correspondence to Certain Free Writing Prospectuses) (October 2010). This filing requirement does not apply to a free writing prospectus prepared by or on behalf of the issuer of securities. See 17 C.F.R. §§ 230.433(d)(1)(i) and 230.433(h)(1).
29. The filing exclusion for reprints of independently prepared articles or reports incorporates the conditions currently included in the definition of “independently prepared reprint.” See NASD Rule 2210(a)(6)(A). This filing exclusion also covers independently prepared investment company reports described in NASD Rule 2210(a)(6)(B).
30. See NASD Rule 2210(a)(5).
31. The NYSE Listed Company Manual requires listed companies to “release quickly to the public any news or information which might reasonably be expected to materially affect the market for its securities.” NYSE Listed Company Manual section 202.05. Section 202.06 of the Manual (the “immediate release policy”) requires this information to be disclosed by means of any Regulation FD compliant method, such as a press release.
32. This provision is consistent with NASD Rule 2210(c)(10).
33. See NASD IM-2210-6 (Requirements for the Use of Investment Analysis Tools). NASD IM-2210-6 will be codified as FINRA Rule 2214.
34. See NASD Rule 2711(h)(7).
35. These standards mirror those required for price targets contained in research reports on equity securities under NASD Rule 2711(h)(7).
36. These assumptions may include, for example, the age at which an investor may begin withdrawing funds from a tax-deferred account, the actual federal tax rates applied in the hypothetical taxable illustration, any state income tax rate applied in the illustration, and the charges associated with the hypothetical investment.
37. See “NASD Reminds Members of Their Responsibilities Regarding Hypothetical Tax-Deferral Illustrations in Variable Annuity Illustrations,” *NASD Member Alert* (May 10, 2004).
38. See NASD IM-2210-2.
39. FINRA has found that the current rules governing disclosures of financial interests in connection with recommendations contained in advertisements and sales literature, which apply to financial interests of all officers and partners, do not lead to useful disclosure when a firm has a large number of officers or partners. See NASD IM-2210-1(6)(A)(ii).
40. The content standards do not apply to a free writing prospectus prepared by or on behalf of the issuer of securities. See 17 C.F.R. §§ 230.433(d)(1)(i) and 230.433(h)(1).
41. NASD Rule 2210(a)(5).
42. FINRA Rule 2210(f)(2).
43. The requirement to establish supervisory policies and procedures for public appearances is consistent with NASD Rule 3010(b) and Incorporated NYSE Rule 472(l).
44. FINRA Rule 2210(f)(5).
45. This provision is consistent with footnote 3 to NASD IM-2210-6.
46. See NASD IM-2210-7(b).