

*Required fields are shown with yellow backgrounds and asterisks.*

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SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549  
Form 19b-4

File No.\* SR - 2011 - \* 035

Amendment No. (req. for Amendments \*)

Proposed Rule Change by Financial Industry Regulatory Authority  
Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934Initial \* ☒ Amendment \* ☐ Withdrawal ☐Section 19(b)(2) \* ☒ Section 19(b)(3)(A) \* ☐ Section 19(b)(3)(B) \* ☐

Rule

Pilot ☐ Extension of Time Period  
for Commission Action \* ☐ Date Expires \* ☐ 19b-4(f)(1) ☐ 19b-4(f)(4)  
☐ 19b-4(f)(2) ☐ 19b-4(f)(5)  
☐ 19b-4(f)(3) ☐ 19b-4(f)(6)Exhibit 2 Sent As Paper Document  
☐Exhibit 3 Sent As Paper Document  
☐**Description**

Provide a brief description of the proposed rule change (limit 250 characters, required when Initial is checked \*).

Proposed Rule Change to Adopt FINRA Rules 2210, 2212, 2213, 2214, 2215, and 2216 in the Consolidated FINRA Rulebook

**Contact Information**

Provide the name, telephone number and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the proposed rule change.

First Name \* Philip Last Name \* Shaikun  
Title \* Associate Vice President and Associate General Counsel  
E-mail \* philip.shaikun@finra.org  
Telephone \* (202) 728-8451 Fax (202) 728-8264**Signature**

Pursuant to the requirements of the Securities Exchange Act of 1934,

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized officer.

Date 07/14/2011

By Patrice Gliniecki

(Name \*)

Senior Vice President and Deputy General Counsel

(Title \*)

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

Patrice Gliniecki,

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EDFS website.

**Form 19b-4 Information (required)**

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The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

**Exhibit 1 - Notice of Proposed Rule Change (required)**

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications**

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Exhibit Sent As Paper Document

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Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

**Exhibit 3 - Form, Report, or Questionnaire**

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Exhibit Sent As Paper Document

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Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

**Exhibit 4 - Marked Copies**

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

**Exhibit 5 - Proposed Rule Text**

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The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

**Partial Amendment**

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

**1. Text of Proposed Rule Change**

(a) Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act,” “Exchange Act” or “SEA”),<sup>1</sup> Financial Industry Regulatory Authority, Inc. (“FINRA”) (f/k/a National Association of Securities Dealers, Inc. (“NASD”)) is filing with the Securities and Exchange Commission (“SEC” or “Commission”) a 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, and to delete paragraphs (a)(1), (i), (j) and (l) of Incorporated NYSE Rule 472, Incorporated NYSE Rule Supplementary Material 472.10(1), (3), (4) and (5), and 472.90, and Incorporated NYSE Rule Interpretations 472/01 and 472/03 through 472/11. The proposed rule change would renumber NASD Rules 2210 and 2211 and NASD Interpretive Materials 2210-1 and 2210-4 as FINRA Rule 2210, NASD Interpretive Material 2210-3 as FINRA Rule 2212, NASD Interpretive Material 2210-5 as FINRA Rule 2213, NASD Interpretive Material 2210-6 as FINRA Rule 2214, NASD Interpretive Material 2210-7 as FINRA Rule 2215, and NASD Interpretive Material 2210-8 as FINRA Rule 2216.

The text of the proposed rule change is attached as Exhibit 5 to this rule filing.

(b) Upon Commission approval and implementation by FINRA of the proposed rule change, NASD Rules 2210 and 2211, NASD Interpretive Materials 2210-1, 2210-3, 2210-4, 2210-5, 2210-6, 2210-7, and 2210-8, paragraphs (a)(1), (i), (j) and (l) of Incorporated NYSE Rule 472, Incorporated NYSE Rule Supplementary Material 472.10(1), (3), (4) and (5), and 472.90, and Incorporated NYSE Rule Interpretations

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

472/01 and 472/03 through 472/11 will be eliminated from the current FINRA rulebook.

(c) Not applicable.

**2. Procedures of the Self-Regulatory Organization**

At its meeting on April 15, 2009, the FINRA Board of Governors authorized the filing of the proposed rule change with the SEC. No other action by FINRA is necessary for the filing of the proposed rule change.

FINRA will announce the implementation date of the proposed rule change in a Regulatory Notice to be published no later than 90 days following Commission approval. The implementation date will be no later than 365 days following Commission approval.

**3. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

(a) Purpose

As part of the process of developing a new consolidated rulebook (“Consolidated FINRA Rulebook”),<sup>2</sup> FINRA is proposing 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, and to delete paragraphs (a)(1), (i), (j) and (l) of Incorporated NYSE Rule 472, Incorporated NYSE Rule Supplementary Material 472.10(1), (3), (4) and (5), and 472.90, and Incorporated NYSE Rule Interpretations 472/01 and 472/03 through 472/11.

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<sup>2</sup> The current FINRA rulebook consists of (1) FINRA Rules; (2) NASD Rules; and (3) rules incorporated from NYSE (“Incorporated NYSE Rules”) (together, the NASD Rules and Incorporated NYSE Rules are referred to as the “Transitional Rulebook”). 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 (“Dual Members”). 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, March 12, 2008 (Rulebook Consolidation Process).

### Current Rules Governing Communications with the Public

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

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 the principal approval, filing and content standards 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 or (2) 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 member. While such communications do not require principal pre-use approval, members still must establish and maintain policies and procedures to supervise them for compliance with applicable standards.

Members must file with the FINRA Advertising Regulation Department (“Department”) for review certain advertisements and sales literature. For example, advertisements and sales literature concerning investment companies, variable insurance products and public direct participation programs, and advertisements concerning government securities, must be filed within 10 business days of first use, but members are not required to file independently prepared reprints, correspondence or institutional sales material. The filing requirements also differ based on the member using the material and its content.

Members that previously have not filed advertisements with the Department must file all advertisements at least 10 business days prior to first use for a one-year period following the date the first advertisement was filed. Additionally, under NASD Rule 2210 and related Interpretive Materials, all members must file advertisements concerning collateralized mortgage obligations (“CMOs”) and security futures, and advertisements and sales literature concerning registered investment companies that include unpublished or self-created rankings or performance comparisons, at least 10 business days prior to first use, and must withhold them from publication until any changes specified by the Department have been made.

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.<sup>3</sup> The 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.

#### Proposed Rule Change

#### *Reorganization of Rules*

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<sup>3</sup> NYSE Rule 472(a)(1).

The proposed rule change would create a new FINRA Rule 2210 that would encompass, 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 would receive its own FINRA rule number and would adopt the same communication categories used in FINRA Rule 2210.<sup>4</sup>

#### *Communication Categories*

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

- *Institutional communication* would include communications that fall within the current definition of “institutional sales material” under NASD Rule 2211(a)(2): written (including electronic) communications that are distributed or made available only to institutional investors. “Institutional investor” generally would have the same definition as under NASD Rule 2211(a)(3).<sup>5</sup>

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<sup>4</sup> Proposed FINRA Rule 2211 (Communications with the Public About Variable Insurance Products), which would replace NASD Interpretive Material 2210-2, is the subject of a separate proposed rule change. See Securities Exchange Act Release No. 61107 (December 3, 2009), 74 FR 65180 (December 9, 2009) (Notice of Filing File No. SR-FINRA-2009-070).

<sup>5</sup> FINRA has modified the definition of “institutional investor” in proposed 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. FINRA also has added a Supplementary Material to clarify that a member’s internal written (including electronic) communications that are intended to educate or train registered persons about the products or services offered by a member are considered institutional communications pursuant to paragraph (a)(3) of proposed FINRA Rule 2210. See proposed FINRA Rule 2210.01. Accordingly, such internal communications are subject to both the provisions of proposed FINRA Rule 2210



- *Retail communication* would include 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” would include any person other than an institutional investor, regardless of whether the person has an account with the member.
- *Correspondence* would include any written (including electronic) communication that is distributed or made available to 25 or fewer retail investors within any 30 calendar-day period.

The proposal would eliminate the current definitions of “advertisement,” “sales literature,” “institutional sales material,” “public appearance” and “independently prepared reprint” in NASD Rule 2210, as well as all of the definitions in NASD Rule 2211.<sup>6</sup> The proposal also would eliminate the definitions of “communication,” “advertisement,” “market letter” and “sales literature” in Incorporated NYSE Rule 472.

Communications that currently qualify as advertisements and sales literature generally would fall under the definition of “retail communication.” In addition, to the extent that a member distributed or made 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 would fall under the definition of “retail

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and NASD Rule 3010(d) (Review of Transactions and Correspondence). See also Securities Exchange Act Release No. 64736 (June 23, 2011), 76 FR 38245 (June 29, 2011) (Notice of Filing File No. SR-FINRA-2011-028) (proposing, among other things, to adopt NASD Rule 3010(d) as FINRA Rule 3110(b)(4), subject to certain changes).

<sup>6</sup> NASD Rule 2211 currently defines the terms “correspondence,” “institutional sales material,” “institutional investor,” “existing retail customer,” “prospective retail customer” and “market letter.”

communication.” Communications that currently qualify as “institutional sales material” would fall within the definition of “institutional communication.” Some communications that currently qualify as “correspondence” would continue to fall within that definition. However, communications sent to more than 25 retail investors within a 30 calendar-day period in all cases would be considered retail communications.<sup>7</sup>

Although the proposal would eliminate the terms “public appearance” and “independently prepared reprint,” as discussed below, the proposal would retain with respect to these communication categories much of the substance of the exceptions from the filing requirements and limited application of the content standards.

#### *Approval, Review and Recordkeeping Requirements*

Currently NASD Rule 2210(b)(1)(A) requires a registered principal of the member to approve each advertisement, item of sales literature and independently prepared reprint before the earlier of its use or filing with the Department. Proposed FINRA Rule 2210(b)(1)(A) would require an appropriately qualified registered principal

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<sup>7</sup> The definition of “correspondence” in NASD Rule 2211 currently includes market letters as well as written letters and electronic mail messages that are sent to one or more existing retail customers and fewer than 25 prospective retail customers within a 30 calendar-day period. “Market letter” is defined to include any communication excepted from the definition of “research report” pursuant to NASD Rule 2711(a)(9)(A). See NASD Rule 2211(a)(5). FINRA revised the definition of “correspondence” to include market letters in February 2009 in order to allow members 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 (February 2009). Proposed FINRA Rule 2210 would continue to allow members to send retail communications that are excepted from the definition of “research report” pursuant to NASD Rule 2711(a)(9)(A) without having a registered principal approve the communication prior to use, provided that a member supervises and reviews such communications in the same manner as correspondence. See proposed FINRA Rule 2210(b)(1)(D).

of the member to approve each retail communication before the earlier of its use or filing with the Department. The principal registration required to approve particular communications would depend upon the permissible activities for each principal registration category.<sup>8</sup> The proposed rule change would eliminate 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.<sup>9</sup>

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.<sup>10</sup> Proposed FINRA Rule 2210(b)(1)(B) would continue this provision without substantive change.<sup>11</sup>

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<sup>8</sup> Currently NASD Rule 1022(g) permits a General Securities Sales Supervisor to approve sales literature as defined in NASD Rule 2210, but does not permit persons within this category to approve advertisements. FINRA separately sought comment on a proposal that would amend the General Securities Sales Supervisor registration category to remove the restriction on approving advertisements, and to permit persons within this registration category to approve retail communications as defined in proposed FINRA Rule 2210. See Regulatory Notice 09-70 (December 2009).

<sup>9</sup> The term “allied member” was largely deleted from the Incorporated NYSE Rules in 2008, and thus is not being carried over as part of proposed FINRA Rule 2210(b)(1)(A). See Regulatory Notice 08-64 (October 2008).

<sup>10</sup> FINRA separately sought comment on a proposal that would adopt a stand-alone permissive registration category for Supervisory Analysts. See Regulatory Notice 09-70 (December 2009).

<sup>11</sup> NASD Rule 2210(b)(1)(C) currently requires a registered principal qualified to supervise security futures activities to approve each advertisement or item of sales literature concerning security futures. This requirement would continue going forward with respect to retail communications concerning security futures. Nevertheless, this provision is being eliminated as redundant given the requirement under proposed FINRA Rule 2210(b)(1)(A) that an appropriately qualified principal approve each retail communication.

NASD Rule 2210(b)(1)(D) provides an exception from the principal 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 member intends to publish or distribute it: (i) another member has filed it with the Department and has received a letter from the Department stating that it appears to be consistent with applicable standards; and (ii) the member 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 Department's letter. Proposed FINRA Rule 2210(b)(1)(C) would preserve this exception for retail communications.

Proposed FINRA Rule 2210(b)(1)(D) would except from the principal approval requirements of proposed FINRA Rule 2210(b)(1)(A) three additional categories of retail communications, provided that the member supervises and reviews such 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); (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 member.

The first category generally carries forward a current exception from the principal pre-use approval requirements for market letters.<sup>12</sup> The second category codifies a current interpretation of the rules governing communications with the public that allows members to supervise communications posted on interactive electronic forums in the

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<sup>12</sup> See NASD Rules 2211(a)(1), (a)(5) and (b)(1)(A); see also Regulatory Notice 09-10 (February 2009).

same manner as is required for supervising correspondence.<sup>13</sup> The third category broadens a current principal pre-use approval exception for 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 member.<sup>14</sup> Unlike the current principal pre-use approval exception, this exception would apply to all retail communications.<sup>15</sup>

Proposed FINRA Rule 2210(b)(1)(E) would allow FINRA, pursuant to the FINRA Rule 9600 Series, to grant an exemption from the principal 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.

Proposed FINRA Rule 2210(b)(1)(F) would provide that, notwithstanding any other provision of FINRA Rule 2210, a registered principal must approve a communication prior to the member filing it with the Department. Currently NASD Rule 2210(b)(1)(A) requires a principal to approve an advertisement, item of sales literature or

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<sup>13</sup> See Regulatory Notice 10-06 (January 2010).

<sup>14</sup> See NASD Rule 2211(b)(1)(A).

<sup>15</sup> Thus, the current rules require firms to make the determination of whether correspondence that is sent to 25 or more existing retail customers within a 30 calendar-day period requires principal pre-use approval because it makes a financial or investment recommendation or otherwise promotes a product or service of the member. FINRA would expect firms to apply the same analysis going forward regarding principal pre-use approval with respect to all retail communications. FINRA generally considers this exception to cover communications that are more 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. Communications that are intended to educate investors about products or services, however, do not fall within this exception.

independently prepared reprint before the earlier of its use or filing with the Department. Proposed FINRA 2210(b)(1)(F) is intended to clarify that an appropriately qualified principal must approve any communication that is filed with the Department, even if a communication otherwise would come under an exception to the principal approval requirements of proposed FINRA Rule 2210(b)(1)(A).

NASD Rule 2211(b)(1) and NASD Rule 3010(d) impose certain supervisory and review requirements with regard to a member's correspondence and institutional sales material.<sup>16</sup> Proposed FINRA Rules 2210(b)(2) and (3) generally would maintain the supervision and review standards for correspondence and institutional communications that are currently found in NASD Rules 2211 and 3010(d).

Currently NASD Rule 2210(b)(2) requires members 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 such approval was not required pursuant to NASD Rule

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<sup>16</sup> These rules require each member 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.

2210(b)(1)(D);<sup>17</sup> and (iii) for any communication for which principal approval was not required pursuant to NASD Rule 2210(b)(1)(D), the name of the member that filed the communication with the Department and a copy of the corresponding Department review letter. NASD Rule 2211(b)(2) requires members 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 such communication. NASD Rules 3010(d)(3)<sup>18</sup> and 3110(a)<sup>19</sup> require members to retain correspondence of registered representatives as prescribed by SEA Rule 17a-4.

Proposed FINRA Rule 2210(b)(4)(A) would set forth the record-keeping requirements for retail and institutional communications; generally, these requirements would mirror current record-keeping requirements. This provision incorporates by

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<sup>17</sup> As noted above, NASD Rule 2210(b)(1)(D) creates an exception from the principal approval requirements of NASD Rule 2210(b)(1)(A) for any advertisement, item of sales literature or independently prepared reprint if, at the time that a member intends to publish or distribute it: (i) another member has filed it with the Department and has received a letter from the Department stating that it appears to be consistent with applicable standards; and (ii) the member using it 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 Department's letter.

<sup>18</sup> FINRA is proposing to adopt NASD Rule 3010(d)(3) as FINRA Rule 3110.11 (Retention of Correspondence and Internal Communications), subject to certain changes, in the Consolidated FINRA Rulebook. See Securities Exchange Act Release No. 64736 (June 23, 2011), 76 FR 38245 (June 29, 2011) (Notice of Filing File No. SR-FINRA-2011-028 (Proposed Rule Change to Adopt the Consolidated FINRA Supervision Rules).

<sup>19</sup> The SEC has approved the adoption of the general recordkeeping requirements of NASD Rule 3110(a) as FINRA Rule 4511, subject to certain changes. FINRA Rule 4511 becomes effective on December 5, 2011. See Securities Exchange Act Release No. 63784 (January 27, 2011), 76 FR 5850 (February 2, 2011) (Order Approving File No. SR-FINRA-2010-052); Regulatory Notice 11-19 (April 2011).

reference the record-keeping format, medium and retention period requirements of SEA Rule 17a-4.<sup>20</sup>

Proposed FINRA Rule 2210(b)(4)(A) specifies that such records would have to 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;<sup>21</sup>
- 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 proposed FINRA Rule 2210(b)(1)(C), the name of the member that filed the retail

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<sup>20</sup> 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.

<sup>21</sup> 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.



communication with the Department and a copy of the Department's review letter.

Proposed FINRA Rule 2210(b)(4)(B) cross-references NASD Rules 3010(d)(3)<sup>22</sup> and 3110(a)<sup>23</sup> with respect to correspondence record-keeping requirements.

*Filing Requirements and Review Procedures*

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

NASD Rule 2210(c)(5)(A) currently requires a member that previously has not filed advertisements with the Department or another self-regulatory organization to file its initial advertisement with the Department at least 10 business days prior to use. This filing requirement continues for a year after the initial filing. Proposed FINRA Rule 2210(c)(1)(A) would trigger the new member one-year filing requirement beginning on the date reflected in the Central Registration Depository (CRD®) system that the firm's FINRA membership became effective, rather than on the date a member first files an advertisement with the Department. Although proposed FINRA Rule 2210 no longer defines the term "advertisement," this new member filing requirement would only apply to retail communications that currently fall under the "advertisement" definition, such as generally accessible websites, print media communications, and television and radio commercials.

NASD Rule 2210(c)(5)(B) currently authorizes the Department to require a member to file all of its advertisements and/or sales literature, or the portion of the

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<sup>22</sup> See supra note 17.

<sup>23</sup> See supra note 18.

member's material relating to specific types or classes of securities or services, with the Department at least 10 business days prior to use, if the Department determines that the member has departed from NASD Rule 2210's standards. Proposed FINRA Rule 2210(c)(1)(B) would carry forward this authority and apply it to all of a member's communications (rather than just advertisements or sales literature).

NASD Rule 2210(c)(4) currently requires members 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 Department have been made. These communications include advertisements and sales literature for certain registered investment companies that include self-created rankings, advertisements concerning CMOs, and advertisements concerning security futures.

Proposed FINRA Rule 2210(c)(2) would revise 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 member.

Proposed FINRA Rule 2210(c)(3) would revise the categories of communications that must be filed within 10 business days of first use or publication. Similar to NASD Rule 2210(c)(2), proposed FINRA Rule 2210(c)(3) would require retail communications

concerning registered investment companies and public direct participation programs to be filed within 10 business days of first use. However, the proposal for the first time would require that *all* retail communications concerning closed-end registered investment companies be filed with FINRA. Currently NASD Rule 2210 requires members 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.<sup>24</sup> The proposed filing requirement also would apply to retail communications that are distributed after a closed-end fund’s IPO period. FINRA believes that investors deserve the same protections concerning retail communications about closed-end funds that are distributed after the IPO period as those that are distributed during the IPO period.

Proposed FINRA Rule 2210(c)(3)(C) would require members to file within 10 business days of first use all retail communications concerning government securities. Currently this requirement only applies to advertisements concerning such securities.<sup>25</sup> Consistent with current requirements, proposed FINRA Rule 2210(c)(3)(D) would require members to file within 10 business days of first use templates for written reports produced by, or retail communications concerning an investment analysis tool, as such term is defined in proposed FINRA Rule 2214.<sup>26</sup>

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<sup>24</sup> See “Ask the Analyst,” Regulatory & Compliance Alert (Winter 1999) p. 13.

<sup>25</sup> See NASD Rule 2210(c)(2)(C).

<sup>26</sup> See NASD Rule 2210(c)(2)(D).

Proposed FINRA Rule 2210(c)(3)(E) would require members to file within 10 business days of first use retail communications concerning CMOs that are registered under the Securities Act of 1933 (“Securities Act”). Currently members are required only to file advertisements concerning CMOs, but must file them at least 10 business days prior to first use.<sup>27</sup>

Under proposed FINRA Rule 2210(c)(3)(F), members would have to file within 10 business days of first use all retail communications concerning any security that is registered under the Securities Act 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 (E) of paragraph (c)(3). The purpose of this provision is to require the filing of retail communications concerning publicly offered structured 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 proposed paragraph (c), such as retail communications concerning registered investment companies or public direct participation programs.

Consistent with current rules, proposed FINRA Rule 2210(c)(4) provides that, if a member has filed a draft version or “story board” of a television or video retail communication pursuant to a filing requirement, then the member also must file the final filmed version within 10 business days of first use or broadcast.<sup>28</sup>

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<sup>27</sup> See NASD Rule 2210(c)(4)(B).

<sup>28</sup> See NASD Rule 2210(c)(6).

Proposed FINRA Rule 2210(c)(5) specifies that a member must provide with each filing the actual or anticipated date of first use, the name, title and CRD® number of the registered principal who approved the communication, and the date of approval. These requirements generally carry forward the current requirements of NASD Rule 2210(c)(1).

Proposed FINRA Rule 2210(c)(6) provides that each member's written communications may be subject to a spot-check procedure, and that members must submit requested material within the time frame specified by the Department. This provision is consistent with current rules.<sup>29</sup>

Proposed FINRA Rule 2210(c)(7) generally duplicates the current exclusions from the filing requirements under NASD Rule 2210(c)(8), with certain modifications. Proposed paragraph (c)(7)(A) would continue the current filing exclusion for retail communications that previously have been filed with the Department and that are to be used without material change.<sup>30</sup> Proposed paragraph (c)(7)(B) would add an exclusion for retail communications that are based on templates that were previously filed with the Department, the changes to which are limited to updates of more recent statistical or other non-narrative information.<sup>31</sup> Proposed paragraph (c)(7)(C) would exclude retail

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<sup>29</sup> See NASD Rule 2210(c)(7).

<sup>30</sup> See NASD Rule 2210(c)(8)(A).

<sup>31</sup> This exclusion is based in part on an earlier staff interpretation concerning how NASD Rule 2210's approval, record-keeping and filing requirements apply to statistical updates contained in pre-existing templates. See Letter from Thomas M. Selman, NASD, to Forrest R. Foss, T. Rowe Price Associates, Inc., dated January 28, 2002. If a member changed the template's presentation in any material respect, however, this exclusion would not apply.

communications that do not make any financial or investment recommendation or otherwise promote a product or service of the member.<sup>32</sup>

Proposed paragraphs (c)(7)(D), (E), (G) and (H) would preserve for retail communications the current filing exclusions for advertisements and sales literature that do no more than identify a national securities exchange symbol of the member or identify a security for which the member is a registered market maker; advertisements and sales literature that do no more than identify the member 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.<sup>33</sup>

Proposed paragraph (c)(7)(F) would modify the current filing exclusion for prospectuses and other documents that have been filed with the SEC or any state.<sup>34</sup> The current filing exclusion does not cover investment company omitting prospectuses published pursuant to Securities Act Rule 482. As modified, this filing exclusion also would not cover free writing prospectuses that are filed with the SEC pursuant to Securities Act Rule 433(d)(1)(ii).<sup>35</sup> As discussed in Regulatory Notice 10-52, FINRA is concerned that broadly disseminated free writing prospectuses present the same investor

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<sup>32</sup> This filing exception would have the same scope as the proposed 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 proposed FINRA Rule 2210(b)(1)(D)(iii).

<sup>33</sup> See NASD Rules 2210(c)(8)(C), (D), (F) and (G).

<sup>34</sup> See NASD Rule 2210(c)(8)(E).

<sup>35</sup> 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.

protection concerns as communications regulated by NASD Rules 2210 and 2211.

Accordingly, FINRA interprets NASD 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.<sup>36</sup> This proposed modification would codify the guidance provided in that Regulatory Notice.

Proposed paragraph (c)(7)(I) would maintain the filing exclusion for reprints of independently prepared articles or reports currently found in NASD Rule 2210(c)(8)(H).<sup>37</sup>

Proposed paragraphs (c)(7)(J) and (K) would maintain the current filing exclusions for correspondence and institutional sales material.<sup>38</sup> Proposed paragraph (c)(7)(L) would exclude from filing communications that refer to types of investments solely as part of a listing of products or services offered by the member.<sup>39</sup>

Proposed paragraph (c)(8) would provide that communications excluded from the filing requirements pursuant to paragraphs (c)(7)(H) through (K) would be deemed filed with FINRA for purposes of Section 24(b) of the Investment Company Act and Rule 24b-3 thereunder. This provision is consistent with NASD Rule 2210(c)(8).

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<sup>36</sup> See Regulatory Notice 10-52 (October 2010).

<sup>37</sup> 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 would also cover independently prepared investment company reports described in NASD Rule 2210(a)(6)(B).

<sup>38</sup> See NASD Rules 2210(c)(8)(I) and (J).

<sup>39</sup> NASD Rule 2210(c)(9) similarly excludes from the filing requirements 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.

Proposed FINRA Rule 2210(c)(9)(A) would allow FINRA to exempt pursuant to the FINRA Rule 9600 Series, a member from the pre-use filing requirements of paragraph (c)(1)(A) for good cause shown.<sup>40</sup> Proposed paragraph (c)(9)(B) would allow FINRA to grant an exemption from the filing requirements of paragraph (c)(3) 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 would be limited to the same extent as in proposed paragraph (b)(1)(E), which would authorize FINRA to grant exemptive relief from the principal approval requirements in proposed FINRA Rule 2210(b)(1)(A) for retail communications, subject to the same standards.

#### *Content Standards*

Proposed 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 would apply to retail communications.

Proposed FINRA Rule 2210(d)(1)(A) incorporates the current standards of NASD Rule 2210(d)(1)(A) without substantive change.

Proposed FINRA Rule 2210(d)(1)(B) incorporates the current standards of NASD Rule 2210(d)(1)(B) largely without change, except that it would expressly prohibit promissory statements or claims. The Department staff already interprets NASD Rule

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This provision is consistent with NASD Rule 2210(c)(10).



2210(d)(1)(B) to prohibit promissory language in member communications, and Incorporated NYSE Rule 472(i) specifically prohibits promissory statements.

Proposed FINRA Rule 2210(d)(1)(C) incorporates the current standards of NASD Rule 2210(d)(1)(C) without change.

Proposed FINRA Rule 2210(d)(1)(D) generally incorporates the standards currently found in NASD IM-2210-1(1), with only minor, non-substantive changes.

Proposed FINRA Rule 2210(d)(1)(E) generally incorporates the standards currently found in NASD IM-2210-1(2), although in a more abbreviated fashion.

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.

Proposed FINRA Rule 2210(d)(1)(F) would carry forward the current prohibition of performance predictions and projections, as well as, the allowance for hypothetical illustrations of mathematical principles. The proposal also would clarify 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.<sup>41</sup> Second, FINRA has permitted research

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<sup>41</sup> See NASD IM-2210-6 (Requirements for the Use of Investment Analysis Tools). NASD IM-2210-6 will be codified as FINRA Rule 2214 under the proposed rule change.

reports on debt or equity securities to include price targets under certain circumstances.<sup>42</sup>

Accordingly, proposed FINRA Rule 2210(d)(1)(F) would clarify 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. Proposed FINRA Rule 2210(d)(1)(F) also would clarify 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.<sup>43</sup>

Proposed FINRA Rule 2210(d)(2) incorporates the standards currently found in NASD Rule 2210(d)(2)(B) without substantive change.

NASD Rule 2210(d)(2)(C) requires all advertisements and sales literature to: (i) prominently disclose the name of the member, and allows a fictional name by which the member is commonly recognized or which is required by any state or jurisdiction; (ii) reflect any relationship between the member 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 member. Proposed FINRA Rule 2210(d)(3) would apply these standards to correspondence as well as to retail communications. Members would be permitted to use the name under which a member's broker-dealer business is conducted as disclosed on the member's Form BD, as well as a

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<sup>42</sup> See NASD Rule 2711(h)(7).

<sup>43</sup> These standards mirror those required for price targets contained in research reports on equity securities under NASD Rule 2711(h)(7).

fictional name by which a member is commonly recognized or which is required by any state or jurisdiction.

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. Proposed FINRA Rule 2210(d)(4)(A) would carry 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. Proposed FINRA Rule 2210(d)(4)(B) would carry forward this prohibition for all communications.

Proposed FINRA Rule 2210(d)(4)(C) would add new language concerning comparative illustrations of the mathematical principles of tax-deferred versus taxable compounding.

First, the illustration would have to 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. Second, the illustration would have to use and identify actual federal income tax rates. Third, the illustration would be 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. Fourth, the tax rates used in the illustration that is intended for a target audience would have to reasonably reflect its tax bracket or brackets as well as the tax character of capital gains and ordinary income. Fifth, if the illustration covers an investment's payout period, the illustration would have to reflect the impact of taxes during this period. Sixth, the illustration could not assume an unreasonable period of tax deferral.

Seventh, the illustration would have to 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;
- Its underlying assumptions;<sup>44</sup>
- 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.

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<sup>44</sup> 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.

Much of this language reflects previous guidance that FINRA has provided regarding tax-deferral illustrations.<sup>45</sup> By placing this rule language in proposed 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.<sup>46</sup>

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. Proposed FINRA Rule 2210(d)(5) would maintain this standard for retail communications and correspondence.

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. Proposed FINRA Rule 2210(d)(6)(A) carries forward this standard for communications.

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<sup>45</sup> See "NASD Reminds Members of Their Responsibilities Regarding Hypothetical Tax-Deferral Illustrations in Variable Annuity Illustrations," NASD Member Alert (May 10, 2004).

<sup>46</sup> See NASD IM-2210-2; see also Securities Exchange Act Release No. 61107 (December 3, 2009), 74 FR 65180 (December 9, 2009) (Notice of Filing File No. SR-FINRA-2009-070) (Proposed Rule Change to Adopt FINRA Rule 2211 (Communications with the Public About Variable Insurance Products)).

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 member or its products to prominently disclose: (i) the fact that the testimonial may not be representative of the experience of other customers; (ii) the fact that the testimonial is no guarantee of future performance or success; and (iii) if more than a nominal sum is paid, the fact that it is a paid testimonial. Proposed 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.

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

First, the proposal would apply these standards to retail communications and public appearances. Currently the standards apply only to advertisements and sales literature.

Second, NASD IM-2210-1(6)(A) requires disclosure of certain specified conflicts of interest to the extent applicable. These disclosures include: (i) if the member 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) if the member 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) if the member was manager or co-manager of a public offering of any

securities of the recommended issuer in the past 12 months. Proposed FINRA Rule 2210(d)(7)(A) would carry forward the first and third disclosures, but would modify the second disclosure to limit it to financial interests of the member or any associated person with the ability to influence the content of the communication, 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 members with numerous officers and partners.<sup>47</sup>

Proposed FINRA Rule 2210(d)(7)(B) would require a member 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. This provision would carry forward the current requirements of NASD IM-2210-6(B).

Third, proposed FINRA Rule 2210(d)(7)(C) would amend 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 proposed 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.<sup>48</sup>

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<sup>47</sup> 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).

<sup>48</sup> Proposed FINRA Rule 2210(d)(7)(C), like Rule 206(4)-1(a)(2), generally would prohibit retail communications from referring to past specific recommendations of the member that were or would have been profitable to any person. The rule would allow, however, a retail communication or correspondence to set out or

Fourth, proposed FINRA Rule 2210(d)(7)(D) expressly would exclude from its coverage communications that meet the definition of “research report” or that are public appearances by a research analyst for purposes of NASD Rule 2711 and that include all of the applicable disclosures required by that rule. Proposed FINRA Rule 2210(d)(7)(D) also would exclude any communication that recommends only registered investment companies or variable insurance products.<sup>49</sup>

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.”<sup>50</sup> 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

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offer to furnish a list of all recommendations as to the same type, kind, grade or classification of securities made by the member within the immediately preceding period of not less than one year. The list would have to provide certain information regarding each recommended security and include a prescribed cautionary legend warning investors not to assume that future recommendations will be profitable.

<sup>49</sup> FINRA is proposing to exclude communications that recommend only registered investment companies or variable insurance products because it believes that recommendations of these products do not raise the same kinds of conflicts of interest as recommendations of other types of securities, since they are pooled investment vehicles rather than securities of a single issuer. Nevertheless, there may be other types of sales-related conflicts of interest raised when members recommend such securities. FINRA has addressed these types of conflicts through its rules governing sales of these products. See NASD Rule 2830 (Investment Companies Securities) and FINRA Rule 2320 (Variable Contracts of an Insurance Company); see also Securities Exchange Act Release No. 64386 (May 3, 2011), 76 FR 26779 (May 9, 2011) (Notice of Filing File No. SR-FINRA-2011-018).

<sup>50</sup> NASD Rule 2210(a)(5).



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 member file a public appearance with the Department.

In the interest of simplification, the term “public appearance” is no longer a separate communication category. Nevertheless, proposed FINRA Rule 2210(f) sets forth many of the same general standards that would apply to public appearances that exist currently. Public appearances would have to meet the general “fair and balanced” standards of proposed paragraph (d)(1). Unlike the current rules governing public appearances, the disclosure requirements applicable to recommendations in proposed paragraph (d)(7) also would apply if the public appearance included a recommendation of a security. The proposal also would require members 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 proposed FINRA Rule 2210.<sup>51</sup>

#### *Use of Investment Company Rankings in Retail Communications*

Proposed FINRA Rule 2212 would replace NASD IM-2210-3 with regard to standards applicable to the use of investment company rankings in communications. The standards generally would 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

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<sup>51</sup> The requirement to establish supervisory policies and procedures for public appearances is consistent with NASD Rule 3010(b) and Incorporated NYSE Rule 472(l).

the fact that the investment companies or classes have different expense structures. The proposal would add a new paragraph (h) that would exclude from the proposed rule's coverage reprints or excerpts of articles or reports that are excluded from the Department's filing requirements pursuant to proposed FINRA Rule 2210(c)(7)(I).

*Requirements for the Use of Bond Mutual Fund Volatility Ratings*

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

*Requirements for the Use of Investment Analysis Tools*

Proposed FINRA Rule 2214 would replace NASD IM-2210-6 with regard to standards applicable to the use of investment analysis tools. The standards generally would remain the same with some minor changes. Currently NASD IM-2210-6 requires a member that offers or intends to offer an investment analysis tool, within 10 days of first use, to provide the 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. Proposed FINRA Rule 2214(a) would require members 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 proposed FINRA Rule 2210(c).

The proposal also would move some language that is currently contained either in NASD IM-2210-6's text or in footnotes to Supplementary Material that follows the Rule. Proposed Supplementary Material 2214.06 would provide that a retail communication

that contains only an incidental reference to an investment analysis tool would not have to include the disclosures otherwise required for retail communications that advertise an investment analysis tool, and would not have to be filed with FINRA unless otherwise required by FINRA Rule 2210.<sup>52</sup> In addition, the Supplementary Material would provide 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 would only have to include the disclosures required by paragraphs (c)(2) and (c)(4) of proposed Rule 2214. Proposed Supplementary Material 2214.07 provides additional detail regarding disclosure required by paragraph (c)(3) of Rule 2214. This language is currently found in footnote 4 to 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 an underwriter.

*Communications with the Public Regarding Security Futures*

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

First, portions of NASD IM-2210-7 apply only to advertisements. Proposed FINRA Rule 2215 would apply these provisions to all retail communications.

Second, NASD IM-2210-7(a)(1) requires members to submit all advertisements concerning security futures to the Department at least 10 days prior to use. Proposed FINRA Rule 2215(a)(1) would require members to submit all retail communications

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<sup>52</sup> This provision is consistent with footnote 3 to NASD IM-2210-6.

concerning security futures to the Department at least 10 business days prior to first use. Both the current and the proposed filing provisions would require a member to withhold the communication from publication or circulation until any changes specified by the Department have been made.

Third, the proposal would amend the provisions that require communications concerning security futures to be accompanied or preceded by the security futures risk disclosure document under certain circumstances.<sup>53</sup> As revised, a communication concerning security futures would have to be accompanied or preceded by the risk disclosure document if it contained the names of specific securities.

Fourth, proposed FINRA Rule 2214(b)(4)(D) would clarify 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*

Proposed FINRA Rule 2216 would replace NASD IM-2210-8 with regard to standards applicable to retail communications concerning CMOs. The standards would remain the same as in IM-2210-8.

As noted above, FINRA will announce the implementation date of the proposed rule change in a Regulatory Notice to be published no later than 90 days following Commission approval. The implementation date will be no later than 365 days following Commission approval.

(b) Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of

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<sup>53</sup> See NASD IM-2210-7(b).

Section 15A(b)(6) of the Act,<sup>54</sup> which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes that the proposed rule change will help ensure that investors are protected from potentially false or misleading communications with the public distributed by FINRA member firms.

**4. Self-Regulatory Organization's Statement on Burden on Competition**

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

**5. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Firms, Participants, or Others**

In September 2009, FINRA published Regulatory Notice 09-55 (the “Notice”), requesting comment on the rules as proposed therein (the “Notice proposal”). A copy of the Notice is attached as Exhibit 2a. The comment period expired on November 20, 2009. FINRA received 23 comments in response to the Notice. A list of the commenters in response to the Notice is attached as Exhibit 2b, and copies of the comment letters received in response to the Notice are attached as Exhibit 2c.<sup>55</sup> A summary of the comments and FINRA’s response is provided below.

**Communication Categories**

***Interactive Electronic Communications***

Cornell, Cutter, PIABA, SIFMA, StockCross, Vanguard and Wells Fargo

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<sup>54</sup> 15 U.S.C. 78o-3(b)(6).

<sup>55</sup> See Exhibit 2b for a list of abbreviations assigned to commenters.

generally supported the proposed consolidation of the six current communication categories under NASD Rule 2210 into three categories under proposed FINRA Rule 2210(a). Fidelity and the ICI suggested that FINRA add a new separate communication category for “interactive electronic communications,” which would include real-time interactive electronic communications made through social media websites, and that FINRA allow this communication to be supervised in a manner similar to the supervision of correspondence.

FINRA does not believe adding a fourth communication category for interactive electronic communication categories is necessary. However, as discussed below, FINRA has modified the principal review and approval requirements under proposed paragraph (b) to allow retail communications that are posted on online interactive electronic forums to be supervised in the same manner as correspondence.<sup>56</sup> FINRA believes that this modification of the principal review and approval requirements achieves the same result sought by Fidelity and the ICI.

#### *Definition of Correspondence*

The Notice proposal defined “correspondence” as any written (including electronic) communication that is distributed or made available to 25 or fewer retail investors. The Notice proposal likewise defined “retail communication” as any written (including electronic) communication that is distributed or made available to more than 25 retail investors.

The proposed definition of “correspondence” generated a number of comments. The CAI, the ICI, TLGI, MBSC, NPHI, TD Ameritrade, Vanguard and WilmerHale

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<sup>56</sup> See proposed FINRA Rule 2210(b)(1)(D)(ii).

objected to treating communications to more than 25 retail investors as retail communications rather than correspondence. These commenters argued that the 25-investor cutoff is arbitrary, and that given the challenges in monitoring whether a communication is limited to 25 or fewer recipients, members would be forced to treat all letters and emails as retail communications. These commenters recommended that FINRA revise the proposal to include within the definition of “correspondence” emails to existing retail customers, regardless of the number of recipients.

NASD Rule 2211(a)(1) defines “correspondence” as “any written letter 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.” However, NASD Rule 2211 also requires a member to have a registered principal approve prior to use correspondence that is distributed to 25 or more existing retail customers within any 30 calendar-day period and makes any financial or investment recommendation or otherwise promotes a product or service of the member.<sup>57</sup>

FINRA is not revising the definition of “correspondence” to include emails or written letters to existing retail customers without limit as to the number of recipients. However, to address the concern raised by the commenters, FINRA has revised the proposed principal approval requirements to exclude communications to retail investors that do not make any financial or investment recommendation or otherwise promotes a product or service of the member.<sup>58</sup> This revision will continue to allow members to

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<sup>57</sup> See NASD Rule 2211(b)(1)(A).

<sup>58</sup> See proposed FINRA Rule 2210(b)(1)(D)(iii).

distribute non-promotional emails and other communications to retail investors without having a principal approve them prior to use.

Unlike the current definition of “correspondence” under NASD Rule 2211, the Notice proposal’s definition of “correspondence” did not reference a 30 calendar-day window within which to count the number of recipients. Cutter, the ICI, Morgan, SIFMA, WGSi and WilmerHale all objected to the elimination of the 30 calendar-day period. In response to these comments, FINRA has revised the definition of “correspondence” to include written communications distributed or made available to 25 or fewer retail investors within any 30 calendar-day period. FINRA likewise has revised the definition of “retail communication” to include written communications that are distributed or made available to more than 25 retail investors within any 30 calendar-day period.

The current definition of “correspondence” includes “market letters,” which are defined as “any written communication excepted from the definition of ‘research report’ pursuant to NASD Rule 2711(a)(9)(A).”<sup>59</sup> The Notice proposal’s definition of “correspondence” did not include market letters. Forefield and Wells Fargo opposed the elimination of market letters from the definition of correspondence. These commenters requested that FINRA either revise the definition to include market letters, or provide an exception from the principal approval requirements for market letters.

In the interest of keeping the definition of “correspondence” as straightforward as possible, FINRA is not revising the definition to include market letters. However, FINRA has revised the principal approval requirements to allow members to supervise

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<sup>59</sup> See NASD Rule 2211(a)(5).



any retail communication that is excepted from the definition of “research report” pursuant to NASD Rule 2711(a)(9)(A) in the same manner as correspondence.<sup>60</sup> FINRA believes that the same rationale it used to provide members with more flexibility in supervising market letters continues to exist, and thus has made this change to the principal approval requirements.<sup>61</sup>

*Definitions of Institutional Communication and Institutional Investor*

The Notice proposal defined “institutional communication” as “any written (including electronic) communication that is distributed or made available only to institutional investors.” TD Ameritrade commented that “or made available to” should be deleted from the definition and replaced with “intended for an audience of.” With this change, TD Ameritrade noted that members could post to websites that are intended for institutional investors without having to make it password-protected.

FINRA disagrees with this comment. If members were merely required to “intend” that a communication reach institutional investors, they could effectively distribute the communication to anyone simply by including a disclaimer regarding its intended audience. This rule change would make the distinction between institutional communications and retail communications virtually meaningless.

The Notice proposal defined “institutional investor” to include persons described in NASD Rule 3110(c)(4) (definition of “institutional account”), government entities and subdivisions, certain employee benefit and qualified plans that have at least 100 participants, members and their registered personnel, and persons acting on behalf of

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<sup>60</sup> See proposed FINRA Rule 2210(b)(1)(D)(i).

<sup>61</sup> See Notice to Members 09-10 (February 2009).

institutional investors. Fidelity requested that FINRA clarify that if an employer offers multiple employee benefit plans, the plans may be aggregated for purposes of calculating the number of participants. FINRA has revised the definition of “institutional investor” to allow aggregation of multiple plans offered by a single employer.

Fidelity, SIFMA and WilmerHale argued for expanding the definition of “institutional investor” to include non-retail entities with assets under \$50 million.<sup>62</sup> FINRA believes that the definition is already sufficiently broad, and that entities that have assets of less than \$50 million often require the same investor protections regarding sales material as a retail investor.

SIFMA and TD Ameritrade argued that the rule should make clear that if a member provides an institutional communication to another member, the first member is not responsible if the second member forwards the communication to retail investors. FINRA believes that, while one member generally is not responsible for the actions of another, such a determination will be subject to the facts and circumstances. Moreover, a member may not provide an institutional communication to another if the member has reason to believe that it will be forwarded to retail investors. Accordingly, FINRA declines to make this change.

FINRA has added a Supplementary Material to FINRA Rule 2210 to clarify the extent to which a member’s internal communications would be considered institutional

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<sup>62</sup> Under NASD Rule 3110(c)(4), a person who does not fall within one of the enumerated categories must have total assets of at least \$50 million to be considered an institutional account. The SEC recently approved the adoption of NASD Rule 3110(c)(4) as FINRA Rule 4512(c) without material change. See Securities Exchange Act Release No. 63784 (January 27, 2011), 76 FR 5850 (February 2, 2011) (Order Approving File No. SR-FINRA-2010-052). FINRA Rule 4512 becomes effective on December 5, 2011. See Regulatory Notice 11-19 (April 2011).

communications. The Supplementary Material provides that a member's internal written (including electronic) communications that are intended to educate or train registered persons about the products or services offered by a member are considered institutional communications pursuant to paragraph (a)(3) of proposed FINRA Rule 2210.

Accordingly, such internal communications are subject to both the provisions of proposed FINRA Rule 2210 and NASD Rule 3010(d).

*Definition of Retail Communication*

The Notice proposal defined "retail communication" as "any written (including electronic) communication that is distributed or made available to more than 25 retail investors." "Retail investor" was defined as "any person other than an institutional investor." Generally "retail communication" would include communications that currently fall under the definitions of "advertisement" and "sales literature."

The CAI and NPHI both expressed concern that combining advertisements and sales literature into a single category might lead FINRA staff to apply the same standards to all retail communications regardless of the intended audience. These commenters recommended that FINRA provide guidance that it will continue to take into account the anticipated audience for a proposed retail communication when determining what disclosures and other content standards to apply.

FINRA notes that proposed FINRA Rule 2210(d)(1)(E) provides that "[m]embers must consider the nature of the audience to which the communication will be directed and must provide details and explanations appropriate to the audience." While proposed FINRA Rule 2210's content standards apply to all retail communications, the level of detail and explanation required for a particular retail communication will depend on the

audience to which it is directed.

It may be unclear whether the definition of “retail investor” includes persons who are not customers of a member. Accordingly, FINRA has revised the definition to add at its end “regardless of whether the person has an account with a member.”<sup>63</sup>

### Approval and Recordkeeping

#### *Review and Approval of Retail Communications*

FINRA Rule 2210(b)(1)(A) in the Notice proposal provided that “an appropriately qualified registered principal” must approve each retail communication before the earlier of its use or filing with the Department. SIFMA and Wells Fargo commented that the proposal should provide greater guidance as to which principal registration category is required to approve different categories of retail communications. FINRA believes that this issue is already addressed in the registration rules for principals and supervisors.<sup>64</sup> Accordingly, FINRA does not believe that it would be appropriate or useful to restate those rules’ provisions in the rules governing communications with the public.

In a similar vein, Morgan, SIFMA and WilmerHale requested clarification as to whether a Series 9/10 general securities sales supervisor would be permitted to review and approve retail communications and correspondence. Currently, Series 9/10 supervisors are qualified to review and approve correspondence and sales literature, but are not qualified to approve advertisements as defined in NASD Rule 2210.<sup>65</sup> While the scope of a Series 9/10 supervisor’s activities are not part of this rule proposal, FINRA

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<sup>63</sup> As noted above, FINRA also revised the definition of “retail communication” to add at its end “within any 30 calendar-day period.”

<sup>64</sup> See NASD Rules 1020 et seq.

<sup>65</sup> See NASD Rule 1022(g)(2)(C)(iii).

notes that it has separately proposed to adopt new FINRA rules that would allow a general securities sales supervisor to approve both correspondence and retail communications.<sup>66</sup>

The ICI requested confirmation that the principal approval requirements do not apply to the updating of templates contained in retail communications. FINRA does not intend to revise its earlier interpretive position with regard to the updating of templates as stated in a 2002 interpretive letter to T. Rowe Price Associates, Inc.<sup>67</sup> Moreover, proposed paragraph (c)(7)(B) would add an exclusion from the filing requirements for retail communications that are based on templates that were previously filed with the Department, the changes to which are limited to updates of more recent statistical or other non-narrative information.

SIFMA recommended that FINRA reiterate its previous interpretive guidance regarding the supervision of electronic communications as set forth in Regulatory Notice 07-59.<sup>68</sup> FINRA is separately addressing the staff guidance contained in Regulatory Notice 07-59 regarding the supervision of electronic communications as part of its proposal to adopt new FINRA Rule 3110.<sup>69</sup>

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<sup>66</sup> See Regulatory Notice 09-70 (December 2009), Attachment B (proposed FINRA Rule 1230(a)(10)) (eliminates current restriction on Series 9/10 supervisors approving advertisements).

<sup>67</sup> See Letter from Thomas M. Selman, NASD, to Forrest Foss, T. Rowe Price Associates Inc., dated January 28, 2002 (interpreting the approval, filing and recordkeeping requirements of NASD Rule 2210 as generally not applying to statistical updates contained in pre-existing templates).

<sup>68</sup> See Regulatory Notice 07-59 (December 2007).

<sup>69</sup> See Securities Exchange Act Release No. 64736 (June 23, 2011), 76 FR 38245 (June 29, 2011) (Notice of Filing File No. SR-FINRA-2011-028).

The CAI, Cornell, Fidelity, the FSI, MBSC, NPHI, SIFMA, Vanguard, and WGSII commented that FINRA should address the supervision requirements for social networking sites and include them in the revised proposal filed with the SEC. After Regulatory Notice 09-55 was published for comment, but before this filing with the SEC, FINRA published Regulatory Notice 10-06, which provides guidance on blogs and social networking websites.<sup>70</sup> Among other things, that Notice addressed the supervision of social media sites and specified that members may adopt supervisory procedures similar to those outlined for electronic correspondence in Regulatory Notice 07-59. FINRA is now codifying this guidance as part of proposed FINRA Rule 2210. Proposed paragraph (b)(1)(D)(ii) specifies that the requirements of paragraph (b)(1)(A), which require a principal to approve retail communications prior to use, will not apply to retail communications that are posted on an online interactive electronic forum, provided that the member supervises and reviews such communications in the same manner as required for supervising and reviewing correspondence pursuant to NASD Rule 3010(d).

In addition, given the rapid changes to technology used to communicate with customers, FINRA believes it will be useful going forward to have exemptive authority with regard to the principal pre-use approval requirements applicable to retail communications in certain circumstances. Accordingly, FINRA has added a new proposed paragraph (b)(1)(E) that would authorize FINRA to grant an exemption from the principal approval requirements of paragraph (b)(1)(A) for good cause shown and to the extent that such exemption is consistent with the purposes of Rule 2210, the protection of investors, and the public interest.

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See Regulatory Notice 10-06 (January 2010).

*Review and Approval of Research-Related Retail Communications*

FINRA Rule 2210(b)(1)(B) in the Notice proposal provided that, “[w]ith respect to research reports on debt and equity securities, the requirements of paragraph (b)(1)(A) may be met by a Supervisory Analyst approved pursuant to NYSE Rule 344.” This language duplicated an identical provision in NASD Rule 2210(b)(1)(B). SIFMA and WilmerHale requested that FINRA clarify that a supervisory analyst also may review and approve research-related communications that are not research reports, such as market letters, research notes and economic analyses.

FINRA does not believe such a clarification is necessary. Proposed paragraph (b)(1)(D)(i) would except from the requirements of paragraph (b)(1)(A) any retail communication that is excepted from the definition of “research report” pursuant to NASD Rule 2711(a)(9)(A), provided that the member supervises and reviews such communications in the same manner as required for supervising and reviewing correspondence. NASD Rule 2711(a)(9)(A) excludes from the definition of “research report” a broad range of research-related communications, such as discussions of broad-based indices, commentaries on economic, political or market conditions, and certain other research-related communications.<sup>71</sup> By allowing firms to supervise and review these communications in the same manner as firms supervise and review correspondence, FINRA believes that firms will have sufficient flexibility to address the concerns raised by SIFMA and WilmerHale.

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<sup>71</sup> Currently NASD Rule 2211(a)(1) includes within the definition of “correspondence” any “market letter.” “Market letter” is defined as any written communication excepted from the definition of “research report” pursuant to NASD Rule 2711(a)(9)(A). See NASD Rule 2211(a)(5). Thus, the proposal would allow members to continue to supervise market letters in the same manner as they supervise correspondence.

*Administrative Communications*

FINRA Rule 2210(b)(1)(D) in the Notice proposal excluded from the principal approval requirements of paragraph (b)(1)(A) “any retail communication that is solely administrative in nature.” The CAI, Cutter, Fidelity, the FSI, Invesco, the ICI, MBSC, Morgan and SIFMA noted that currently NASD Rule 2211 does not require principal pre-use approval of emails and written letters to existing retail customers (without limit) as long as the communication does not make an investment recommendation or promote a product or service of the member.<sup>72</sup> These commenters argued that FINRA should make clear that these communications are included within the “solely administrative” exception. PIABA expressed concern that this exception could be used by members as a loophole to avoid principal review, and recommended that FINRA better define which communications fall within this exception.

In response to these comments, FINRA has revised paragraph (b)(1)(D) to eliminate the reference to “solely administrative” retail communications, and instead to exclude “any retail communication that does not make any financial or investment recommendation or otherwise promote a product or service of the member.” This language is currently used in NASD Rule 2211(b)(1)(A) with regard to the requirements for supervising correspondence that is sent to 25 or more existing retail clients, and thus maintains the same standard members face today with regard to such correspondence. In addition, FINRA believes the revised text better defines the scope of this exclusion. Members would still be required to supervise such retail communications in the same manner as required for supervising and reviewing correspondence pursuant to NASD

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<sup>72</sup> See NASD Rule 2211(b)(1)(A).



Rule 3010(d).

FINRA is also adding a new paragraph (b)(1)(F) to clarify that, notwithstanding any other provision of proposed FINRA Rule 2210, an appropriately qualified principal must approve a communication prior to a member filing the communication with the Department.

*Recordkeeping Requirements*

FINRA Rule 2210(b)(4) in the Notice proposal set forth members' recordkeeping obligations with respect to each communication category. Proposed paragraph (b)(4)(A)(ii) provided that, with respect to institutional communications, records must include "the name of the person who prepared or distributed the communication." Fidelity, the ICI and MBSC supported the requirement to maintain records of the person who prepared a communication, but opposed a requirement to keep records of the person who distributed the communication, which they believed would be difficult to implement. TD Ameritrade recommended that members be required to keep records of the person who prepared an institutional communication only where a registered principal has not approved it.

In response to these comments, FINRA has revised the recordkeeping provisions. As revised, a member's records must include the name of any registered principal who approved a communication and the date approval was given.<sup>73</sup> In the case of a retail communication or institutional communication that is not approved prior to first use by a registered principal, the records must include the name of the person who prepared or distributed the communication. Thus, a member would not have to keep records of the

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<sup>73</sup> See proposed FINRA Rule 2210(b)(4)(A)(ii).

person who distributed a retail communication or institutional communication, if the records included either the registered principal who approved the communication, or the person who prepared the communication.

FINRA Rule 2210(b)(4)(A)(iv) in the Notice proposal required records to include “the source of any statistical table, chart, graph or other illustration used in the communication.” Fidelity and the FSI requested that FINRA clarify what is required regarding sources of statistical tables or charts. For example, is it sufficient to have a citation to a study, or must a record include a copy of the study itself? In response to these comments, FINRA has revised proposed FINRA Rule 2210(b)(4)(A)(iv) to require “information concerning” the source of the table or chart. This revision reflects the current recordkeeping requirements for sources of statistical tables or charts.<sup>74</sup>

#### Filing Requirements

##### *Filing Requirements for New Members and Certain Rule Violators*

FINRA Rule 2210(c)(1)(A) in the Notice proposal required a new member to file with the Department all of its retail communications for a one-year period beginning on the effective date a member becomes registered with FINRA. This new member filing requirement differs from NASD Rule 2210(c)(5)(A), which applies only to advertisements and commences on the first date a new member files an advertisement with the Department. Proposed paragraph (c)(1)(B) provided that, if the Department determines that a member has departed from proposed FINRA Rule 2210’s standards, it may require the member to file all or part of its communications at least 10 business days prior to use.

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<sup>74</sup> See NASD Rule 2210(b)(2)(B).

Cornell opposed the commencement date of the new member filing period, arguing that this will decrease the time during which the Department will monitor a new member's communications. FINRA disagrees that the new filing period is insufficient. Members are still subject to a filing requirement during their first year of operation and are required to file certain retail communications thereafter. In addition, members are always subject to spot-check procedures. Nevertheless, to ensure that the starting date for this filing requirement is clear, FINRA has revised this provision to specify that the one-year filing period begins on the date reflected in the CRD® system as the date the firm's FINRA membership became effective.

WilmerHale opposed the breadth of this expanded filing requirement, which would cover communications that currently qualify as sales literature and thus do not have to be filed. WilmerHale argued that this expanded filing requirement would substantially hinder new firms' operations. SIFMA similarly argued that this filing requirement should exclude password-protected websites, since they are considered sales literature rather than advertisements under current rules.

FINRA recognizes that it may be burdensome for new firms to file all of their retail communications, including form letters and group emails sent to 25 or more retail investors within a 30 calendar-day period. Accordingly, FINRA has narrowed the scope of this filing requirement to cover only retail communications that are published or used in any electronic or other public media, including any generally accessible website, newspaper, magazine or other periodical, radio, television, telephone or audio recording, video display, signs or billboards, motion pictures or telephone directories (other than routine listings). This narrowing of the filing requirement would require new firms to file

only retail communications that currently fall within the definition of “advertisement” under NASD Rule 2210, thus not changing the scope of this filing requirement as compared to current standards. The filing requirements of proposed paragraph (c)(1)(A) would not apply to password-protected websites.

Fidelity commented that FINRA should be required to delineate the administrative process that must be followed before it can impose a pre-use filing requirement on members that have violated the communications rules. FINRA believes that proposed paragraph (c)(1)(B) specifies the steps FINRA must take before it may impose this requirement. The paragraph states that the Department must notify the member in writing of the types of communications to be filed and the length of time the requirement is to be in effect. The paragraph also states that any such filing requirement will take effect 21 calendar days after service of the written notice, during which time the member may request a hearing under FINRA Rules 9551 and 9559.

*Retail Communications Concerning Structured Products*

FINRA Rule 2210(c)(2)(B) in the Notice proposal required members to file at least 10 business days prior to use, retail communications concerning publicly offered CMOs, options, security futures, and any other publicly offered securities derived from or based on a single security, a basket of securities, an index, a commodity, a debt issuance or a foreign currency (“structured products”). These pre-use filing requirements would not apply to retail communications concerning options or security futures that are submitted to another self-regulatory organization having comparable standards, retail communications in which the only reference to options or security futures is contained in a listing of the member’s services, and retail communications that are subject to a

separate filing requirement in paragraph (c) of the proposed rule.

Cornell, the ICI, PIABA and Vanguard supported the pre-use filing requirement for retail communications concerning structured products. Fidelity commented that FINRA should list which products fall within this requirement, and clarify that investment company products do not fall within this requirement. Fidelity also recommended that this filing requirement exclude factual material about structured products, such as research reports and fact sheets, and that FINRA should allow a member to use retail communications that are filed with the Department if the member does not receive a response from FINRA within 10 business days.

Invesco and SIFMA commented that the proposal should be revised to eliminate the pre-use filing requirement for retail communications concerning structured products, and instead allow members to file such communications within 10 business days of first use. SIFMA also recommended that the reference to retail communications concerning options be stricken, since these communications are separately regulated under FINRA Rule 2220. In addition, SIFMA requested that FINRA exempt from this filing requirement retail communications concerning structured products for which there is a registration exemption under the Securities Act.

StockCross argued that the pre-use filing requirement for retail communications concerning structured products will hinder business since often these products have a limited offering period. Wells Fargo suggested that retail investors will be put at a disadvantage relative to institutional investors since retail investors will not be able to receive sales material concerning structured products until after the member receives Department staff's comments to filed communications.

WilmerHale also opposed the pre-use filing requirement for retail communications concerning structured products. WilmerHale argued that the burdens on members will strongly outweigh any benefit to investors. For example, members would be prevented from sending group emails to clients reminding them that their options are in the money without first filing such an email with FINRA at least 10 business days prior to transmission. WilmerHale and SIFMA both expressed concern that FINRA lacks the resources necessary to review such communications. WilmerHale also recommended that FINRA exclude all research from the requirements of proposed FINRA Rule 2210 and address any specific concerns under NASD Rule 2711.

In response to these comments, FINRA is revising the filing requirements for retail communications concerning options, CMOs and structured products. FINRA agrees that FINRA Rule 2220 separately imposes a filing requirement for advertisements and sales literature concerning options; accordingly, it is unnecessary to include a separate filing requirement for retail communications concerning options under proposed FINRA Rule 2210. Thus, the reference to retail communications concerning options has been deleted.

FINRA also agrees that there may be situations in which a pre-use filing requirement would prevent members from distributing time-sensitive retail communications concerning CMOs and structured products in a timely manner. Accordingly, FINRA has revised the proposal to permit members to file retail communications concerning CMOs and structured products within 10 business days of first use, instead of at least 10 business days prior to use.<sup>75</sup>

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<sup>75</sup> See proposed FINRA Rules 2210(c)(3)(E) and (F).

FINRA does not believe it is appropriate to attempt to list all products that are derived from or based on a single security, a basket of securities, an index, a commodity, a debt issuance or a foreign currency. Members frequently develop new types of retail structured products that would not be included in any list that FINRA created today. Thus, FINRA believes that it is better to leave open the possibility that retail communications concerning new products also will fall under this filing requirement.

FINRA agrees that retail communications concerning registered investment companies are not subject to the filing requirement covering structured products communications, since they are already subject to a separate filing requirement under proposed paragraphs (c)(2)(A), (c)(2)(C) and (c)(3)(A). FINRA has added language to proposed paragraph (c)(3)(F) to make this more clear.

FINRA does not agree that retail communications that only present “factual information” about structured products should be excluded. Arguably all sales material is “factual,” and the determination of which communications are not factual would be highly subjective. In addition, the proposal already excludes from filing retail communications whose only reference to investments is solely as part of a listing of products and services offered by the member.<sup>76</sup>

FINRA agrees that the filing requirement should not apply to retail communications concerning structured products that are not registered under the Securities Act. As a general matter, the filing requirements under NASD Rule 2210 do not apply to communications concerning privately placed securities, since typically these securities are not widely advertised. Accordingly, FINRA has added language to

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<sup>76</sup> See proposed FINRA Rule 2210(c)(7)(L).

proposed paragraph (c)(3)(F) to clarify that the filing requirement only applies to retail communications concerning structured products that are registered under the Securities Act.

FINRA disagrees with the assertion that it lacks the resources to review retail communications concerning structured products. FINRA will ensure that the Department has the necessary staffing to review such material in a timely manner. Additionally, by allowing members to file such communications concurrent with use, this revision takes some of the time pressure off members that seek to distribute retail communications prior to receiving staff comments.

FINRA also disagrees that proposed FINRA Rule 2210 should not apply to research. While NASD Rule 2711 does impose some content standards on research reports, it does not include the more general standards of proposed FINRA Rule 2210 that require communications to be fair and balanced. In addition, proposed FINRA Rule 2210 requires certain non-independent research, such as research prepared by a member or its affiliate on mutual funds or exchange-traded funds (“ETFs”), to be filed with the Department.

*Retail Communications Concerning Closed-End Funds*

FINRA Rule 2210(c)(3)(A) in the Notice proposal required members to file all retail communications concerning registered closed-end investment companies. Currently, FINRA only requires members to file such communications during a closed-end fund’s IPO period.

Cornell, the ICI, PIABA and Vanguard supported this expanded filing requirement. The ICI requested that FINRA clarify that its rules only reach members that



prepare closed-end fund communications, and not the fund itself or its adviser. The ICI also requested that FINRA clarify that a fund underwriter is not responsible for communications concerning a closed-end fund prepared by an unaffiliated member.

FINRA rules apply to communications used by FINRA member firms. While its rules do not apply to non-member firms, such as investment companies and investment advisers that are not registered as broker-dealers, they do apply to any communications used by a member, regardless of which entity prepared the communications. Generally, FINRA does not hold one member responsible for the actions of another member, but considers each case separately based on the facts and circumstances.

Wells Fargo opposed the requirement to file retail communications concerning closed-end funds after the IPO period has expired, arguing that trading closed-end funds on the secondary market does not raise the same concerns as during the IPO period. FINRA disagrees with this argument. FINRA currently requires members to file retail communications concerning other types of investment company securities that are traded on the secondary market, such as ETFs. In addition, FINRA believes that investor protection concerns can arise from any retail communication concerning a closed-end fund, regardless of when it is distributed.

#### *Filing Exclusions for Non-Material Changes and Templates*

FINRA Rule 2210(c)(7)(A) in the Notice proposal excluded from the filing requirements of proposed paragraphs (c)(1) through (c)(4) “retail communications that previously have been filed and that are used without material change, including retail communications that are based on templates that were previously filed with the Department the changes to which are limited to updates of more recent statistical or other

non-narrative information.” NASD Rule 2210(c)(8)(A) includes the same filing exclusion for previously filed advertisements and sales literature that are used without material change, but does not contain any express filing exclusion for templates.

The CAI, Fidelity, the ICI and MBSC expressed concern that proposed paragraph (c)(7)(A) would narrow the current filing exclusion for communications used without material change. By including the template filing exclusion in the same paragraph, these commenters feared that this filing exception would not allow non-material changes to narrative information. FINRA did not intend to narrow the current filing exclusion for retail communications that are used without material change. Accordingly, FINRA has separated the filing exclusion for previously filed retail communications that are used without material change from the exclusion for certain previously filed templates.<sup>77</sup>

*Filing Exclusion for Administrative Communications*

FINRA Rule 2210(c)(1)(B) in the Notice proposal excluded from the filing requirements retail communications “that are solely administrative in nature.” This filing exclusion replaced a current exclusion for advertisements and sales literature “solely related to recruitment or changes in a member’s name, personnel, electronic or postal address, ownership, offices, business structure, officers or partners, telephone or teletype numbers, or concerning a merger with, or acquisition by, another member.”<sup>78</sup>

SIFMA requested that FINRA clarify that this exclusion covers generic documents or excerpts describing a member’s products or services, even if they reference a product subject to the filing requirements. Vanguard requested that this filing exclusion

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<sup>77</sup> See proposed FINRA Rules 2210(c)(7)(A) and (B).

<sup>78</sup> See NASD Rule 2210(c)(8)(B).

specifically reference the list of items that is excluded under current rules. Wells Fargo argued that this exclusion should not be limited to the administrative items that are excluded under current rules.

SIFMA's interpretation of this filing exclusion is broader than FINRA intended. However, FINRA acknowledges that "solely administrative in nature" may be unclear to some members. Accordingly, FINRA is revising this exclusion to cover retail communications that do not make any financial or investment recommendation or otherwise promote a product or service of the member. In this regard, the filing exclusion covers the same retail communications that are excepted from the principal approval requirements under proposed FINRA Rule 2210(b)(1)(D).

#### *Other Filing Exclusions*

FINRA Rule 2210(c)(7)(G) of the Notice proposal excluded from the filing requirements reprints and excerpts of certain articles and reports produced by independent third parties. SIFMA requested that FINRA clarify whether that filing exclusion covered independent third-party research reports concerning registered investment companies, which are currently excluded from filing under NASD Rule 2210(c)(8)(H). FINRA does intend this filing exclusion also to cover independent research reports on registered investment companies which are excluded from filing under the current rules.

FINRA Rule 2210(c)(7)(J) of the Notice proposal excluded from the filing requirements communications that refer to investment company securities, direct participation programs or exempted securities solely as part of a listing of products or services offered by the member. TD Ameritrade requested that FINRA expand this

exclusion to allow members to discuss the types of securities that can be traded through a member, to include general descriptions of these securities, to explain the functionality of online tools and trading platforms, and to present related fees and commissions, as long as no actual security is named. Cutter requested that this exclusion permit a listing of any type of investment a member offers, not just the securities described in the paragraph.

FINRA does not believe TD Ameritrade's proposed expansion would be appropriate, since it would cover many types of retail communications that normally require review by Department staff. FINRA agrees, however, that a communication that refers to an investment solely as part of a listing of a member's products and services should be excluded from filing. FINRA has modified this filing exclusion accordingly.<sup>79</sup>

The Notice proposal would have eliminated a current filing exclusion for press releases that are made available only to members of the media.<sup>80</sup> The Notice proposal stated that FINRA staff found that members almost always post press releases on their websites, thus making them available to the general public, and making this filing exclusion inapplicable. Fidelity, the ICI and MBSC commented that members still rely on this filing exclusion, and thus objected to its elimination. Based on these representations, FINRA has reinstated the filing exclusion for press releases made available only to members of the media.<sup>81</sup>

In 2006, FINRA published an interpretive letter stating that free writing

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<sup>79</sup> See proposed FINRA Rule 2210(c)(7)(L).

<sup>80</sup> See NASD Rule 2210(c)(8)(G).

<sup>81</sup> See proposed FINRA Rule 2210(c)(7)(H).

prospectuses are excluded from the provisions of NASD Rules 2210 and 2211.<sup>82</sup> Based on this 2006 letter, Morgan, SIFMA and WilmerHale requested that FINRA include a filing exclusion for free writing prospectuses. In October 2010, FINRA published a Regulatory Notice that withdrew, in part, the guidance provided in the 2006 interpretive letter.<sup>83</sup> In the 2010 Notice, FINRA stated that broadly disseminated free writing prospectuses present the same investor protection concerns as communications governed by NASD Rules 2210 and 2211. Accordingly, FINRA announced that it now interprets FINRA 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. Based on this new guidance, rather than exclude free writing prospectuses, FINRA is modifying the current filing exclusion for SEC-filed documents not to cover broadly disseminated free writing prospectuses filed with the SEC pursuant to Securities Act Rule 433(d)(1)(ii).<sup>84</sup> Thus, such free writing prospectuses must be filed with FINRA to the extent that they constitute a retail communication covered by another filing requirement (such as a free writing prospectus concerning a structured product registered under the Securities Act).

SIFMA recommended that FINRA add a filing exclusion for general investment pieces that discuss an investment strategy but do not recommend or promote a particular product or service of a member. FINRA has revised the proposal to exclude retail

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<sup>82</sup> See Letter from Lisa C. Horrigan, Assistant General Counsel, NASD, to Eileen Ryan, Securities Industry Association, and Sarah Starkweather, The Bond Market Association, dated August 1, 2006.

<sup>83</sup> See Regulatory Notice 10-52 (October 2010).

<sup>84</sup> See proposed FINRA Rule 2210(c)(7)(F).

communications that do not make investment recommendations or promote a member's products or services. However, depending on the facts and circumstances, a retail communication that discusses investment strategies may in fact be making investment recommendations or promoting a member's products or services.

#### *Filing Exemptions*

NASD Rule 2210(c)(10) and FINRA Rule 2210(c)(9) of the Notice proposal permitted FINRA to exempt a member from the pre-use filing requirements of paragraph (c)(1)(A) for good cause shown. As discussed above, FINRA has revised the principal review and approval requirements to authorize FINRA to grant an exemption from the principal approval requirements of paragraph (b)(1)(A) for retail communications for good cause shown after taking into consideration all relevant factors, to the extent such exemption is consistent with the purposes of Rule 2210, the protection of investors, and the public interest. FINRA is similarly revising proposed paragraph (c)(9) to authorize FINRA to exempt a specific category of retail communications from the filing requirements under the same circumstances described with respect to the principal approval exemptive authority.

#### *Other Filing Issues*

NPHI requested that FINRA revise its filing requirements to be triggered off the date a registered principal approves a communication, rather than the date a member first uses the communication, since a member may not know the exact date of first use. FINRA disagrees with this recommendation since such a standard would allow members to delay filing a communication indefinitely until a principal approved it. Moreover, FINRA believes that it is important for members to keep records of when a

communication is used.

T. Rowe commented that members should be allowed to file retail communications within 15 business days of first use, rather than 10 business days. FINRA disagrees with this recommendation since allowing members to file 15 business days after the date of first use would create too long a period between the first date a member distributes its communication and the first date FINRA has an opportunity to review the communication.

Proposed FINRA Rule 2210(c)(3)(A) requires a member that files a retail communication that includes an investment company performance ranking or comparison to include a copy of the ranking or comparison used in the communication. T. Rowe recommended that members be allowed to submit one performance ranking backup document and refer to that document in future filings. FINRA does not agree with this comment, since Department staff need the ranking or comparison used in a retail communication when conducting their review, and reference to a ranking document contained in a prior filing would slow the process.

#### Content Standards

##### *General Comments*

FINRA Rule 2210(d)(1)(F) in the Notice proposal generally prohibited communications from predicting or projecting performance, but permitted a hypothetical illustration of mathematical principles as long as it does not predict or project performance. TD Ameritrade commented that this provision should be revised to permit examples of hypothetical transactions (such as the maximum gain or loss that would occur based on an assumed change in market price), as long as the assumptions are

disclosed. FINRA does not believe the provisions should be changed in this regard. If a hypothetical example is an illustration of mathematical principles, it would be permitted. If, however, it is really a projection of performance of a particular investment, FINRA believes this practice should not be allowed.

FINRA does believe, however, that proposed paragraph (d)(1)(F) needs to be clarified to indicate the circumstances under which a projection of performance is permitted: in an investment analysis tool, or a written report produced by such a tool, as permitted under proposed FINRA Rule 2214, and a price target in a research report on debt or equity securities, subject to certain conditions. FINRA has revised proposed paragraph (d)(1)(F) to reflect these exceptions.

FINRA Rule 2210(d)(3)(B) in the Notice proposal required all retail communications and correspondence to reflect any relationship between the member and any non-member or individual who is also named. TD Ameritrade recommended that this provision be revised to require such a disclosure only where a relationship exists. FINRA believes no change is necessary, since the paragraph requires a communication to “reflect any relationship between the member and any non-member or individual who is also named.” If no relationship exists, no disclosure is required.

FINRA Rule 2210(d)(4)(C)(iii) in the Notice proposal provided that, in a comparative illustration of the mathematical principles of tax-deferred versus taxable compounding, the illustration may reflect an actual state income tax rate, provided that the communication is used only with investors that reside in the identified state. TD Ameritrade commented that this provision should be revised to allow the use of an actual state income tax rate as long as the material clearly discloses that the rate only applies to



residents of a particular state. FINRA has revised this provision to allow illustrations to reflect an actual state income tax rate if it prominently discloses that the illustration is applicable only to investors that reside in the identified state.

FINRA also has revised the disclosure requirements in proposed FINRA Rule 2210(d)(4)(vii) for such comparative illustrations. Illustrations additionally must disclose the degree of risk in the investment's assumed rate of return, including a statement that the assumed rate of return is not guaranteed, and the possible effect of investment losses on the relative advantage of the taxable versus tax-deferred investments.

*Disclosure of Expenses in Fund Performance Advertising*

FINRA Rule 2210(d)(5) in the Notice proposal required retail communications that present non-money market fund performance data to disclose, among other things, the fund's maximum front-end or back-end sales charges and total annual fund operating expense ratio, gross of any fee waivers or expense reimbursements, as stated in the fee table of the fund's prospectus or annual report, whichever is more current. Currently NASD Rule 2210(d)(3) requires the sales charges and expense ratio simply to reflect the current prospectus, and not a fund's annual report.

Fidelity, the ICI and MBSC opposed the requirement to show the expense ratio from either the prospectus or annual report, whichever is more current. These commenters argued such a requirement would be too burdensome and confusing to investors. American Funds argued that a fund should be allowed to show current expenses based on a fund's annualized monthly expense ratio, and not have to refer to the prospectus. Vanguard supported the proposed change, but recommended that the rule allow members to show the expense ratio from a fund's prospectus if it reflects the fund's

reasonable expectation of the current year's expenses.

FINRA had made this proposed change based on earlier industry input that members should be allowed to show expenses from an annual report if it is more current than the prospectus. However, in light of comments received on the Notice proposal and the importance for expense disclosure to be comparable among funds, FINRA is retaining the standard reflected in NASD Rule 2210(d)(3), and requiring sales charges and expense ratios to reflect a fund's current prospectus.

The CAI requested confirmation that this disclosure requirement does not apply to the presentation of performance of an underlying investment option contained in a variable insurance product communication. FINRA agrees the provision does not apply to such communications.

FINRA Rule 2210(d)(5)(B) in the Notice proposal required a print advertisement to disclose standardized performance and expense-related information in a prominent text box. Fidelity, the ICI and MBSC requested confirmation that this requirement only applies to print advertisements and not other forms of retail communications, such as websites. The ICI and MBSC also recommended that FINRA eliminate the text box requirement and replace it with a prominence requirement applicable to all retail communications.

Consistent with its application of NASD Rule 2210(d)(3), FINRA confirms that the text box requirement only applies to print advertisements. FINRA disagrees however, with the recommendation to eliminate the text box requirement for print advertisements. FINRA created this requirement due to past abuses in which non-standardized performance was prominently displayed in print advertisements, while disclosures

regarding standardized performance and expenses were placed in footnotes. FINRA believes that this requirement has helped to prevent this kind of misleading presentation since the rule was adopted.

### *Recommendations*

FINRA Rule 2210(d)(7)(A) in the Notice proposal required retail communications, correspondence and public appearances to contain certain disclosures if the communication included a recommendation of securities. The communication would have to disclose if the member was making a market in the security (or an underlying option or future), if the member or its associated person will sell or buy the security from customers on a principal basis, that the member or any associated person with the ability to influence the substance of the communication has a financial interest in the recommended security, and if the member was manager or co-manager of a public offering of any securities of the recommended issuer in the past 12 months.

Cornell and PIABA both opposed limiting disclosures of financial interests to the member and associated persons with the ability to influence the substance of the communication. These commenters felt the associated person standard was too narrow and vague. Fidelity recommended that the disclosure standard for associated persons should be limited to persons who are direct employees of the member or are registered with the member, and who are directly and materially involved in the preparation of the communication. Fidelity and Morgan commented that disclosure should not be required unless an employee has a direct and material financial interest in the recommended security. This would exclude small investments and investments through mutual funds.

Morgan, SIFMA and WilmerHale commented that it would be impossible for a

member to track which associated persons have the ability to influence the substance of a communication, and that FINRA must provide more guidance as to which associated persons the disclosure requirements would apply. The FSI inquired as to whether the disclosure standard would apply to a supervisor of a registered representative who emails a securities recommendation to a customer. SIFMA commented that the disclosure requirement should be limited to the member and its officers and partners, and that the rule permit generic, non-specific disclosures regarding financial interests, market making and underwriting activities.

Morgan, SIFMA and WilmerHale commented that the provision not apply to correspondence. WilmerHale also urged that the proposed rule exclude retail communications and public appearances by research analysts, since these situations are already covered by NASD Rule 2711.

In response to these comments, FINRA has revised proposed paragraph (d)(7)(A). First, paragraph (d)(7)(A) no longer applies to correspondence. Given that correspondence may not be delivered to more than 25 retail investors within a 30 calendar-day period, FINRA believes that it is not necessary to include the extensive disclosure required for retail communications in communications sent to a more limited audience.

Second, FINRA has added a requirement that a recommendation of securities have a reasonable basis. This requirement is consistent with NASD IM-2210-1(6)(A).

Third, FINRA has modified the requirement to disclose the financial interests of any associated person with the ability to influence the substance of the communication. Instead, the disclosure requirement will apply to any associated person with the ability to

influence the “content” of the communication. While this modification is minor, FINRA believes that it will help clarify which associated persons must disclose their financial interests. FINRA continues to believe that persons who influence the content of a communication that includes a recommendation have a material conflict of interest that should be disclosed if the person also has a financial interest in the recommended security.

Fourth, the disclosure requirement excludes financial interests that are “nominal.” This revision makes the rule consistent with the current disclosure requirements for advertisements and sales literature that include securities recommendations under NASD IM 2210-1(6)(A)(ii).

Fifth, FINRA has excluded from this disclosure requirement public appearances by research analysts, since they are already covered under NASD Rule 2711. The proposed language also excludes research reports for the same reason.

Proposed FINRA Rules 2210(d)(7)(C) revised the current disclosure requirements for communications that contain past specific recommendations.<sup>85</sup> The revised provisions more closely reflect the disclosure standards applicable to advertisements of investment advisers that contain past specific recommendations. Wells Fargo supported this change, but urged FINRA also to adopt the SEC’s interpretations of the Investment Advisers Act regarding recommendations. While FINRA may look to past SEC interpretations of its rules for guidance, FINRA declines to adopt any of the SEC interpretations of the Investment Advisers Act regarding recommendations for purposes of this filing.

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<sup>85</sup> See NASD IM-2210-6(C) and (D).

*Other Comments*

Fidelity, the ICI and Vanguard requested clarification as to whether a member is responsible for content posted by third parties on a member's website. These commenters also recommended that FINRA develop interpretive guidance concerning the principles that members should follow when developing communications intended for customers' mobile electronic devices. For example, FINRA should address how members may meet various disclosure requirements, such as the requirement to disclose a member's name, fees, expenses and standardized performance information.

FINRA previously addressed the issue of third-party content in Regulatory Notice 10-06. FINRA also agrees that issues related to communications intended for mobile electronic devices is important and will consider further guidance or rulemaking as issues arise, but does not believe this proposed rulemaking is the appropriate vehicle to address all issues raised by new technologies. In the past, when FINRA has reviewed a member's advertisement or sales literature that includes a bond fund's 30-day yield, and the fund's affiliates have subsidized or reimbursed the fund's expenses, FINRA staff has required the member also to disclose the fund's yield that would have occurred had expenses not been subsidized (the "unsubsidized yield"). FINRA has imposed this requirement based on language contained in the SEC's 1988 adopting release for Rule 482 under the Securities Act.<sup>86</sup> The ICI and T. Rowe both objected to this requirement and requested that FINRA clarify that disclosure of the unsubsidized yield is unnecessary in such circumstances. Because this issue involves an interpretation of Rule 482 under the Securities Act, FINRA declines to provide guidance through the proposed rule

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<sup>86</sup> See Securities Act Release No. 6753 (February 2, 1988), 53 FR 3868 (February 10, 1988) (Order Approving File No. S7-23-86), p. 37.

change.

### Public Appearances

Proposed FINRA Rule 2210(f) in the Notice proposal sets forth the content and supervision requirements for members and associated persons that participate in seminars, forums or radio or television interviews. Paragraph (f)(1) specifies that the member or associated person must follow the content standards of paragraph (d)(1), and if the member or associated person recommends a security, paragraph (d)(7).

Fidelity, Invesco, the ICI and Morgan opposed requiring associated persons that make recommendations in public appearances to meet the content standards of paragraph (d)(7). These commenters argued that it would be impossible to monitor or supervise. Invesco also argued that this requirement creates an uneven playing field between broker-dealers and investment advisers, since investment advisers do not have a similar disclosure requirement.

FINRA disagrees with the comments that the disclosure requirements regarding recommendations would be impossible to monitor or supervise. Members that employ research analysts already must meet similar requirements under NASD Rule 2711. Members could impose similar policies and procedures for their associated persons who intend to recommend securities in public appearances. The ICI requested clarification that, if a member sponsors a seminar or forum, the member is responsible only for its own presentation and not those of others. This issue will be a matter of facts and circumstances, but generally a member is only responsible for the communications of the member or its associated persons, unless the member or its associated persons are entangled with or adopt others' communications.

NPHI requested clarification as to whether a discussion of a general product category constitutes a recommendation for purposes of the public appearance disclosure requirements. If a member or associated person merely discusses a general product category without recommending a particular security, the disclosure requirements would not apply. Similarly, T. Rowe asked whether the mere reference to a security is a recommendation. Generally the mere reference to a security is not a recommendation, but this issue will be a matter of facts and circumstances.

Under NASD Rule 2210, “public appearance” is a separate category of communications with the public.<sup>87</sup> Proposed FINRA Rule 2210 does not retain “public appearance” as a separate category of “communications with the public.” T. Rowe suggested that FINRA retain its definition of “public appearance,” since otherwise an email to a member of the media or private conversation might be viewed as a public appearance. FINRA does not believe this is necessary. Proposed paragraph (f)(1) makes clear that it applies only to “a seminar, forum, radio or television interview or ... public appearances or speaking activities ...” An email or private conversation would not fall within this description.<sup>88</sup> In addition, the language used to describe a public appearance in proposed paragraph (f)(1) is similar to the current definition of “public appearance” under NASD Rule 2210(a)(5).

Proposed paragraph (f)(2) would require members to adopt written procedures that are appropriate to a member’s business, size, structure, and customers to supervise its associated persons’ public appearances. The procedures must include, among other

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<sup>87</sup> See NASD Rule 2210(a)(5).

<sup>88</sup> Moreover, proposed paragraph (f)(1) expressly excludes correspondence from the description of a public appearance.



things, surveillance and follow-up to ensure that such procedures are implemented and adhered to. T. Rowe requested clarification as to what level of surveillance and follow-up is required, particularly for one-time appearances. T. Rowe also commented that there should be an exception if a member approves appearances in advance. FINRA does not believe it would be appropriate to pre-determine how a member must supervise its associated persons' public appearances, since this will vary depending on a member's business model, size, and the type of public appearance involved. FINRA also does not agree that a member should have no obligation to review public appearances after the fact for compliance with applicable rules as long as it approves the appearance in advance.

FINRA is making one additional change to the proposed paragraph (f) in light of other changes to the proposed rule. Paragraph (f)(1) of the Notice proposal also covered "interactive electronic forums" within its description of a public appearance. To the extent participation in an interactive electronic forum takes the form of a written communication disseminated through an interactive website, FINRA considers such a communication to be a retail communication rather than a public appearance. However, as discussed above, proposed FINRA Rule 2210(b)(1)(D)(ii) allows a member to supervise and review retail communications that are posted on online interactive electronic forums in the same manner as required for supervising and reviewing correspondence. Accordingly, FINRA has deleted "(including an interactive electronic forum)" from proposed paragraph (f)(1).

#### Investment Analysis Tools

Proposed FINRA Rule 2214 of the Notice proposal codifies largely without change current NASD IM-2210-6 (Requirements for the Use of Investment Analysis

Tools).<sup>89</sup> Fidelity, the ICI, MBSC and T. Rowe commented that Rule 2214 should be revised to allow members to present projections of performance in retail communications even in cases where the tool is not interactive with customers. These commenters argue that a firm should be permitted to show projected performance of an investment in a communication that is not based on information provided by a customer independently or with the assistance of the member firm. T. Rowe also commented that members should be allowed to use the data generated by an investment analysis tool in sales material for target date funds provided that these illustrations are limited to a discussion of a fund's investment strategy and not used to project performance.

FINRA disagrees with the comment that proposed Rule 2214 should be revised to eliminate the requirement that an investment analysis tool be interactive. The purpose of NASD IM-2210-6 and proposed FINRA Rule 2214 is to allow members to use interactive tools with customers to show the likelihood of various investment outcomes under different scenarios, thereby serving as an additional resource to investors to evaluate their specific investment choices. It is not to allow the use of performance projections in retail communications in all circumstances as long as an investment analysis tool is used to create the projections. In the case of retail communications concerning target date funds that do not include projections, reliance on the proposed rule is unnecessary, since it only applies to retail communications that contain projections.

Supplementary Material 2214.06 provides that a retail communication that contains only an incidental reference to an investment analysis tool need not include the

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<sup>89</sup> Certain of NASD IM-2210-6's text that appears either in the Interpretive Material itself or in footnotes to the Interpretive Material have been moved to Supplementary Material.

disclosures required by the proposed rule and would not need to be filed with the Department. Vanguard commented that proposed Rule 2214 should be revised to allow members not to include all of the proposed rule's required disclosures as long as the communication does not include the tool itself or any data or results produced by the tool.

FINRA agrees that, under these circumstances, some of the proposed rule's required disclosures, such as those required by paragraph (c)(1) (a description of the tool's methodology) or paragraph (c)(3) (certain disclosures in situations in which the tool analyzes only a limited range of investments), are unnecessary. FINRA believes however, that a retail communication that refers to an investment analysis tool in more detail than an incidental reference but does not provide access to the tool or the results generated by the tool must disclose that results may vary with each use (as required by paragraph (c)(2)) and the warning required by paragraph (c)(4) that the projections generated by the tool are hypothetical and are not guarantees of future results. FINRA has revised proposed Rule 2214.06 accordingly.

#### Security Futures

Proposed FINRA Rule 2215 (Guidelines for Communications with the Public Regarding Security Futures) is the successor to current NASD IM-2210-7. TD Ameritrade commented that paragraph (b)(1)(A)(iii), which prohibits projections of performance in communications used prior to the delivery of a security futures risk disclosure statement, should be modified to permit examples of hypothetical transactions. This comment is similar to another TD Ameritrade comment on proposed FINRA Rule 2210(d)(1)(F) (which also prohibits performance projections), and FINRA's response is the same as discussed above.

Proposed paragraph (b)(2)(A)(iv) requires any communication concerning a security future to include a statement that supporting documentation for any claims, comparisons, recommendations, statistics or other technical data will be supplied upon request. TD Ameritrade commented that FINRA should clarify that this disclosure requirement only applies if a communication actually includes a claim, comparison, recommendation, statistics or other technical data. While this issue will be a matter of facts and circumstances, FINRA agrees that no such disclosure would be required if a communication does not contain any statement or data that requires supporting documentation.

#### Transition Period

Fidelity, Invesco and NPHI requested that FINRA allow members at least six months before having to comply with the new rules. The ICI suggested a compliance date of 10 business days after the second quarter ending following adoption of the final rule changes. PSD requested nine months' lead time, and suggested that members should be permitted to "grandfather" and continue to use communications that were filed under the current rules. Alternatively, members should have a minimum of two years from the date the new rules become effective to continue to use communications filed under the existing rules.

FINRA plans on publishing a Regulatory Notice no later than 90 days following SEC approval of the rule changes. The implementation date will be no later than 365 days following SEC approval. In establishing the implementation schedule, FINRA will consider members' need to adopt and implement new policies and procedures necessary to comply with the new rules.

In most cases, FINRA expects that communications that are in compliance with the current communication rules will continue to be in compliance with the new rules, and thus “grandfathering” of past filed material will be unnecessary. To the extent a member has questions about whether a previously filed communication continues to be compliant under the new rules, the member should discuss this issue with its assigned Department advertising analyst.

**6. Extension of Time Period for Commission Action**

FINRA does not consent at this time to an extension of the time period for Commission action specified in Section 19(b)(2) of the Act.<sup>90</sup>

**7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)**

Not applicable.

**8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission**

Not applicable.

**9. Exhibits**

Exhibit 1. Completed notice of proposed rule change for publication in the Federal Register.

Exhibit 2a. FINRA Regulatory Notice 09-55 (September 2009).

Exhibit 2b. List of comments received in response to FINRA Regulatory Notice 09-55.

Exhibit 2c. Copies of comments received in response to FINRA Regulatory Notice 09-55.

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<sup>90</sup> 15 U.S.C. 78s(b)(2).

Exhibit 5. Text of the proposed rule change (FINRA Rules 2210, 2212, 2213, 2214, 2215 and 2216).

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34- ; File No. SR-FINRA-2011-035)

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change to Adopt FINRA Rules 2210 (Communications with the Public), 2212 (Use of Investment Companies Rankings in Retail Communications), 2213 (Requirements for the Use of Bond Mutual Fund Volatility Ratings), 2214 (Requirements for the Use of Investment Analysis Tools), 2215 (Communications with the Public Regarding Security Futures), and 2216 (Communications with the Public About Collateralized Mortgage Obligations (CMOs)) in the Consolidated FINRA Rulebook

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on \_\_\_\_\_, \_\_\_\_\_, Financial Industry Regulatory Authority, Inc. (“FINRA”) (f/k/a National Association of Securities Dealers, Inc. (“NASD”)) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing 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, and to delete paragraphs (a)(1), (i), (j) and (l) of Incorporated NYSE Rule 472, Incorporated NYSE Rule Supplementary Material 472.10(1), (3), (4) and (5), and 472.90, and Incorporated NYSE Rule Interpretations 472/01 and 472/03 through 472/11. The

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

proposed rule change would renumber NASD Rules 2210 and 2211 and NASD Interpretive Materials 2210-1 and 2210-4 as FINRA Rule 2210, NASD Interpretive Material 2210-3 as FINRA Rule 2212, NASD Interpretive Material 2210-5 as FINRA Rule 2213, NASD Interpretive Material 2210-6 as FINRA Rule 2214, NASD Interpretive Material 2210-7 as FINRA Rule 2215, and NASD Interpretive Material 2210-8 as FINRA Rule 2216.

The text of the proposed rule change is available on FINRA's website at <http://www.finra.org>, at the principal office of FINRA and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

As part of the process of developing a new consolidated rulebook ("Consolidated FINRA Rulebook"),<sup>3</sup> FINRA is proposing to adopt NASD Rules 2210 and 2211 and

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<sup>3</sup> The current FINRA rulebook consists of (1) FINRA Rules; (2) NASD Rules; and (3) rules incorporated from NYSE ("Incorporated NYSE Rules") (together, the NASD Rules and Incorporated NYSE Rules are referred to as the "Transitional Rulebook"). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to those members of FINRA that are also



NASD Interpretive Materials 2210-1 and 2210-3 through 2210-8 as FINRA Rules 2210 and 2212 through 2216, and to delete paragraphs (a)(1), (i), (j) and (l) of Incorporated NYSE Rule 472, Incorporated NYSE Rule Supplementary Material 472.10(1), (3), (4) and (5), and 472.90, and Incorporated NYSE Rule Interpretations 472/01 and 472/03 through 472/11.

#### Current Rules Governing Communications with the Public

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

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.

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members of the NYSE ("Dual Members"). 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, March 12, 2008 (Rulebook Consolidation Process).

- 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 the principal approval, filing and content standards 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 or (2) 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 member. While such communications do not require principal pre-use approval, members still must establish and maintain policies and procedures to supervise them for compliance with applicable standards.

Members must file with the FINRA Advertising Regulation Department (“Department”) for review certain advertisements and sales literature. For example, advertisements and sales literature concerning investment companies, variable insurance

products and public direct participation programs, and advertisements concerning government securities, must be filed within 10 business days of first use, but members are not required to file independently prepared reprints, correspondence or institutional sales material. The filing requirements also differ based on the member using the material and its content.

Members that previously have not filed advertisements with the Department must file all advertisements at least 10 business days prior to first use for a one-year period following the date the first advertisement was filed. Additionally, under NASD Rule 2210 and related Interpretive Materials, all members must file advertisements concerning collateralized mortgage obligations (“CMOs”) and security futures, and advertisements and sales literature concerning registered investment companies that include unpublished or self-created rankings or performance comparisons, at least 10 business days prior to first use, and must withhold them from publication until any changes specified by the Department have been made.

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.<sup>4</sup> The 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

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<sup>4</sup> NYSE Rule 472(a)(1).

material facts whose absence would make the communication misleading. More particular content standards apply to specific issues or securities.

#### Proposed Rule Change

#### Reorganization of Rules

The proposed rule change would create a new FINRA Rule 2210 that would encompass, 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 would receive its own FINRA rule number and would adopt the same communication categories used in FINRA Rule 2210.<sup>5</sup>

#### Communication Categories

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

- Institutional communication would include communications that fall within the current definition of “institutional sales material” under NASD Rule 2211(a)(2): written (including electronic) communications that are distributed or made available only to institutional investors. “Institutional investor” generally would have the same definition as under NASD Rule 2211(a)(3).<sup>6</sup>

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<sup>5</sup> Proposed FINRA Rule 2211 (Communications with the Public About Variable Insurance Products), which would replace NASD Interpretive Material 2210-2, is the subject of a separate proposed rule change. See Securities Exchange Act Release No. 61107 (December 3, 2009), 74 FR 65180 (December 9, 2009) (Notice of Filing File No. SR-FINRA-2009-070).

<sup>6</sup> FINRA has modified the definition of “institutional investor” in proposed FINRA Rule 2210 to clarify that the term includes multiple employee benefit plans and

- Retail communication would include 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” would include any person other than an institutional investor, regardless of whether the person has an account with the member.
- Correspondence would include any written (including electronic) communication that is distributed or made available to 25 or fewer retail investors within any 30 calendar-day period.

The proposal would eliminate the current definitions of “advertisement,” “sales literature,” “institutional sales material,” “public appearance” and “independently prepared reprint” in NASD Rule 2210, as well as all of the definitions in NASD Rule 2211.<sup>7</sup> The proposal also would eliminate the definitions of “communication,” “advertisement,” “market letter” and “sales literature” in Incorporated NYSE Rule 472.

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multiple qualified plans offered to employees of the same employer, provided that the plans in the aggregate have at least 100 participants. FINRA also has added a Supplementary Material to clarify that a member’s internal written (including electronic) communications that are intended to educate or train registered persons about the products or services offered by a member are considered institutional communications pursuant to paragraph (a)(3) of proposed FINRA Rule 2210. See proposed FINRA Rule 2210.01. Accordingly, such internal communications are subject to both the provisions of proposed FINRA Rule 2210 and NASD Rule 3010(d) (Review of Transactions and Correspondence). See also Securities Exchange Act Release No. 64736 (June 23, 2011), 76 FR 38245 (June 29, 2011) (Notice of Filing File No. SR-FINRA-2011-028) (proposing, among other things, to adopt NASD Rule 3010(d) as FINRA Rule 3110(b)(4), subject to certain changes).

<sup>7</sup> NASD Rule 2211 currently defines the terms “correspondence,” “institutional sales material,” “institutional investor,” “existing retail customer,” “prospective retail customer” and “market letter.”

Communications that currently qualify as advertisements and sales literature generally would fall under the definition of “retail communication.” In addition, to the extent that a member distributed or made 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 would fall under the definition of “retail communication.” Communications that currently qualify as “institutional sales material” would fall within the definition of “institutional communication.” Some communications that currently qualify as “correspondence” would continue to fall within that definition. However, communications sent to more than 25 retail investors within a 30 calendar-day period in all cases would be considered retail communications.<sup>8</sup>

Although the proposal would eliminate the terms “public appearance” and “independently prepared reprint,” as discussed below, the proposal would retain with respect to these communication categories much of the substance of the exceptions from the filing requirements and limited application of the content standards.

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<sup>8</sup> The definition of “correspondence” in NASD Rule 2211 currently includes market letters as well as written letters and electronic mail messages that are sent to one or more existing retail customers and fewer than 25 prospective retail customers within a 30 calendar-day period. “Market letter” is defined to include any communication excepted from the definition of “research report” pursuant to NASD Rule 2711(a)(9)(A). See NASD Rule 2211(a)(5). FINRA revised the definition of “correspondence” to include market letters in February 2009 in order to allow members 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 (February 2009). Proposed FINRA Rule 2210 would continue to allow members to send retail communications that are excepted from the definition of “research report” pursuant to NASD Rule 2711(a)(9)(A) without having a registered principal approve the communication prior to use, provided that a member supervises and reviews such communications in the same manner as correspondence. See proposed FINRA Rule 2210(b)(1)(D).

Approval, Review and Recordkeeping Requirements

Currently NASD Rule 2210(b)(1)(A) requires a registered principal of the member to approve each advertisement, item of sales literature and independently prepared reprint before the earlier of its use or filing with the Department. Proposed FINRA Rule 2210(b)(1)(A) would require an appropriately qualified registered principal of the member to approve each retail communication before the earlier of its use or filing with the Department. The principal registration required to approve particular communications would depend upon the permissible activities for each principal registration category.<sup>9</sup> The proposed rule change would eliminate 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.<sup>10</sup>

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

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<sup>9</sup> Currently NASD Rule 1022(g) permits a General Securities Sales Supervisor to approve sales literature as defined in NASD Rule 2210, but does not permit persons within this category to approve advertisements. FINRA separately sought comment on a proposal that would amend the General Securities Sales Supervisor registration category to remove the restriction on approving advertisements, and to permit persons within this registration category to approve retail communications as defined in proposed FINRA Rule 2210. See Regulatory Notice 09-70 (December 2009).

<sup>10</sup> The term “allied member” was largely deleted from the Incorporated NYSE Rules in 2008, and thus is not being carried over as part of proposed FINRA Rule 2210(b)(1)(A). See Regulatory Notice 08-64 (October 2008).

securities.<sup>11</sup> Proposed FINRA Rule 2210(b)(1)(B) would continue this provision without substantive change.<sup>12</sup>

NASD Rule 2210(b)(1)(D) provides an exception from the principal 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 member intends to publish or distribute it: (i) another member has filed it with the Department and has received a letter from the Department stating that it appears to be consistent with applicable standards; and (ii) the member 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 Department's letter. Proposed FINRA Rule 2210(b)(1)(C) would preserve this exception for retail communications.

Proposed FINRA Rule 2210(b)(1)(D) would except from the principal approval requirements of proposed FINRA Rule 2210(b)(1)(A) three additional categories of retail communications, provided that the member supervises and reviews such 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

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<sup>11</sup> FINRA separately sought comment on a proposal that would adopt a stand-alone permissive registration category for Supervisory Analysts. See Regulatory Notice 09-70 (December 2009).

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



2711(a)(9)(A); (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 member.

The first category generally carries forward a current exception from the principal pre-use approval requirements for market letters.<sup>13</sup> The second category codifies a current interpretation of the rules governing communications with the public that allows members to supervise communications posted on interactive electronic forums in the same manner as is required for supervising correspondence.<sup>14</sup> The third category broadens a current principal pre-use approval exception for 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 member.<sup>15</sup> Unlike the current principal pre-use approval exception, this exception would apply to all retail communications.<sup>16</sup>

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<sup>13</sup> See NASD Rules 2211(a)(1), (a)(5) and (b)(1)(A); see also Regulatory Notice 09-10 (February 2009).

<sup>14</sup> See Regulatory Notice 10-06 (January 2010).

<sup>15</sup> See NASD Rule 2211(b)(1)(A).

<sup>16</sup> Thus, the current rules require firms to make the determination of whether correspondence that is sent to 25 or more existing retail customers within a 30 calendar-day period requires principal pre-use approval because it makes a financial or investment recommendation or otherwise promotes a product or service of the member. FINRA would expect firms to apply the same analysis going forward regarding principal pre-use approval with respect to all retail communications. FINRA generally considers this exception to cover communications that are more 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. Communications that are intended to educate investors about products or services, however, do not fall within this exception.

Proposed FINRA Rule 2210(b)(1)(E) would allow FINRA, pursuant to the FINRA Rule 9600 Series, to grant an exemption from the principal 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.

Proposed FINRA Rule 2210(b)(1)(F) would provide that, notwithstanding any other provision of FINRA Rule 2210, a registered principal must approve a communication prior to the member filing it with the Department. Currently NASD Rule 2210(b)(1)(A) requires a principal to approve an advertisement, item of sales literature or independently prepared reprint before the earlier of its use or filing with the Department. Proposed FINRA 2210(b)(1)(F) is intended to clarify that an appropriately qualified principal must approve any communication that is filed with the Department, even if a communication otherwise would come under an exception to the principal approval requirements of proposed FINRA Rule 2210(b)(1)(A).

NASD Rule 2211(b)(1) and NASD Rule 3010(d) impose certain supervisory and review requirements with regard to a member's correspondence and institutional sales material.<sup>17</sup> Proposed FINRA Rules 2210(b)(2) and (3) generally would maintain the

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<sup>17</sup> These rules require each member 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.

supervision and review standards for correspondence and institutional communications that are currently found in NASD Rules 2211 and 3010(d).

Currently NASD Rule 2210(b)(2) requires members 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 such approval was not required pursuant to NASD Rule 2210(b)(1)(D);<sup>18</sup> and (iii) for any communication for which principal approval was not required pursuant to NASD Rule 2210(b)(1)(D), the name of the member that filed the communication with the Department and a copy of the corresponding Department review letter. NASD Rule 2211(b)(2) requires members 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 such communication. NASD Rules 3010(d)(3)<sup>19</sup> and 3110(a)<sup>20</sup>

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<sup>18</sup> As noted above, NASD Rule 2210(b)(1)(D) creates an exception from the principal approval requirements of NASD Rule 2210(b)(1)(A) for any advertisement, item of sales literature or independently prepared reprint if, at the time that a member intends to publish or distribute it: (i) another member has filed it with the Department and has received a letter from the Department stating that it appears to be consistent with applicable standards; and (ii) the member using it 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 Department's letter.

<sup>19</sup> FINRA is proposing to adopt NASD Rule 3010(d)(3) as FINRA Rule 3110.11 (Retention of Correspondence and Internal Communications), subject to certain changes, in the Consolidated FINRA Rulebook. See Securities Exchange Act Release No. 64736 (June 23, 2011), 76 FR 38245 (June 29, 2011) (Notice of Filing File No. SR-FINRA-2011-028 (Proposed Rule Change to Adopt the Consolidated FINRA Supervision Rules).

<sup>20</sup> The SEC has approved the adoption of the general recordkeeping requirements of NASD Rule 3110(a) as FINRA Rule 4511, subject to certain changes. FINRA

require members to retain correspondence of registered representatives as prescribed by SEA Rule 17a-4.

Proposed FINRA Rule 2210(b)(4)(A) would set forth the record-keeping requirements for retail and institutional communications; generally, these requirements would mirror current record-keeping requirements. This provision incorporates by reference the record-keeping format, medium and retention period requirements of SEA Rule 17a-4.<sup>21</sup>

Proposed FINRA Rule 2210(b)(4)(A) specifies that such records would have to 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;

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Rule 4511 becomes effective on December 5, 2011. See Securities Exchange Act Release No. 63784 (January 27, 2011), 76 FR 5850 (February 2, 2011) (Order Approving File No. SR-FINRA-2010-052); Regulatory Notice 11-19 (April 2011).

<sup>21</sup> 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.

- 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;<sup>22</sup>
- 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 proposed FINRA Rule 2210(b)(1)(C), the name of the member that filed the retail communication with the Department and a copy of the Department's review letter.

Proposed FINRA Rule 2210(b)(4)(B) cross-references NASD Rules 3010(d)(3)<sup>23</sup> and 3110(a)<sup>24</sup> with respect to correspondence record-keeping requirements.

#### Filing Requirements and Review Procedures

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

NASD Rule 2210(c)(5)(A) currently requires a member that previously has not filed advertisements with the Department or another self-regulatory organization to file its initial advertisement with the Department at least 10 business days prior to use. This filing requirement continues for a year after the initial filing. Proposed FINRA Rule 2210(c)(1)(A) would trigger the new member one-year filing requirement beginning on

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<sup>22</sup> 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.

<sup>23</sup> See supra note 18.

<sup>24</sup> See supra note 19.

the date reflected in the Central Registration Depository (CRD®) system that the firm's FINRA membership became effective, rather than on the date a member first files an advertisement with the Department. Although proposed FINRA Rule 2210 no longer defines the term "advertisement," this new member filing requirement would only apply to retail communications that currently fall under the "advertisement" definition, such as generally accessible websites, print media communications, and television and radio commercials.

NASD Rule 2210(c)(5)(B) currently authorizes the Department to require a member to file all of its advertisements and/or sales literature, or the portion of the member's material relating to specific types or classes of securities or services, with the Department at least 10 business days prior to use, if the Department determines that the member has departed from NASD Rule 2210's standards. Proposed FINRA Rule 2210(c)(1)(B) would carry forward this authority and apply it to all of a member's communications (rather than just advertisements or sales literature).

NASD Rule 2210(c)(4) currently requires members 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 Department have been made. These communications include advertisements and sales literature for certain registered investment companies that include self-created rankings, advertisements concerning CMOs, and advertisements concerning security futures.

Proposed FINRA Rule 2210(c)(2) would revise 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 member.

Proposed FINRA Rule 2210(c)(3) would revise the categories of communications that must be filed within 10 business days of first use or publication. Similar to NASD Rule 2210(c)(2), proposed FINRA Rule 2210(c)(3) would require retail communications concerning registered investment companies and public direct participation programs to be filed within 10 business days of first use. However, the proposal for the first time would require that all retail communications concerning closed-end registered investment companies be filed with FINRA. Currently NASD Rule 2210 requires members 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.<sup>25</sup> The proposed filing requirement also would apply to retail communications that are distributed after a closed-end fund's IPO period. FINRA believes that investors deserve the same protections concerning retail communications about closed-end funds that are distributed after the IPO period as those that are distributed during the IPO period.

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<sup>25</sup> See "Ask the Analyst," Regulatory & Compliance Alert (Winter 1999) p. 13.

Proposed FINRA Rule 2210(c)(3)(C) would require members to file within 10 business days of first use all retail communications concerning government securities. Currently this requirement only applies to advertisements concerning such securities.<sup>26</sup> Consistent with current requirements, proposed FINRA Rule 2210(c)(3)(D) would require members to file within 10 business days of first use templates for written reports produced by, or retail communications concerning an investment analysis tool, as such term is defined in proposed FINRA Rule 2214.<sup>27</sup>

Proposed FINRA Rule 2210(c)(3)(E) would require members to file within 10 business days of first use retail communications concerning CMOs that are registered under the Securities Act of 1933 (“Securities Act”). Currently members are required only to file advertisements concerning CMOs, but must file them at least 10 business days prior to first use.<sup>28</sup>

Under proposed FINRA Rule 2210(c)(3)(F), members would have to file within 10 business days of first use all retail communications concerning any security that is registered under the Securities Act 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 (E) of paragraph (c)(3). The purpose of this provision is to require the filing of retail communications concerning publicly offered structured products, such as exchange-traded notes or registered grantor trusts that currently are not required to be filed. This

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<sup>26</sup> See NASD Rule 2210(c)(2)(C).

<sup>27</sup> See NASD Rule 2210(c)(2)(D).

<sup>28</sup> See NASD Rule 2210(c)(4)(B).



provision excludes retail communications that are already subject to a separate filing requirement found elsewhere in proposed paragraph (c), such as retail communications concerning registered investment companies or public direct participation programs.

Consistent with current rules, proposed FINRA Rule 2210(c)(4) provides that, if a member has filed a draft version or “story board” of a television or video retail communication pursuant to a filing requirement, then the member also must file the final filmed version within 10 business days of first use or broadcast.<sup>29</sup>

Proposed FINRA Rule 2210(c)(5) specifies that a member must provide with each filing the actual or anticipated date of first use, the name, title and CRD® number of the registered principal who approved the communication, and the date of approval. These requirements generally carry forward the current requirements of NASD Rule 2210(c)(1).

Proposed FINRA Rule 2210(c)(6) provides that each member’s written communications may be subject to a spot-check procedure, and that members must submit requested material within the time frame specified by the Department. This provision is consistent with current rules.<sup>30</sup>

Proposed FINRA Rule 2210(c)(7) generally duplicates the current exclusions from the filing requirements under NASD Rule 2210(c)(8), with certain modifications. Proposed paragraph (c)(7)(A) would continue the current filing exclusion for retail communications that previously have been filed with the Department and that are to be used without material change.<sup>31</sup> Proposed paragraph (c)(7)(B) would add an exclusion

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<sup>29</sup> See NASD Rule 2210(c)(6).

<sup>30</sup> See NASD Rule 2210(c)(7).

<sup>31</sup> See NASD Rule 2210(c)(8)(A).

for retail communications that are based on templates that were previously filed with the Department, the changes to which are limited to updates of more recent statistical or other non-narrative information.<sup>32</sup> Proposed paragraph (c)(7)(C) would exclude retail communications that do not make any financial or investment recommendation or otherwise promote a product or service of the member.<sup>33</sup>

Proposed paragraphs (c)(7)(D), (E), (G) and (H) would preserve for retail communications the current filing exclusions for advertisements and sales literature that do no more than identify a national securities exchange symbol of the member or identify a security for which the member is a registered market maker; advertisements and sales literature that do no more than identify the member 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.<sup>34</sup>

Proposed paragraph (c)(7)(F) would modify the current filing exclusion for prospectuses and other documents that have been filed with the SEC or any state.<sup>35</sup> The current filing exclusion does not cover investment company omitting prospectuses

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<sup>32</sup> This exclusion is based in part on an earlier staff interpretation concerning how NASD Rule 2210’s approval, record-keeping and filing requirements apply to statistical updates contained in pre-existing templates. See Letter from Thomas M. Selman, NASD, to Forrest R. Foss, T. Rowe Price Associates, Inc., dated January 28, 2002. If a member changed the template’s presentation in any material respect, however, this exclusion would not apply.

<sup>33</sup> This filing exception would have the same scope as the proposed 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 proposed FINRA Rule 2210(b)(1)(D)(iii).

<sup>34</sup> See NASD Rules 2210(c)(8)(C), (D), (F) and (G).

<sup>35</sup> See NASD Rule 2210(c)(8)(E).

published pursuant to Securities Act Rule 482. As modified, this filing exclusion also would not cover free writing prospectuses that are filed with the SEC pursuant to Securities Act Rule 433(d)(1)(ii).<sup>36</sup> 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 NASD 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.<sup>37</sup> This proposed modification would codify the guidance provided in that Regulatory Notice.

Proposed paragraph (c)(7)(I) would maintain the filing exclusion for reprints of independently prepared articles or reports currently found in NASD Rule 2210(c)(8)(H).<sup>38</sup>

Proposed paragraphs (c)(7)(J) and (K) would maintain the current filing exclusions for correspondence and institutional sales material.<sup>39</sup> Proposed paragraph

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<sup>36</sup> 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.

<sup>37</sup> See Regulatory Notice 10-52 (October 2010).

<sup>38</sup> 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 would also cover independently prepared investment company reports described in NASD Rule 2210(a)(6)(B).

<sup>39</sup> See NASD Rules 2210(c)(8)(I) and (J).

(c)(7)(L) would exclude from filing communications that refer to types of investments solely as part of a listing of products or services offered by the member.<sup>40</sup>

Proposed paragraph (c)(8) would provide that communications excluded from the filing requirements pursuant to paragraphs (c)(7)(H) through (K) would be deemed filed with FINRA for purposes of Section 24(b) of the Investment Company Act and Rule 24b-3 thereunder. This provision is consistent with NASD Rule 2210(c)(8).

Proposed FINRA Rule 2210(c)(9)(A) would allow FINRA to exempt pursuant to the FINRA Rule 9600 Series, a member from the pre-use filing requirements of paragraph (c)(1)(A) for good cause shown.<sup>41</sup> Proposed paragraph (c)(9)(B) would allow FINRA to grant an exemption from the filing requirements of paragraph (c)(3) 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 would be limited to the same extent as in proposed paragraph (b)(1)(E), which would authorize FINRA to grant exemptive relief from the principal approval requirements in proposed FINRA Rule 2210(b)(1)(A) for retail communications, subject to the same standards.

#### Content Standards

Proposed 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

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<sup>40</sup> NASD Rule 2210(c)(9) similarly excludes from the filing requirements 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.

<sup>41</sup> This provision is consistent with NASD Rule 2210(c)(10).

472(i) and (j), subject to certain changes. Content standards that currently apply to advertisements and sales literature generally would apply to retail communications.

Proposed FINRA Rule 2210(d)(1)(A) incorporates the current standards of NASD Rule 2210(d)(1)(A) without substantive change.

Proposed FINRA Rule 2210(d)(1)(B) incorporates the current standards of NASD Rule 2210(d)(1)(B) largely without change, except that it would expressly prohibit promissory statements or claims. The Department 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.

Proposed FINRA Rule 2210(d)(1)(C) incorporates the current standards of NASD Rule 2210(d)(1)(C) without change.

Proposed FINRA Rule 2210(d)(1)(D) generally incorporates the standards currently found in NASD IM-2210-1(1), with only minor, non-substantive changes.

Proposed FINRA Rule 2210(d)(1)(E) generally incorporates the standards currently found in NASD IM-2210-1(2), although in a more abbreviated fashion.

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.

Proposed FINRA Rule 2210(d)(1)(F) would carry forward the current prohibition of performance predictions and projections, as well as, the allowance for hypothetical illustrations of mathematical principles. The proposal also would clarify 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.<sup>42</sup> Second, FINRA has permitted research reports on debt or equity securities to include price targets under certain circumstances.<sup>43</sup>

Accordingly, proposed FINRA Rule 2210(d)(1)(F) would clarify 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. Proposed FINRA Rule 2210(d)(1)(F) also would clarify 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.<sup>44</sup>

Proposed FINRA Rule 2210(d)(2) incorporates the standards currently found in NASD Rule 2210(d)(2)(B) without substantive change.

NASD Rule 2210(d)(2)(C) requires all advertisements and sales literature to: (i) prominently disclose the name of the member, and allows a fictional name by which the member is commonly recognized or which is required by any state or jurisdiction; (ii) reflect any relationship between the member and any non-member or individual who is

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<sup>42</sup> See NASD IM-2210-6 (Requirements for the Use of Investment Analysis Tools). NASD IM-2210-6 will be codified as FINRA Rule 2214 under the proposed rule change.

<sup>43</sup> See NASD Rule 2711(h)(7).

<sup>44</sup> These standards mirror those required for price targets contained in research reports on equity securities under NASD Rule 2711(h)(7).

also named in the communication; and (iii) if the communication includes other names, reflect which products and services are offered by the member. Proposed FINRA Rule 2210(d)(3) would apply these standards to correspondence as well as to retail communications. Members would be permitted to use the name under which a member's broker-dealer business is conducted as disclosed on the member's Form BD, as well as a fictional name by which a member is commonly recognized or which is required by any state or jurisdiction.

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. Proposed FINRA Rule 2210(d)(4)(A) would carry 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. Proposed FINRA Rule 2210(d)(4)(B) would carry forward this prohibition for all communications.

Proposed FINRA Rule 2210(d)(4)(C) would add new language concerning comparative illustrations of the mathematical principles of tax-deferred versus taxable compounding.

First, the illustration would have to 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. Second, the illustration would have to use and identify actual federal income tax rates. Third, the illustration would be 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. Fourth, the tax rates used in the illustration that is intended for a target audience would have to reasonably reflect its tax bracket or brackets as well as the tax character of capital gains and ordinary income. Fifth, if the illustration covers an investment's payout period, the illustration would have to reflect the impact of taxes during this period. Sixth, the illustration could not assume an unreasonable period of tax deferral.

Seventh, the illustration would have to 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;
- Its underlying assumptions;<sup>45</sup>

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<sup>45</sup> 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



- 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.<sup>46</sup> By placing this rule language in proposed 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.<sup>47</sup>

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

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applied in the hypothetical taxable illustration, any state income tax rate applied in the illustration, and the charges associated with the hypothetical investment.

<sup>46</sup> See "NASD Reminds Members of Their Responsibilities Regarding Hypothetical Tax-Deferral Illustrations in Variable Annuity Illustrations," NASD Member Alert (May 10, 2004).

<sup>47</sup> See NASD IM-2210-2; see also Securities Exchange Act Release No. 61107 (December 3, 2009), 74 FR 65180 (December 9, 2009) (Notice of Filing File No. SR-FINRA-2009-070) (Proposed Rule Change to Adopt FINRA Rule 2211 (Communications with the Public About Variable Insurance Products)).

operating expense ratio as set forth in the fund's current prospectus fee table. Proposed FINRA Rule 2210(d)(5) would maintain this standard for retail communications and correspondence.

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. Proposed 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 member or its products to prominently disclose: (i) the fact that the testimonial may not be representative of the experience of other customers; (ii) the fact that the testimonial is no guarantee of future performance or success; and (iii) if more than a nominal sum is paid, the fact that it is a paid testimonial. Proposed 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.

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

First, the proposal would apply these standards to retail communications and public appearances. Currently the standards apply only to advertisements and sales literature.

Second, NASD IM-2210-1(6)(A) requires disclosure of certain specified conflicts of interest to the extent applicable. These disclosures include: (i) if the member 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) if the member 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) if the member was manager or co-manager of a public offering of any securities of the recommended issuer in the past 12 months. Proposed FINRA Rule 2210(d)(7)(A) would carry forward the first and third disclosures, but would modify the second disclosure to limit it to financial interests of the member or any associated person with the ability to influence the content of the communication, 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 members with numerous officers and partners.<sup>48</sup>

Proposed FINRA Rule 2210(d)(7)(B) would require a member 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. This provision would carry forward the current requirements of NASD IM-2210-6(B).

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<sup>48</sup> 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).

Third, proposed FINRA Rule 2210(d)(7)(C) would amend 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 proposed 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.<sup>49</sup>

Fourth, proposed FINRA Rule 2210(d)(7)(D) expressly would exclude from its coverage communications that meet the definition of “research report” or that are public appearances by a research analyst for purposes of NASD Rule 2711 and that include all of the applicable disclosures required by that rule. Proposed FINRA Rule 2210(d)(7)(D) also would exclude any communication that recommends only registered investment companies or variable insurance products.<sup>50</sup>

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<sup>49</sup> Proposed FINRA Rule 2210(d)(7)(C), like Rule 206(4)-1(a)(2), generally would prohibit retail communications from referring to past specific recommendations of the member that were or would have been profitable to any person. The rule would allow, 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 member within the immediately preceding period of not less than one year. The list would have to provide certain information regarding each recommended security and include a prescribed cautionary legend warning investors not to assume that future recommendations will be profitable.

<sup>50</sup> FINRA is proposing to exclude communications that recommend only registered investment companies or variable insurance products because it believes that recommendations of these products do not raise the same kinds of conflicts of interest as recommendations of other types of securities, since they are pooled investment vehicles rather than securities of a single issuer. Nevertheless, there may be other types of sales-related conflicts of interest raised when members recommend such securities. FINRA has addressed these types of conflicts through its rules governing sales of these products. See NASD Rule 2830 (Investment Companies Securities) and FINRA Rule 2320 (Variable Contracts of an Insurance Company); see also Securities Exchange Act Release No. 64386

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.”<sup>51</sup> 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 member file a public appearance with the Department.

In the interest of simplification, the term “public appearance” is no longer a separate communication category. Nevertheless, proposed FINRA Rule 2210(f) sets forth many of the same general standards that would apply to public appearances that exist currently. Public appearances would have to meet the general “fair and balanced” standards of proposed paragraph (d)(1). Unlike the current rules governing public appearances, the disclosure requirements applicable to recommendations in proposed paragraph (d)(7) also would apply if the public appearance included a recommendation of a security. The proposal also would require members 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

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(May 3, 2011), 76 FR 26779 (May 9, 2011) (Notice of Filing File No. SR-FINRA-2011-018).

<sup>51</sup> NASD Rule 2210(a)(5).

public appearances are considered communications for purposes of proposed FINRA Rule 2210.<sup>52</sup>

#### Use of Investment Company Rankings in Retail Communications

Proposed FINRA Rule 2212 would replace NASD IM-2210-3 with regard to standards applicable to the use of investment company rankings in communications. The standards generally would 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. The proposal would add a new paragraph (h) that would exclude from the proposed rule's coverage reprints or excerpts of articles or reports that are excluded from the Department's filing requirements pursuant to proposed FINRA Rule 2210(c)(7)(I).

#### Requirements for the Use of Bond Mutual Fund Volatility Ratings

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

#### Requirements for the Use of Investment Analysis Tools

Proposed FINRA Rule 2214 would replace NASD IM-2210-6 with regard to standards applicable to the use of investment analysis tools. The standards generally would remain the same with some minor changes. Currently NASD IM-2210-6 requires a member that offers or intends to offer an investment analysis tool, within 10 days of

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<sup>52</sup> The requirement to establish supervisory policies and procedures for public appearances is consistent with NASD Rule 3010(b) and Incorporated NYSE Rule 472(l).

first use, to provide the 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. Proposed FINRA Rule 2214(a) would require members 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 proposed FINRA Rule 2210(c).

The proposal also would move some language that is currently contained either in NASD IM-2210-6's text or in footnotes to Supplementary Material that follows the Rule. Proposed Supplementary Material 2214.06 would provide that a retail communication that contains only an incidental reference to an investment analysis tool would not have to include the disclosures otherwise required for retail communications that advertise an investment analysis tool, and would not have to be filed with FINRA unless otherwise required by FINRA Rule 2210.<sup>53</sup> In addition, the Supplementary Material would provide 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 would only have to include the disclosures required by paragraphs (c)(2) and (c)(4) of proposed Rule 2214. Proposed Supplementary Material 2214.07 provides additional detail regarding disclosure required by paragraph (c)(3) of Rule 2214. This language is currently found in footnote 4 to IM-2210-6. However, FINRA has added a specific requirement to disclose whether the investment analysis tool is limited to

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<sup>53</sup> This provision is consistent with footnote 3 to NASD IM-2210-6.

searching, analyzing or in any way favoring securities in which the member serves as an underwriter.

Communications with the Public Regarding Security Futures

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

First, portions of NASD IM-2210-7 apply only to advertisements. Proposed FINRA Rule 2215 would apply these provisions to all retail communications.

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

Third, the proposal would amend the provisions that require communications concerning security futures to be accompanied or preceded by the security futures risk disclosure document under certain circumstances.<sup>54</sup> As revised, a communication concerning security futures would have to be accompanied or preceded by the risk disclosure document if it contained the names of specific securities.

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<sup>54</sup> See NASD IM-2210-7(b).



Fourth, proposed FINRA Rule 2214(b)(4)(D) would clarify 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

Proposed FINRA Rule 2216 would replace NASD IM-2210-8 with regard to standards applicable to retail communications concerning CMOs. The standards would remain the same as in IM-2210-8.

As noted above, FINRA will announce the implementation date of the proposed rule change in a Regulatory Notice to be published no later than 90 days following Commission approval. The implementation date will be no later than 365 days following Commission approval.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>55</sup> which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes that the proposed rule change will help ensure that investors are protected from potentially false or misleading communications with the public distributed by FINRA member firms.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the

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<sup>55</sup> 15 U.S.C. 78o-3(b)(6).

Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

In September 2009, FINRA published Regulatory Notice 09-55 (the "Notice"), requesting comment on the rules as proposed therein (the "Notice proposal"). A copy of the Notice is attached as Exhibit 2a. The comment period expired on November 20, 2009. FINRA received 23 comments in response to the Notice. A list of the commenters in response to the Notice is attached as Exhibit 2b, and copies of the comment letters received in response to the Notice are attached as Exhibit 2c.<sup>56</sup> A summary of the comments and FINRA's response is provided below.

Communication Categories

Interactive Electronic Communications

Cornell, Cutter, PIABA, SIFMA, StockCross, Vanguard and Wells Fargo generally supported the proposed consolidation of the six current communication categories under NASD Rule 2210 into three categories under proposed FINRA Rule 2210(a). Fidelity and the ICI suggested that FINRA add a new separate communication category for "interactive electronic communications," which would include real-time interactive electronic communications made through social media websites, and that FINRA allow this communication to be supervised in a manner similar to the supervision of correspondence.

FINRA does not believe adding a fourth communication category for interactive electronic communication categories is necessary. However, as discussed below, FINRA has modified the principal review and approval requirements under proposed paragraph

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<sup>56</sup> See Exhibit 2b for a list of abbreviations assigned to commenters.

(b) to allow retail communications that are posted on online interactive electronic forums to be supervised in the same manner as correspondence.<sup>57</sup> FINRA believes that this modification of the principal review and approval requirements achieves the same result sought by Fidelity and the ICI.

#### Definition of Correspondence

The Notice proposal defined “correspondence” as any written (including electronic) communication that is distributed or made available to 25 or fewer retail investors. The Notice proposal likewise defined “retail communication” as any written (including electronic) communication that is distributed or made available to more than 25 retail investors.

The proposed definition of “correspondence” generated a number of comments. The CAI, the ICI, TLGI, MBSC, NPHI, TD Ameritrade, Vanguard and WilmerHale objected to treating communications to more than 25 retail investors as retail communications rather than correspondence. These commenters argued that the 25-investor cutoff is arbitrary, and that given the challenges in monitoring whether a communication is limited to 25 or fewer recipients, members would be forced to treat all letters and emails as retail communications. These commenters recommended that FINRA revise the proposal to include within the definition of “correspondence” emails to existing retail customers, regardless of the number of recipients.

NASD Rule 2211(a)(1) defines “correspondence” as “any written letter 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

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<sup>57</sup> See proposed FINRA Rule 2210(b)(1)(D)(ii).

within any 30 calendar-day period.” However, NASD Rule 2211 also requires a member to have a registered principal approve prior to use correspondence that is distributed to 25 or more existing retail customers within any 30 calendar-day period and makes any financial or investment recommendation or otherwise promotes a product or service of the member.<sup>58</sup>

FINRA is not revising the definition of “correspondence” to include emails or written letters to existing retail customers without limit as to the number of recipients. However, to address the concern raised by the commenters, FINRA has revised the proposed principal approval requirements to exclude communications to retail investors that do not make any financial or investment recommendation or otherwise promotes a product or service of the member.<sup>59</sup> This revision will continue to allow members to distribute non-promotional emails and other communications to retail investors without having a principal approve them prior to use.

Unlike the current definition of “correspondence” under NASD Rule 2211, the Notice proposal’s definition of “correspondence” did not reference a 30 calendar-day window within which to count the number of recipients. Cutter, the ICI, Morgan, SIFMA, WGSF and WilmerHale all objected to the elimination of the 30 calendar-day period. In response to these comments, FINRA has revised the definition of “correspondence” to include written communications distributed or made available to 25 or fewer retail investors within any 30 calendar-day period. FINRA likewise has revised the definition of “retail communication” to include written communications that are

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<sup>58</sup> See NASD Rule 2211(b)(1)(A).

<sup>59</sup> See proposed FINRA Rule 2210(b)(1)(D)(iii).

distributed or made available to more than 25 retail investors within any 30 calendar-day period.

The current definition of “correspondence” includes “market letters,” which are defined as “any written communication excepted from the definition of ‘research report’ pursuant to NASD Rule 2711(a)(9)(A).”<sup>60</sup> The Notice proposal’s definition of “correspondence” did not include market letters. Forefield and Wells Fargo opposed the elimination of market letters from the definition of correspondence. These commenters requested that FINRA either revise the definition to include market letters, or provide an exception from the principal approval requirements for market letters.

In the interest of keeping the definition of “correspondence” as straightforward as possible, FINRA is not revising the definition to include market letters. However, FINRA has revised the principal approval requirements to allow members to supervise any retail communication that is excepted from the definition of “research report” pursuant to NASD Rule 2711(a)(9)(A) in the same manner as correspondence.<sup>61</sup> FINRA believes that the same rationale it used to provide members with more flexibility in supervising market letters continues to exist, and thus has made this change to the principal approval requirements.<sup>62</sup>

#### Definitions of Institutional Communication and Institutional Investor

The Notice proposal defined “institutional communication” as “any written (including electronic) communication that is distributed or made available only to

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<sup>60</sup> See NASD Rule 2211(a)(5).

<sup>61</sup> See proposed FINRA Rule 2210(b)(1)(D)(i).

<sup>62</sup> See Notice to Members 09-10 (February 2009).

institutional investors.” TD Ameritrade commented that “or made available to” should be deleted from the definition and replaced with “intended for an audience of.” With this change, TD Ameritrade noted that members could post to websites that are intended for institutional investors without having to make it password-protected.

FINRA disagrees with this comment. If members were merely required to “intend” that a communication reach institutional investors, they could effectively distribute the communication to anyone simply by including a disclaimer regarding its intended audience. This rule change would make the distinction between institutional communications and retail communications virtually meaningless.

The Notice proposal defined “institutional investor” to include persons described in NASD Rule 3110(c)(4) (definition of “institutional account”), government entities and subdivisions, certain employee benefit and qualified plans that have at least 100 participants, members and their registered personnel, and persons acting on behalf of institutional investors. Fidelity requested that FINRA clarify that if an employer offers multiple employee benefit plans, the plans may be aggregated for purposes of calculating the number of participants. FINRA has revised the definition of “institutional investor” to allow aggregation of multiple plans offered by a single employer.

Fidelity, SIFMA and WilmerHale argued for expanding the definition of “institutional investor” to include non-retail entities with assets under \$50 million.<sup>63</sup>

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<sup>63</sup> Under NASD Rule 3110(c)(4), a person who does not fall within one of the enumerated categories must have total assets of at least \$50 million to be considered an institutional account. The SEC recently approved the adoption of NASD Rule 3110(c)(4) as FINRA Rule 4512(c) without material change. See Securities Exchange Act Release No. 63784 (January 27, 2011), 76 FR 5850 (February 2, 2011) (Order Approving File No. SR-FINRA-2010-052). FINRA

FINRA believes that the definition is already sufficiently broad, and that entities that have assets of less than \$50 million often require the same investor protections regarding sales material as a retail investor.

SIFMA and TD Ameritrade argued that the rule should make clear that if a member provides an institutional communication to another member, the first member is not responsible if the second member forwards the communication to retail investors. FINRA believes that, while one member generally is not responsible for the actions of another, such a determination will be subject to the facts and circumstances. Moreover, a member may not provide an institutional communication to another if the member has reason to believe that it will be forwarded to retail investors. Accordingly, FINRA declines to make this change.

FINRA has added a Supplementary Material to FINRA Rule 2210 to clarify the extent to which a member's internal communications would be considered institutional communications. The Supplementary Material provides that a member's internal written (including electronic) communications that are intended to educate or train registered persons about the products or services offered by a member are considered institutional communications pursuant to paragraph (a)(3) of proposed FINRA Rule 2210. Accordingly, such internal communications are subject to both the provisions of proposed FINRA Rule 2210 and NASD Rule 3010(d).

#### Definition of Retail Communication

The Notice proposal defined "retail communication" as "any written (including electronic) communication that is distributed or made available to more than 25 retail

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Rule 4512 becomes effective on December 5, 2011. See Regulatory Notice 11-19 (April 2011).

investors.” “Retail investor” was defined as “any person other than an institutional investor.” Generally “retail communication” would include communications that currently fall under the definitions of “advertisement” and “sales literature.”

The CAI and NPHI both expressed concern that combining advertisements and sales literature into a single category might lead FINRA staff to apply the same standards to all retail communications regardless of the intended audience. These commenters recommended that FINRA provide guidance that it will continue to take into account the anticipated audience for a proposed retail communication when determining what disclosures and other content standards to apply.

FINRA notes that proposed FINRA Rule 2210(d)(1)(E) provides that “[m]embers must consider the nature of the audience to which the communication will be directed and must provide details and explanations appropriate to the audience.” While proposed FINRA Rule 2210’s content standards apply to all retail communications, the level of detail and explanation required for a particular retail communication will depend on the audience to which it is directed.

It may be unclear whether the definition of “retail investor” includes persons who are not customers of a member. Accordingly, FINRA has revised the definition to add at its end “regardless of whether the person has an account with a member.”<sup>64</sup>

#### Approval and Recordkeeping

##### Review and Approval of Retail Communications

FINRA Rule 2210(b)(1)(A) in the Notice proposal provided that “an appropriately qualified registered principal” must approve each retail communication before the earlier

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<sup>64</sup> As noted above, FINRA also revised the definition of “retail communication” to add at its end “within any 30 calendar-day period.”



of its use or filing with the Department. SIFMA and Wells Fargo commented that the proposal should provide greater guidance as to which principal registration category is required to approve different categories of retail communications. FINRA believes that this issue is already addressed in the registration rules for principals and supervisors.<sup>65</sup> Accordingly, FINRA does not believe that it would be appropriate or useful to restate those rules' provisions in the rules governing communications with the public.

In a similar vein, Morgan, SIFMA and WilmerHale requested clarification as to whether a Series 9/10 general securities sales supervisor would be permitted to review and approve retail communications and correspondence. Currently, Series 9/10 supervisors are qualified to review and approve correspondence and sales literature, but are not qualified to approve advertisements as defined in NASD Rule 2210.<sup>66</sup> While the scope of a Series 9/10 supervisor's activities are not part of this rule proposal, FINRA notes that it has separately proposed to adopt new FINRA rules that would allow a general securities sales supervisor to approve both correspondence and retail communications.<sup>67</sup>

The ICI requested confirmation that the principal approval requirements do not apply to the updating of templates contained in retail communications. FINRA does not intend to revise its earlier interpretive position with regard to the updating of templates as

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<sup>65</sup> See NASD Rules 1020 et seq.

<sup>66</sup> See NASD Rule 1022(g)(2)(C)(iii).

<sup>67</sup> See Regulatory Notice 09-70 (December 2009), Attachment B (proposed FINRA Rule 1230(a)(10)) (eliminates current restriction on Series 9/10 supervisors approving advertisements).

stated in a 2002 interpretive letter to T. Rowe Price Associates, Inc.<sup>68</sup> Moreover, proposed paragraph (c)(7)(B) would add an exclusion from the filing requirements for retail communications that are based on templates that were previously filed with the Department, the changes to which are limited to updates of more recent statistical or other non-narrative information.

SIFMA recommended that FINRA reiterate its previous interpretive guidance regarding the supervision of electronic communications as set forth in Regulatory Notice 07-59.<sup>69</sup> FINRA is separately addressing the staff guidance contained in Regulatory Notice 07-59 regarding the supervision of electronic communications as part of its proposal to adopt new FINRA Rule 3110.<sup>70</sup>

The CAI, Cornell, Fidelity, the FSI, MBSC, NPHI, SIFMA, Vanguard, and WGSJ commented that FINRA should address the supervision requirements for social networking sites and include them in the revised proposal filed with the SEC. After Regulatory Notice 09-55 was published for comment, but before this filing with the SEC, FINRA published Regulatory Notice 10-06, which provides guidance on blogs and social networking websites.<sup>71</sup> Among other things, that Notice addressed the supervision of social media sites and specified that members may adopt supervisory procedures similar

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<sup>68</sup> See Letter from Thomas M. Selman, NASD, to Forrest Foss, T. Rowe Price Associates Inc., dated January 28, 2002 (interpreting the approval, filing and recordkeeping requirements of NASD Rule 2210 as generally not applying to statistical updates contained in pre-existing templates).

<sup>69</sup> See Regulatory Notice 07-59 (December 2007).

<sup>70</sup> See Securities Exchange Act Release No. 64736 (June 23, 2011), 76 FR 38245 (June 29, 2011) (Notice of Filing File No. SR-FINRA-2011-028).

<sup>71</sup> See Regulatory Notice 10-06 (January 2010).

to those outlined for electronic correspondence in Regulatory Notice 07-59. FINRA is now codifying this guidance as part of proposed FINRA Rule 2210. Proposed paragraph (b)(1)(D)(ii) specifies that the requirements of paragraph (b)(1)(A), which require a principal to approve retail communications prior to use, will not apply to retail communications that are posted on an online interactive electronic forum, provided that the member supervises and reviews such communications in the same manner as required for supervising and reviewing correspondence pursuant to NASD Rule 3010(d).

In addition, given the rapid changes to technology used to communicate with customers, FINRA believes it will be useful going forward to have exemptive authority with regard to the principal pre-use approval requirements applicable to retail communications in certain circumstances. Accordingly, FINRA has added a new proposed paragraph (b)(1)(E) that would authorize FINRA to grant an exemption from the principal approval requirements of paragraph (b)(1)(A) for good cause shown and to the extent that such exemption is consistent with the purposes of Rule 2210, the protection of investors, and the public interest.

#### Review and Approval of Research-Related Retail Communications

FINRA Rule 2210(b)(1)(B) in the Notice proposal provided that, “[w]ith respect to research reports on debt and equity securities, the requirements of paragraph (b)(1)(A) may be met by a Supervisory Analyst approved pursuant to NYSE Rule 344.” This language duplicated an identical provision in NASD Rule 2210(b)(1)(B). SIFMA and WilmerHale requested that FINRA clarify that a supervisory analyst also may review and approve research-related communications that are not research reports, such as market letters, research notes and economic analyses.

FINRA does not believe such a clarification is necessary. Proposed paragraph (b)(1)(D)(i) would except from the requirements of paragraph (b)(1)(A) any retail communication that is excepted from the definition of “research report” pursuant to NASD Rule 2711(a)(9)(A), provided that the member supervises and reviews such communications in the same manner as required for supervising and reviewing correspondence. NASD Rule 2711(a)(9)(A) excludes from the definition of “research report” a broad range of research-related communications, such as discussions of broad-based indices, commentaries on economic, political or market conditions, and certain other research-related communications.<sup>72</sup> By allowing firms to supervise and review these communications in the same manner as firms supervise and review correspondence, FINRA believes that firms will have sufficient flexibility to address the concerns raised by SIFMA and WilmerHale.

#### Administrative Communications

FINRA Rule 2210(b)(1)(D) in the Notice proposal excluded from the principal approval requirements of paragraph (b)(1)(A) “any retail communication that is solely administrative in nature.” The CAI, Cutter, Fidelity, the FSI, Invesco, the ICI, MBSC, Morgan and SIFMA noted that currently NASD Rule 2211 does not require principal pre-use approval of emails and written letters to existing retail customers (without limit) as long as the communication does not make an investment recommendation or promote a

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<sup>72</sup> Currently NASD Rule 2211(a)(1) includes within the definition of “correspondence” any “market letter.” “Market letter” is defined as any written communication excepted from the definition of “research report” pursuant to NASD Rule 2711(a)(9)(A). See NASD Rule 2211(a)(5). Thus, the proposal would allow members to continue to supervise market letters in the same manner as they supervise correspondence.

product or service of the member.<sup>73</sup> These commenters argued that FINRA should make clear that these communications are included within the “solely administrative” exception. PIABA expressed concern that this exception could be used by members as a loophole to avoid principal review, and recommended that FINRA better define which communications fall within this exception.

In response to these comments, FINRA has revised paragraph (b)(1)(D) to eliminate the reference to “solely administrative” retail communications, and instead to exclude “any retail communication that does not make any financial or investment recommendation or otherwise promote a product or service of the member.” This language is currently used in NASD Rule 2211(b)(1)(A) with regard to the requirements for supervising correspondence that is sent to 25 or more existing retail clients, and thus maintains the same standard members face today with regard to such correspondence. In addition, FINRA believes the revised text better defines the scope of this exclusion. Members would still be required to supervise such retail communications in the same manner as required for supervising and reviewing correspondence pursuant to NASD Rule 3010(d).

FINRA is also adding a new paragraph (b)(1)(F) to clarify that, notwithstanding any other provision of proposed FINRA Rule 2210, an appropriately qualified principal must approve a communication prior to a member filing the communication with the Department.

#### Recordkeeping Requirements

FINRA Rule 2210(b)(4) in the Notice proposal set forth members’ recordkeeping

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<sup>73</sup> See NASD Rule 2211(b)(1)(A).

obligations with respect to each communication category. Proposed paragraph (b)(4)(A)(ii) provided that, with respect to institutional communications, records must include “the name of the person who prepared or distributed the communication.” Fidelity, the ICI and MBSC supported the requirement to maintain records of the person who prepared a communication, but opposed a requirement to keep records of the person who distributed the communication, which they believed would be difficult to implement. TD Ameritrade recommended that members be required to keep records of the person who prepared an institutional communication only where a registered principal has not approved it.

In response to these comments, FINRA has revised the recordkeeping provisions. As revised, a member’s records must include the name of any registered principal who approved a communication and the date approval was given.<sup>74</sup> In the case of a retail communication or institutional communication that is not approved prior to first use by a registered principal, the records must include the name of the person who prepared or distributed the communication. Thus, a member would not have to keep records of the person who distributed a retail communication or institutional communication, if the records included either the registered principal who approved the communication, or the person who prepared the communication.

FINRA Rule 2210(b)(4)(A)(iv) in the Notice proposal required records to include “the source of any statistical table, chart, graph or other illustration used in the communication.” Fidelity and the FSI requested that FINRA clarify what is required regarding sources of statistical tables or charts. For example, is it sufficient to have a

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<sup>74</sup> See proposed FINRA Rule 2210(b)(4)(A)(ii).

citation to a study, or must a record include a copy of the study itself? In response to these comments, FINRA has revised proposed FINRA Rule 2210(b)(4)(A)(iv) to require “information concerning” the source of the table or chart. This revision reflects the current recordkeeping requirements for sources of statistical tables or charts.<sup>75</sup>

### Filing Requirements

#### Filing Requirements for New Members and Certain Rule Violators

FINRA Rule 2210(c)(1)(A) in the Notice proposal required a new member to file with the Department all of its retail communications for a one-year period beginning on the effective date a member becomes registered with FINRA. This new member filing requirement differs from NASD Rule 2210(c)(5)(A), which applies only to advertisements and commences on the first date a new member files an advertisement with the Department. Proposed paragraph (c)(1)(B) provided that, if the Department determines that a member has departed from proposed FINRA Rule 2210’s standards, it may require the member to file all or part of its communications at least 10 business days prior to use.

Cornell opposed the commencement date of the new member filing period, arguing that this will decrease the time during which the Department will monitor a new member’s communications. FINRA disagrees that the new filing period is insufficient. Members are still subject to a filing requirement during their first year of operation and are required to file certain retail communications thereafter. In addition, members are always subject to spot-check procedures. Nevertheless, to ensure that the starting date for this filing requirement is clear, FINRA has revised this provision to specify that the one-

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<sup>75</sup> See NASD Rule 2210(b)(2)(B).

year filing period begins on the date reflected in the CRD® system as the date the firm's FINRA membership became effective.

WilmerHale opposed the breadth of this expanded filing requirement, which would cover communications that currently qualify as sales literature and thus do not have to be filed. WilmerHale argued that this expanded filing requirement would substantially hinder new firms' operations. SIFMA similarly argued that this filing requirement should exclude password-protected websites, since they are considered sales literature rather than advertisements under current rules.

FINRA recognizes that it may be burdensome for new firms to file all of their retail communications, including form letters and group emails sent to 25 or more retail investors within a 30 calendar-day period. Accordingly, FINRA has narrowed the scope of this filing requirement to cover only retail communications that are published or used in any electronic or other public media, including any generally accessible website, newspaper, magazine or other periodical, radio, television, telephone or audio recording, video display, signs or billboards, motion pictures or telephone directories (other than routine listings). This narrowing of the filing requirement would require new firms to file only retail communications that currently fall within the definition of "advertisement" under NASD Rule 2210, thus not changing the scope of this filing requirement as compared to current standards. The filing requirements of proposed paragraph (c)(1)(A) would not apply to password-protected websites.

Fidelity commented that FINRA should be required to delineate the administrative process that must be followed before it can impose a pre-use filing requirement on members that have violated the communications rules. FINRA believes



that proposed paragraph (c)(1)(B) specifies the steps FINRA must take before it may impose this requirement. The paragraph states that the Department must notify the member in writing of the types of communications to be filed and the length of time the requirement is to be in effect. The paragraph also states that any such filing requirement will take effect 21 calendar days after service of the written notice, during which time the member may request a hearing under FINRA Rules 9551 and 9559.

Retail Communications Concerning Structured Products

FINRA Rule 2210(c)(2)(B) in the Notice proposal required members to file at least 10 business days prior to use, retail communications concerning publicly offered CMOs, options, security futures, and any other publicly offered securities derived from or based on a single security, a basket of securities, an index, a commodity, a debt issuance or a foreign currency (“structured products”). These pre-use filing requirements would not apply to retail communications concerning options or security futures that are submitted to another self-regulatory organization having comparable standards, retail communications in which the only reference to options or security futures is contained in a listing of the member’s services, and retail communications that are subject to a separate filing requirement in paragraph (c) of the proposed rule.

Cornell, the ICI, PIABA and Vanguard supported the pre-use filing requirement for retail communications concerning structured products. Fidelity commented that FINRA should list which products fall within this requirement, and clarify that investment company products do not fall within this requirement. Fidelity also recommended that this filing requirement exclude factual material about structured products, such as research reports and fact sheets, and that FINRA should allow a

member to use retail communications that are filed with the Department if the member does not receive a response from FINRA within 10 business days.

Invesco and SIFMA commented that the proposal should be revised to eliminate the pre-use filing requirement for retail communications concerning structured products, and instead allow members to file such communications within 10 business days of first use. SIFMA also recommended that the reference to retail communications concerning options be stricken, since these communications are separately regulated under FINRA Rule 2220. In addition, SIFMA requested that FINRA exempt from this filing requirement retail communications concerning structured products for which there is a registration exemption under the Securities Act.

StockCross argued that the pre-use filing requirement for retail communications concerning structured products will hinder business since often these products have a limited offering period. Wells Fargo suggested that retail investors will be put at a disadvantage relative to institutional investors since retail investors will not be able to receive sales material concerning structured products until after the member receives Department staff's comments to filed communications.

WilmerHale also opposed the pre-use filing requirement for retail communications concerning structured products. WilmerHale argued that the burdens on members will strongly outweigh any benefit to investors. For example, members would be prevented from sending group emails to clients reminding them that their options are in the money without first filing such an email with FINRA at least 10 business days prior to transmission. WilmerHale and SIFMA both expressed concern that FINRA lacks the resources necessary to review such communications. WilmerHale also recommended

that FINRA exclude all research from the requirements of proposed FINRA Rule 2210 and address any specific concerns under NASD Rule 2711.

In response to these comments, FINRA is revising the filing requirements for retail communications concerning options, CMOs and structured products. FINRA agrees that FINRA Rule 2220 separately imposes a filing requirement for advertisements and sales literature concerning options; accordingly, it is unnecessary to include a separate filing requirement for retail communications concerning options under proposed FINRA Rule 2210. Thus, the reference to retail communications concerning options has been deleted.

FINRA also agrees that there may be situations in which a pre-use filing requirement would prevent members from distributing time-sensitive retail communications concerning CMOs and structured products in a timely manner. Accordingly, FINRA has revised the proposal to permit members to file retail communications concerning CMOs and structured products within 10 business days of first use, instead of at least 10 business days prior to use.<sup>76</sup>

FINRA does not believe it is appropriate to attempt to list all products that are derived from or based on a single security, a basket of securities, an index, a commodity, a debt issuance or a foreign currency. Members frequently develop new types of retail structured products that would not be included in any list that FINRA created today. Thus, FINRA believes that it is better to leave open the possibility that retail communications concerning new products also will fall under this filing requirement.

FINRA agrees that retail communications concerning registered investment

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<sup>76</sup> See proposed FINRA Rules 2210(c)(3)(E) and (F).

companies are not subject to the filing requirement covering structured products communications, since they are already subject to a separate filing requirement under proposed paragraphs (c)(2)(A), (c)(2)(C) and (c)(3)(A). FINRA has added language to proposed paragraph (c)(3)(F) to make this more clear.

FINRA does not agree that retail communications that only present “factual information” about structured products should be excluded. Arguably all sales material is “factual,” and the determination of which communications are not factual would be highly subjective. In addition, the proposal already excludes from filing retail communications whose only reference to investments is solely as part of a listing of products and services offered by the member.<sup>77</sup>

FINRA agrees that the filing requirement should not apply to retail communications concerning structured products that are not registered under the Securities Act. As a general matter, the filing requirements under NASD Rule 2210 do not apply to communications concerning privately placed securities, since typically these securities are not widely advertised. Accordingly, FINRA has added language to proposed paragraph (c)(3)(F) to clarify that the filing requirement only applies to retail communications concerning structured products that are registered under the Securities Act.

FINRA disagrees with the assertion that it lacks the resources to review retail communications concerning structured products. FINRA will ensure that the Department has the necessary staffing to review such material in a timely manner. Additionally, by allowing members to file such communications concurrent with use, this revision takes

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<sup>77</sup> See proposed FINRA Rule 2210(c)(7)(L).

some of the time pressure off members that seek to distribute retail communications prior to receiving staff comments.

FINRA also disagrees that proposed FINRA Rule 2210 should not apply to research. While NASD Rule 2711 does impose some content standards on research reports, it does not include the more general standards of proposed FINRA Rule 2210 that require communications to be fair and balanced. In addition, proposed FINRA Rule 2210 requires certain non-independent research, such as research prepared by a member or its affiliate on mutual funds or exchange-traded funds (“ETFs”), to be filed with the Department.

#### Retail Communications Concerning Closed-End Funds

FINRA Rule 2210(c)(3)(A) in the Notice proposal required members to file all retail communications concerning registered closed-end investment companies. Currently, FINRA only requires members to file such communications during a closed-end fund’s IPO period.

Cornell, the ICI, PIABA and Vanguard supported this expanded filing requirement. The ICI requested that FINRA clarify that its rules only reach members that prepare closed-end fund communications, and not the fund itself or its adviser. The ICI also requested that FINRA clarify that a fund underwriter is not responsible for communications concerning a closed-end fund prepared by an unaffiliated member.

FINRA rules apply to communications used by FINRA member firms. While its rules do not apply to non-member firms, such as investment companies and investment advisers that are not registered as broker-dealers, they do apply to any communications used by a member, regardless of which entity prepared the communications. Generally,

FINRA does not hold one member responsible for the actions of another member, but considers each case separately based on the facts and circumstances.

Wells Fargo opposed the requirement to file retail communications concerning closed-end funds after the IPO period has expired, arguing that trading closed-end funds on the secondary market does not raise the same concerns as during the IPO period.

FINRA disagrees with this argument. FINRA currently requires members to file retail communications concerning other types of investment company securities that are traded on the secondary market, such as ETFs. In addition, FINRA believes that investor protection concerns can arise from any retail communication concerning a closed-end fund, regardless of when it is distributed.

#### Filing Exclusions for Non-Material Changes and Templates

FINRA Rule 2210(c)(7)(A) in the Notice proposal excluded from the filing requirements of proposed paragraphs (c)(1) through (c)(4) “retail communications that previously have been filed and that are used without material change, including retail communications that are based on templates that were previously filed with the Department the changes to which are limited to updates of more recent statistical or other non-narrative information.” NASD Rule 2210(c)(8)(A) includes the same filing exclusion for previously filed advertisements and sales literature that are used without material change, but does not contain any express filing exclusion for templates.

The CAI, Fidelity, the ICI and MBSC expressed concern that proposed paragraph (c)(7)(A) would narrow the current filing exclusion for communications used without material change. By including the template filing exclusion in the same paragraph, these commenters feared that this filing exception would not allow non-material changes to

narrative information. FINRA did not intend to narrow the current filing exclusion for retail communications that are used without material change. Accordingly, FINRA has separated the filing exclusion for previously filed retail communications that are used without material change from the exclusion for certain previously filed templates.<sup>78</sup>

Filing Exclusion for Administrative Communications

FINRA Rule 2210(c)(1)(B) in the Notice proposal excluded from the filing requirements retail communications “that are solely administrative in nature.” This filing exclusion replaced a current exclusion for advertisements and sales literature “solely related to recruitment or changes in a member’s name, personnel, electronic or postal address, ownership, offices, business structure, officers or partners, telephone or teletype numbers, or concerning a merger with, or acquisition by, another member.”<sup>79</sup>

SIFMA requested that FINRA clarify that this exclusion covers generic documents or excerpts describing a member’s products or services, even if they reference a product subject to the filing requirements. Vanguard requested that this filing exclusion specifically reference the list of items that is excluded under current rules. Wells Fargo argued that this exclusion should not be limited to the administrative items that are excluded under current rules.

SIFMA’s interpretation of this filing exclusion is broader than FINRA intended. However, FINRA acknowledges that “solely administrative in nature” may be unclear to some members. Accordingly, FINRA is revising this exclusion to cover retail communications that do not make any financial or investment recommendation or

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<sup>78</sup> See proposed FINRA Rules 2210(c)(7)(A) and (B).

<sup>79</sup> See NASD Rule 2210(c)(8)(B).

otherwise promote a product or service of the member. In this regard, the filing exclusion covers the same retail communications that are excepted from the principal approval requirements under proposed FINRA Rule 2210(b)(1)(D).

#### Other Filing Exclusions

FINRA Rule 2210(c)(7)(G) of the Notice proposal excluded from the filing requirements reprints and excerpts of certain articles and reports produced by independent third parties. SIFMA requested that FINRA clarify whether that filing exclusion covered independent third-party research reports concerning registered investment companies, which are currently excluded from filing under NASD Rule 2210(c)(8)(H). FINRA does intend this filing exclusion also to cover independent research reports on registered investment companies which are excluded from filing under the current rules.

FINRA Rule 2210(c)(7)(J) of the Notice proposal excluded from the filing requirements communications that refer to investment company securities, direct participation programs or exempted securities solely as part of a listing of products or services offered by the member. TD Ameritrade requested that FINRA expand this exclusion to allow members to discuss the types of securities that can be traded through a member, to include general descriptions of these securities, to explain the functionality of online tools and trading platforms, and to present related fees and commissions, as long as no actual security is named. Cutter requested that this exclusion permit a listing of any type of investment a member offers, not just the securities described in the paragraph.

FINRA does not believe TD Ameritrade's proposed expansion would be appropriate, since it would cover many types of retail communications that normally



require review by Department staff. FINRA agrees, however, that a communication that refers to an investment solely as part of a listing of a member's products and services should be excluded from filing. FINRA has modified this filing exclusion accordingly.<sup>80</sup>

The Notice proposal would have eliminated a current filing exclusion for press releases that are made available only to members of the media.<sup>81</sup> The Notice proposal stated that FINRA staff found that members almost always post press releases on their websites, thus making them available to the general public, and making this filing exclusion inapplicable. Fidelity, the ICI and MBSC commented that members still rely on this filing exclusion, and thus objected to its elimination. Based on these representations, FINRA has reinstated the filing exclusion for press releases made available only to members of the media.<sup>82</sup>

In 2006, FINRA published an interpretive letter stating that free writing prospectuses are excluded from the provisions of NASD Rules 2210 and 2211.<sup>83</sup> Based on this 2006 letter, Morgan, SIFMA and WilmerHale requested that FINRA include a filing exclusion for free writing prospectuses. In October 2010, FINRA published a Regulatory Notice that withdrew, in part, the guidance provided in the 2006 interpretive letter.<sup>84</sup> In the 2010 Notice, FINRA stated that broadly disseminated free writing

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<sup>80</sup> See proposed FINRA Rule 2210(c)(7)(L).

<sup>81</sup> See NASD Rule 2210(c)(8)(G).

<sup>82</sup> See proposed FINRA Rule 2210(c)(7)(H).

<sup>83</sup> See Letter from Lisa C. Horrigan, Assistant General Counsel, NASD, to Eileen Ryan, Securities Industry Association, and Sarah Starkweather, The Bond Market Association, dated August 1, 2006.

<sup>84</sup> See Regulatory Notice 10-52 (October 2010).

prospectuses present the same investor protection concerns as communications governed by NASD Rules 2210 and 2211. Accordingly, FINRA announced that it now interprets FINRA 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. Based on this new guidance, rather than exclude free writing prospectuses, FINRA is modifying the current filing exclusion for SEC-filed documents not to cover broadly disseminated free writing prospectuses filed with the SEC pursuant to Securities Act Rule 433(d)(1)(ii).<sup>85</sup> Thus, such free writing prospectuses must be filed with FINRA to the extent that they constitute a retail communication covered by another filing requirement (such as a free writing prospectus concerning a structured product registered under the Securities Act).

SIFMA recommended that FINRA add a filing exclusion for general investment pieces that discuss an investment strategy but do not recommend or promote a particular product or service of a member. FINRA has revised the proposal to exclude retail communications that do not make investment recommendations or promote a member's products or services. However, depending on the facts and circumstances, a retail communication that discusses investment strategies may in fact be making investment recommendations or promoting a member's products or services.

#### Filing Exemptions

NASD Rule 2210(c)(10) and FINRA Rule 2210(c)(9) of the Notice proposal permitted FINRA to exempt a member from the pre-use filing requirements of paragraph (c)(1)(A) for good cause shown. As discussed above, FINRA has revised the principal

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<sup>85</sup> See proposed FINRA Rule 2210(c)(7)(F).

review and approval requirements to authorize FINRA to grant an exemption from the principal approval requirements of paragraph (b)(1)(A) for retail communications for good cause shown after taking into consideration all relevant factors, to the extent such exemption is consistent with the purposes of Rule 2210, the protection of investors, and the public interest. FINRA is similarly revising proposed paragraph (c)(9) to authorize FINRA to exempt a specific category of retail communications from the filing requirements under the same circumstances described with respect to the principal approval exemptive authority.

#### Other Filing Issues

NPHI requested that FINRA revise its filing requirements to be triggered off the date a registered principal approves a communication, rather than the date a member first uses the communication, since a member may not know the exact date of first use. FINRA disagrees with this recommendation since such a standard would allow members to delay filing a communication indefinitely until a principal approved it. Moreover, FINRA believes that it is important for members to keep records of when a communication is used.

T. Rowe commented that members should be allowed to file retail communications within 15 business days of first use, rather than 10 business days. FINRA disagrees with this recommendation since allowing members to file 15 business days after the date of first use would create too long a period between the first date a member distributes its communication and the first date FINRA has an opportunity to review the communication.

Proposed FINRA Rule 2210(c)(3)(A) requires a member that files a retail

communication that includes an investment company performance ranking or comparison to include a copy of the ranking or comparison used in the communication. T. Rowe recommended that members be allowed to submit one performance ranking backup document and refer to that document in future filings. FINRA does not agree with this comment, since Department staff need the ranking or comparison used in a retail communication when conducting their review, and reference to a ranking document contained in a prior filing would slow the process.

#### Content Standards

#### General Comments

FINRA Rule 2210(d)(1)(F) in the Notice proposal generally prohibited communications from predicting or projecting performance, but permitted a hypothetical illustration of mathematical principles as long as it does not predict or project performance. TD Ameritrade commented that this provision should be revised to permit examples of hypothetical transactions (such as the maximum gain or loss that would occur based on an assumed change in market price), as long as the assumptions are disclosed. FINRA does not believe the provisions should be changed in this regard. If a hypothetical example is an illustration of mathematical principles, it would be permitted. If, however, it is really a projection of performance of a particular investment, FINRA believes this practice should not be allowed.

FINRA does believe, however, that proposed paragraph (d)(1)(F) needs to be clarified to indicate the circumstances under which a projection of performance is permitted: in an investment analysis tool, or a written report produced by such a tool, as permitted under proposed FINRA Rule 2214, and a price target in a research report on

debt or equity securities, subject to certain conditions. FINRA has revised proposed paragraph (d)(1)(F) to reflect these exceptions.

FINRA Rule 2210(d)(3)(B) in the Notice proposal required all retail communications and correspondence to reflect any relationship between the member and any non-member or individual who is also named. TD Ameritrade recommended that this provision be revised to require such a disclosure only where a relationship exists. FINRA believes no change is necessary, since the paragraph requires a communication to “reflect any relationship between the member and any non-member or individual who is also named.” If no relationship exists, no disclosure is required.

FINRA Rule 2210(d)(4)(C)(iii) in the Notice proposal provided that, in a comparative illustration of the mathematical principles of tax-deferred versus taxable compounding, the illustration may reflect an actual state income tax rate, provided that the communication is used only with investors that reside in the identified state. TD Ameritrade commented that this provision should be revised to allow the use of an actual state income tax rate as long as the material clearly discloses that the rate only applies to residents of a particular state. FINRA has revised this provision to allow illustrations to reflect an actual state income tax rate if it prominently discloses that the illustration is applicable only to investors that reside in the identified state.

FINRA also has revised the disclosure requirements in proposed FINRA Rule 2210(d)(4)(vii) for such comparative illustrations. Illustrations additionally must disclose the degree of risk in the investment’s assumed rate of return, including a statement that the assumed rate of return is not guaranteed, and the possible effect of investment losses on the relative advantage of the taxable versus tax-deferred investments.

Disclosure of Expenses in Fund Performance Advertising

FINRA Rule 2210(d)(5) in the Notice proposal required retail communications that present non-money market fund performance data to disclose, among other things, the fund's maximum front-end or back-end sales charges and total annual fund operating expense ratio, gross of any fee waivers or expense reimbursements, as stated in the fee table of the fund's prospectus or annual report, whichever is more current. Currently NASD Rule 2210(d)(3) requires the sales charges and expense ratio simply to reflect the current prospectus, and not a fund's annual report.

Fidelity, the ICI and MBSC opposed the requirement to show the expense ratio from either the prospectus or annual report, whichever is more current. These commenters argued such a requirement would be too burdensome and confusing to investors. American Funds argued that a fund should be allowed to show current expenses based on a fund's annualized monthly expense ratio, and not have to refer to the prospectus. Vanguard supported the proposed change, but recommended that the rule allow members to show the expense ratio from a fund's prospectus if it reflects the fund's reasonable expectation of the current year's expenses.

FINRA had made this proposed change based on earlier industry input that members should be allowed to show expenses from an annual report if it is more current than the prospectus. However, in light of comments received on the Notice proposal and the importance for expense disclosure to be comparable among funds, FINRA is retaining the standard reflected in NASD Rule 2210(d)(3), and requiring sales charges and expense ratios to reflect a fund's current prospectus.

The CAI requested confirmation that this disclosure requirement does not apply to

the presentation of performance of an underlying investment option contained in a variable insurance product communication. FINRA agrees the provision does not apply to such communications.

FINRA Rule 2210(d)(5)(B) in the Notice proposal required a print advertisement to disclose standardized performance and expense-related information in a prominent text box. Fidelity, the ICI and MBSC requested confirmation that this requirement only applies to print advertisements and not other forms of retail communications, such as websites. The ICI and MBSC also recommended that FINRA eliminate the text box requirement and replace it with a prominence requirement applicable to all retail communications.

Consistent with its application of NASD Rule 2210(d)(3), FINRA confirms that the text box requirement only applies to print advertisements. FINRA disagrees however, with the recommendation to eliminate the text box requirement for print advertisements. FINRA created this requirement due to past abuses in which non-standardized performance was prominently displayed in print advertisements, while disclosures regarding standardized performance and expenses were placed in footnotes. FINRA believes that this requirement has helped to prevent this kind of misleading presentation since the rule was adopted.

#### Recommendations

FINRA Rule 2210(d)(7)(A) in the Notice proposal required retail communications, correspondence and public appearances to contain certain disclosures if the communication included a recommendation of securities. The communication would have to disclose if the member was making a market in the security (or an underlying

option or future), if the member or its associated person will sell or buy the security from customers on a principal basis, that the member or any associated person with the ability to influence the substance of the communication has a financial interest in the recommended security, and if the member was manager or co-manager of a public offering of any securities of the recommended issuer in the past 12 months.

Cornell and PIABA both opposed limiting disclosures of financial interests to the member and associated persons with the ability to influence the substance of the communication. These commenters felt the associated person standard was too narrow and vague. Fidelity recommended that the disclosure standard for associated persons should be limited to persons who are direct employees of the member or are registered with the member, and who are directly and materially involved in the preparation of the communication. Fidelity and Morgan commented that disclosure should not be required unless an employee has a direct and material financial interest in the recommended security. This would exclude small investments and investments through mutual funds.

Morgan, SIFMA and WilmerHale commented that it would be impossible for a member to track which associated persons have the ability to influence the substance of a communication, and that FINRA must provide more guidance as to which associated persons the disclosure requirements would apply. The FSI inquired as to whether the disclosure standard would apply to a supervisor of a registered representative who emails a securities recommendation to a customer. SIFMA commented that the disclosure requirement should be limited to the member and its officers and partners, and that the rule permit generic, non-specific disclosures regarding financial interests, market making and underwriting activities.



Morgan, SIFMA and WilmerHale commented that the provision not apply to correspondence. WilmerHale also urged that the proposed rule exclude retail communications and public appearances by research analysts, since these situations are already covered by NASD Rule 2711.

In response to these comments, FINRA has revised proposed paragraph (d)(7)(A). First, paragraph (d)(7)(A) no longer applies to correspondence. Given that correspondence may not be delivered to more than 25 retail investors within a 30 calendar-day period, FINRA believes that it is not necessary to include the extensive disclosure required for retail communications in communications sent to a more limited audience.

Second, FINRA has added a requirement that a recommendation of securities have a reasonable basis. This requirement is consistent with NASD IM-2210-1(6)(A).

Third, FINRA has modified the requirement to disclose the financial interests of any associated person with the ability to influence the substance of the communication. Instead, the disclosure requirement will apply to any associated person with the ability to influence the “content” of the communication. While this modification is minor, FINRA believes that it will help clarify which associated persons must disclose their financial interests. FINRA continues to believe that persons who influence the content of a communication that includes a recommendation have a material conflict of interest that should be disclosed if the person also has a financial interest in the recommended security.

Fourth, the disclosure requirement excludes financial interests that are “nominal.” This revision makes the rule consistent with the current disclosure requirements for

advertisements and sales literature that include securities recommendations under NASD IM 2210-1(6)(A)(ii).

Fifth, FINRA has excluded from this disclosure requirement public appearances by research analysts, since they are already covered under NASD Rule 2711. The proposed language also excludes research reports for the same reason.

Proposed FINRA Rules 2210(d)(7)(C) revised the current disclosure requirements for communications that contain past specific recommendations.<sup>86</sup> The revised provisions more closely reflect the disclosure standards applicable to advertisements of investment advisers that contain past specific recommendations. Wells Fargo supported this change, but urged FINRA also to adopt the SEC's interpretations of the Investment Advisers Act regarding recommendations. While FINRA may look to past SEC interpretations of its rules for guidance, FINRA declines to adopt any of the SEC interpretations of the Investment Advisers Act regarding recommendations for purposes of this filing.

#### Other Comments

Fidelity, the ICI and Vanguard requested clarification as to whether a member is responsible for content posted by third parties on a member's website. These commenters also recommended that FINRA develop interpretive guidance concerning the principles that members should follow when developing communications intended for customers' mobile electronic devices. For example, FINRA should address how members may meet various disclosure requirements, such as the requirement to disclose a member's name, fees, expenses and standardized performance information.

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<sup>86</sup> See NASD IM-2210-6(C) and (D).

FINRA previously addressed the issue of third-party content in Regulatory Notice 10-06. FINRA also agrees that issues related to communications intended for mobile electronic devices is important and will consider further guidance or rulemaking as issues arise, but does not believe this proposed rulemaking is the appropriate vehicle to address all issues raised by new technologies. In the past, when FINRA has reviewed a member's advertisement or sales literature that includes a bond fund's 30-day yield, and the fund's affiliates have subsidized or reimbursed the fund's expenses, FINRA staff has required the member also to disclose the fund's yield that would have occurred had expenses not been subsidized (the "unsubsidized yield"). FINRA has imposed this requirement based on language contained in the SEC's 1988 adopting release for Rule 482 under the Securities Act.<sup>87</sup> The ICI and T. Rowe both objected to this requirement and requested that FINRA clarify that disclosure of the unsubsidized yield is unnecessary in such circumstances. Because this issue involves an interpretation of Rule 482 under the Securities Act, FINRA declines to provide guidance through the proposed rule change.

#### Public Appearances

Proposed FINRA Rule 2210(f) in the Notice proposal sets forth the content and supervision requirements for members and associated persons that participate in seminars, forums or radio or television interviews. Paragraph (f)(1) specifies that the member or associated person must follow the content standards of paragraph (d)(1), and if the member or associated person recommends a security, paragraph (d)(7).

Fidelity, Invesco, the ICI and Morgan opposed requiring associated persons that

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<sup>87</sup> See Securities Act Release No. 6753 (February 2, 1988), 53 FR 3868 (February 10, 1988) (Order Approving File No. S7-23-86), p. 37.

make recommendations in public appearances to meet the content standards of paragraph (d)(7). These commenters argued that it would be impossible to monitor or supervise. Invesco also argued that this requirement creates an uneven playing field between broker-dealers and investment advisers, since investment advisers do not have a similar disclosure requirement.

FINRA disagrees with the comments that the disclosure requirements regarding recommendations would be impossible to monitor or supervise. Members that employ research analysts already must meet similar requirements under NASD Rule 2711. Members could impose similar policies and procedures for their associated persons who intend to recommend securities in public appearances. The ICI requested clarification that, if a member sponsors a seminar or forum, the member is responsible only for its own presentation and not those of others. This issue will be a matter of facts and circumstances, but generally a member is only responsible for the communications of the member or its associated persons, unless the member or its associated persons are entangled with or adopt others' communications.

NPHI requested clarification as to whether a discussion of a general product category constitutes a recommendation for purposes of the public appearance disclosure requirements. If a member or associated person merely discusses a general product category without recommending a particular security, the disclosure requirements would not apply. Similarly, T. Rowe asked whether the mere reference to a security is a recommendation. Generally the mere reference to a security is not a recommendation, but this issue will be a matter of facts and circumstances.

Under NASD Rule 2210, "public appearance" is a separate category of

communications with the public.<sup>88</sup> Proposed FINRA Rule 2210 does not retain “public appearance” as a separate category of “communications with the public.” T. Rowe suggested that FINRA retain its definition of “public appearance,” since otherwise an email to a member of the media or private conversation might be viewed as a public appearance. FINRA does not believe this is necessary. Proposed paragraph (f)(1) makes clear that it applies only to “a seminar, forum, radio or television interview or ... public appearances or speaking activities ...” An email or private conversation would not fall within this description.<sup>89</sup> In addition, the language used to describe a public appearance in proposed paragraph (f)(1) is similar to the current definition of “public appearance” under NASD Rule 2210(a)(5).

Proposed paragraph (f)(2) would require members to adopt written procedures that are appropriate to a member’s business, size, structure, and customers to supervise its associated persons’ public appearances. The procedures must include, among other things, surveillance and follow-up to ensure that such procedures are implemented and adhered to. T. Rowe requested clarification as to what level of surveillance and follow-up is required, particularly for one-time appearances. T. Rowe also commented that there should be an exception if a member approves appearances in advance. FINRA does not believe it would be appropriate to pre-determine how a member must supervise its associated persons’ public appearances, since this will vary depending on a member’s business model, size, and the type of public appearance involved. FINRA also does not agree that a member should have no obligation to review public appearances after the fact

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<sup>88</sup> See NASD Rule 2210(a)(5).

<sup>89</sup> Moreover, proposed paragraph (f)(1) expressly excludes correspondence from the description of a public appearance.

for compliance with applicable rules as long as it approves the appearance in advance.

FINRA is making one additional change to the proposed paragraph (f) in light of other changes to the proposed rule. Paragraph (f)(1) of the Notice proposal also covered “interactive electronic forums” within its description of a public appearance. To the extent participation in an interactive electronic forum takes the form of a written communication disseminated through an interactive website, FINRA considers such a communication to be a retail communication rather than a public appearance. However, as discussed above, proposed FINRA Rule 2210(b)(1)(D)(ii) allows a member to supervise and review retail communications that are posted on online interactive electronic forums in the same manner as required for supervising and reviewing correspondence. Accordingly, FINRA has deleted “(including an interactive electronic forum)” from proposed paragraph (f)(1).

#### Investment Analysis Tools

Proposed FINRA Rule 2214 of the Notice proposal codifies largely without change current NASD IM-2210-6 (Requirements for the Use of Investment Analysis Tools).<sup>90</sup> Fidelity, the ICI, MBSC and T. Rowe commented that Rule 2214 should be revised to allow members to present projections of performance in retail communications even in cases where the tool is not interactive with customers. These commenters argue that a firm should be permitted to show projected performance of an investment in a communication that is not based on information provided by a customer independently or with the assistance of the member firm. T. Rowe also commented that members should

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<sup>90</sup> Certain of NASD IM-2210-6’s text that appears either in the Interpretive Material itself or in footnotes to the Interpretive Material have been moved to Supplementary Material.

be allowed to use the data generated by an investment analysis tool in sales material for target date funds provided that these illustrations are limited to a discussion of a fund's investment strategy and not used to project performance.

FINRA disagrees with the comment that proposed Rule 2214 should be revised to eliminate the requirement that an investment analysis tool be interactive. The purpose of NASD IM-2210-6 and proposed FINRA Rule 2214 is to allow members to use interactive tools with customers to show the likelihood of various investment outcomes under different scenarios, thereby serving as an additional resource to investors to evaluate their specific investment choices. It is not to allow the use of performance projections in retail communications in all circumstances as long as an investment analysis tool is used to create the projections. In the case of retail communications concerning target date funds that do not include projections, reliance on the proposed rule is unnecessary, since it only applies to retail communications that contain projections.

Supplementary Material 2214.06 provides that a retail communication that contains only an incidental reference to an investment analysis tool need not include the disclosures required by the proposed rule and would not need to be filed with the Department. Vanguard commented that proposed Rule 2214 should be revised to allow members not to include all of the proposed rule's required disclosures as long as the communication does not include the tool itself or any data or results produced by the tool.

FINRA agrees that, under these circumstances, some of the proposed rule's required disclosures, such as those required by paragraph (c)(1) (a description of the tool's methodology) or paragraph (c)(3) (certain disclosures in situations in which the tool analyzes only a limited range of investments), are unnecessary. FINRA believes

however, that a retail communication that refers to an investment analysis tool in more detail than an incidental reference but does not provide access to the tool or the results generated by the tool must disclose that results may vary with each use (as required by paragraph (c)(2)) and the warning required by paragraph (c)(4) that the projections generated by the tool are hypothetical and are not guarantees of future results. FINRA has revised proposed Rule 2214.06 accordingly.

#### Security Futures

Proposed FINRA Rule 2215 (Guidelines for Communications with the Public Regarding Security Futures) is the successor to current NASD IM-2210-7. TD Ameritrade commented that paragraph (b)(1)(A)(iii), which prohibits projections of performance in communications used prior to the delivery of a security futures risk disclosure statement, should be modified to permit examples of hypothetical transactions. This comment is similar to another TD Ameritrade comment on proposed FINRA Rule 2210(d)(1)(F) (which also prohibits performance projections), and FINRA's response is the same as discussed above.

Proposed paragraph (b)(2)(A)(iv) requires any communication concerning a security future to include a statement that supporting documentation for any claims, comparisons, recommendations, statistics or other technical data will be supplied upon request. TD Ameritrade commented that FINRA should clarify that this disclosure requirement only applies if a communication actually includes a claim, comparison, recommendation, statistics or other technical data. While this issue will be a matter of facts and circumstances, FINRA agrees that no such disclosure would be required if a communication does not contain any statement or data that requires supporting



documentation.

#### Transition Period

Fidelity, Invesco and NPHI requested that FINRA allow members at least six months before having to comply with the new rules. The ICI suggested a compliance date of 10 business days after the second quarter ending following adoption of the final rule changes. PSD requested nine months' lead time, and suggested that members should be permitted to "grandfather" and continue to use communications that were filed under the current rules. Alternatively, members should have a minimum of two years from the date the new rules become effective to continue to use communications filed under the existing rules.

FINRA plans on publishing a Regulatory Notice no later than 90 days following SEC approval of the rule changes. The implementation date will be no later than 365 days following SEC approval. In establishing the implementation schedule, FINRA will consider members' need to adopt and implement new policies and procedures necessary to comply with the new rules.

In most cases, FINRA expects that communications that are in compliance with the current communication rules will continue to be in compliance with the new rules, and thus "grandfathering" of past filed material will be unnecessary. To the extent a member has questions about whether a previously filed communication continues to be compliant under the new rules, the member should discuss this issue with its assigned Department advertising analyst.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-FINRA-2011-035 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-FINRA-2011-035. This file number should be included on the subject line if e-mail is used. To help the Commission process

and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-FINRA-2011-035 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>91</sup>

Elizabeth M. Murphy  
Secretary

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<sup>91</sup> 17 CFR 200.30-3(a)(12).

**EXHIBIT 2b**

**Alphabetical List of Written Comments**

1. Letter from Amal Aly, Securities Industry and Financial Markets Association (“SIFMA”) (Dec. 1, 2009)
2. Letter from Kenneth J. Bradle, MBSC Securities Corporation (“MBSC”) (Nov. 20, 2009)
3. Letter from Darrell N. Braman, Danielle Nicholson-Smith, and Maria Jakobowski, T. Rowe Price Investment Services, Inc. (“T. Rowe”) (Nov. 20, 2009)
4. Letter from Lisa O. Brinkley, Invesco Aim Distributors, Inc. (“Invesco”) (Nov. 20, 2009)
5. Letter from Dale E. Brown, Financial Services Institution (“FSI”) (Nov. 20, 2009)
6. Letter from Deborah Castiglioni, Cutter & Company, Inc. (“Cutter”) (Nov. 20, 2009)
7. Letter from Janice Curcio, World Group Securities, Inc. (“WGSI”) (Nov. 20, 2009)
8. Letter from Dorothy M. Donohue, Investment Company Institute (“ICI”) (Nov. 19, 2009)
9. Letter from S. Kendrick Dunn, Pacific Select Distributors (“PSD”) (Nov. 20, 2009)
10. Letter from Alexander C. Gavis, Fidelity Investments (“Fidelity”) (Nov. 20, 2009)
11. Letter from Lisa J. Henoch, TD Ameritrade (“TD Ameritrade”) (Nov. 19, 2009)
12. Letter from William A. Jacobson and Kelly Cardin, Cornell Law School (“Cornell”) (Nov. 18, 2009)
13. Letter from Elaine M. Kaven, StockCross Financial Services (“StockCross”) (Nov. 18, 2009)
14. Letter from Clifford Kirsch and Susan Krawczyk, Sutherland Asbill & Brennan LLP (“CAI”) (Nov. 20, 2009)
15. Letter from Yoon-Young Lee, WilmerHale (“WilmerHale”) (Nov. 23, 2009)
16. Letter from James Livingston, National Planning Holdings, Inc. (“NPHI”) (Nov. 18, 2009)

17. Letter from Ronald C. Long, Wells Fargo Advisors (“Wells Fargo”) (Nov. 20, 2009)
18. Letter from Timothy W. McHale, American Funds (“American Funds”) (Nov. 20, 2009)
19. Letter from Z. Jane Riley, The Leaders Group, Inc./TLG Advisors, Inc. (“TLGI”) (Nov. 19, 2009)
20. Letter from Howard M. Sendrovitz, Morgan Stanley Smith Barney (“Morgan”) (Nov. 19, 2009)
21. Letter from Scott R. Shewan, Public Investors Arbitration Bar Association (“PIABA”) (Nov. 16, 2009)
22. Letter from Matthew R. Walker, Vanguard (“Vanguard”) (Nov. 20, 2009)
23. Letter from James Walsh, Forefield, Inc. (“Forefield”) (Nov. 18, 2009)

## Exhibit 5

Exhibit 5 shows the text of the proposed rule change. Proposed new language is underlined; proposed deletions are in brackets.

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**Text of Proposed New FINRA Rules  
(Marked to Show Changes from NASD Rules 2210 and 2211, and NASD IM-2210-1,  
IM-2210-3, IM-2210-4, IM-2210-5, IM-2210-6, IM-2210-7 and IM-2210-8; NASD  
Rules 2210 and 2211, and NASD IM-2210-1, IM-2210-3, IM-2210-4, IM-2210-5, IM-  
2210-6, IM-2210-7 and IM-2210-8 to be Deleted in their Entirety from the  
Transitional Rulebook)**

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### 2000. DUTIES AND CONFLICTS

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### 2200. COMMUNICATIONS AND DISCLOSURES

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#### 2210. Communications with the Public

##### (a) Definitions

For purposes of this Rule and any interpretation thereof:

(1) “Communications” consist of correspondence, retail communications and institutional communications.

(2) “Correspondence” means any written (including electronic) communication that is distributed or made available to 25 or fewer retail investors within any 30 calendar-day period.

(3) “Institutional communication” means any written (including electronic) communication that is distributed or made available only to institutional investors.

(4) “Institutional investor” means any:

(A) person described in Rule 4512(c), regardless of whether the person has an account with a member;

(B) governmental entity or subdivision thereof;

(C) employee benefit plan, or multiple employee benefit plans offered to employees of the same employer, that meet the requirements of Section 403(b) or Section 457 of the Internal Revenue Code and in the aggregate have at least 100 participants, but does not include any participant of such plans;

(D) qualified plan, as defined in Section 3(a)(12)(C) of the Exchange Act, or multiple qualified plans offered to employees of the same employer, that in the aggregate have at least 100 participants, but does not include any participant of such plans;

(E) member or registered person of such a member; and

(F) person acting solely on behalf of any such institutional investor.

No 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.

(5) “Retail communication” means any written (including electronic) communication that is distributed or made available to more than 25 retail investors within any 30 calendar-day period.

(6) “Retail investor” means any person other than an institutional investor, regardless of whether the person has an account with a member.

[For purposes of this Rule and any interpretation thereof, “communications with the public” consist of:]

[(1) “Advertisement.” Any material, other than an independently prepared reprint and institutional sales material, that is published, or used in any electronic or other public media, including any Web site, newspaper, magazine or other periodical, radio, television, telephone or tape recording, videotape display, signs or billboards, motion pictures, or telephone directories (other than routine listings).]

[(2) “Sales Literature.” Any written or electronic communication, other than an advertisement, independently prepared reprint, institutional sales material and correspondence, that is generally distributed or made generally available to customers or the public, including circulars, research reports, market letters, performance reports or summaries, form letters, telemarketing scripts, seminar texts, reprints (that are not independently prepared reprints) or excerpts of any other advertisement, sales literature or published article, and press releases concerning a member’s products or services.]

[(3) “Correspondence” as defined in Rule 2211(a)(1).]

[(4) “Institutional Sales Material” as defined in Rule 2211(a)(2).]

[(5) “Public Appearance.” Participation in a seminar, forum (including an interactive electronic forum), radio or television interview, or other public appearance or public speaking activity.]



[(6) “Independently Prepared Reprint.”]

[(A) Any reprint or excerpt of any article issued by a publisher, provided that:]

[(i) the publisher is not an affiliate of the member using the reprint or any underwriter or issuer of a security mentioned in the reprint or excerpt and that the member is promoting;]

[(ii) neither the member using the reprint or excerpt nor any underwriter or issuer of a security mentioned in the reprint or excerpt has commissioned the reprinted or excerpted article; and]

[(iii) the member using the reprint or excerpt has not materially altered its contents except as necessary to make the reprint or excerpt consistent with applicable regulatory standards or to correct factual errors;]

[(B) Any report concerning an investment company registered under the Investment Company Act of 1940, provided that:]

[(i) the report is prepared by an entity that is independent of the investment company, its affiliates, and the member using the report (the “research firm”);]

[(ii) the report’s contents have not been materially altered by the member using the report except as necessary to make the report consistent with applicable regulatory standards or to correct factual errors;]

[(iii) the research firm prepares and distributes reports based on similar research with respect to a substantial number of investment companies;]

[(iv) the research firm updates and distributes reports based on its research of the investment company with reasonable regularity in the normal course of the research firm's business;]

[(v) neither the investment company, its affiliates nor the member using the research report has commissioned the research used by the research firm in preparing the report; and]

[(vi) if a customized report was prepared at the request of the investment company, its affiliate or a member, then the report includes only information that the research firm has already compiled and published in another report, and does not omit information in that report necessary to make the customized report fair and balanced.]

**(b) Approval, Review and Recordkeeping**

**(1) [Registered Principal Approval for Advertisements, Sales**

**Literature and Independently Prepared Reprints] Retail Communications**

(A) An appropriately qualified registered principal of the member must approve [by signature or initial and date] each retail communication [advertisement, item of sales literature and independently prepared reprint] before the earlier of its use or filing with [NASD's] FINRA's Advertising Regulation Department ("Department").

(B) With respect to research reports on debt and equity securities [that are the subject of research reports as that term is defined in Rule 472 of the New York Stock Exchange], the requirements of paragraph (b)(1)(A) may be met by [the signature or initial of] a [s]Supervisory [a]Analyst approved pursuant to NYSE Rule 344 [of the New York Stock Exchange].

[(C) A registered principal qualified to supervise security futures activities must approve by signature or initial and date each advertisement or item of sales literature concerning security futures.]

[(D)C] The requirements of paragraph (b)(1)(A) shall not apply with regard to any [advertisement, item of sales literature, or independently prepared reprint] retail communication if, at the time that a member intends to publish or distribute it:

(i) another member has filed it with the Department and has received a letter from the Department stating that it appears to be consistent with applicable standards; and

(ii) the member using it in reliance upon this subparagraph has not materially altered it and will not use it in a manner that is inconsistent with the conditions of the Department's letter.

(D) The requirements of paragraph (b)(1)(A) shall not apply with regard to the following retail communications, provided that the member supervises and reviews such communications in the same manner as

required for supervising and reviewing correspondence pursuant to NASD Rule 3010(d):

(i) any retail communication that is excepted from the definition of “research report” pursuant to NASD Rule 2711(a)(9)(A);

(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 member.

(E) Pursuant to the Rule 9600 Series, FINRA may conditionally or unconditionally grant an exemption from paragraph (b)(1)(A) for good cause shown after taking into consideration all relevant factors, to the extent such exemption is consistent with the purposes of the Rule, the protection of investors, and the public interest.

(F) Notwithstanding any other provision of this Rule, an appropriately qualified principal must approve a communication prior to a member filing the communication with the Department.

**(2) Correspondence**

All correspondence is subject to the supervision and review requirements of NASD Rule 3010(d).

**(3) Institutional Communications**

Each member shall establish written procedures that are appropriate to its business, size, structure, and customers for the review by an appropriately qualified registered principal of institutional communications used by the member and its associated persons. Such procedures must be reasonably designed to ensure that institutional communications comply with applicable standards. When such procedures do not require review of all institutional communications prior to first use or distribution, they must include provision for the education and training of associated persons as to the firm's procedures governing institutional communications, documentation of such education and training, and surveillance and follow-up to ensure that such procedures are implemented and adhered to. Evidence that these supervisory procedures have been implemented and carried out must be maintained and made available to FINRA upon request.

**(12)4 Recordkeeping**

(A) Members must 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] retail communications and institutional communications for the retention period required by SEA Rule 17a-4(b) and in a format and media that comply with SEA Rule 17a-4. The [file] records must include:

- (i) a copy of the [advertisement, item of sales literature or independently prepared reprint,] communication and the dates of first and (if applicable) last use of such [material] communication;

(ii) the name of any registered principal who approved the communication and the date that approval was given;

(iii) in the case of a retail communication or an 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;

[(ii) the name of the registered principal who approved each advertisement, item of sales literature, and independently prepared reprint and the date that approval was given, unless such approval is not required pursuant to paragraph (b)(1)(D); and]

(iv) information concerning the source of any statistical table, chart, graph or other illustration used in the communication;  
and

[(iii)v) for any [advertisement, item of sales literature or independently prepared reprint] retail communication for which principal approval is not required pursuant to paragraph (b)(1)(D)C), the name of the member that filed the [advertisement, sales literature or independently prepared reprint] retail communication with the Department, and a copy of the corresponding review letter from the Department.

[(B) Members must maintain in a file information concerning the source of any statistical table, chart, graph or other illustration used by the member in communication with the public.]

(B) Members must maintain all correspondence in accordance with the record-keeping requirements of NASD Rules 3010(d)(3) and Rule 4511.

**(c) Filing Requirements and Review Procedures**

**[(1) Date of First Use and Approval Information]**

[The member must provide with each filing under this paragraph 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.]

**(1) Requirement for Certain Members to File Retail Communications**

**Prior to First Use**

(A) For a period of one year beginning on the date reflected in the Central Registration Depository (CRD®) system as the date that FINRA membership became effective, the member must file with the Department at least 10 business days prior to first use any retail communication that is published or used in any electronic or other public media, including any generally accessible website, newspaper, magazine or other periodical, radio, television, telephone or audio recording, video display, signs or billboards, motion pictures, or telephone directories (other than routine listings).

(B) Notwithstanding the foregoing provisions, if the Department determines that a member has departed from the standards of this Rule, it may require that such member file all communications, or the portion of

such member's communications that is related to any specific types or classes of securities or services, with the Department at least 10 business days prior to first use. The Department will notify the member in writing of the types of communications to be filed and the length of time such requirement is to be in effect. Any filing requirement imposed under this subparagraph will take effect 21 calendar days after service of the written notice, during which time the member may request a hearing under Rules 9551 and 9559.

**(2) Requirement to File Certain Retail Communications Prior to First**

**Use**

At least 10 business days prior to first use or publication (or such shorter period as the Department may allow), a member must file the following retail communications with the Department and withhold them from publication or circulation until any changes specified by the Department have been made:

(A) Retail communications concerning registered investment companies (including mutual funds, exchange-traded funds, variable insurance products, closed-end funds and unit investment trusts) that include or incorporate performance rankings or performance comparisons of the investment company with other investment companies when the ranking or comparison category is not generally published or is the creation, either directly or indirectly, of the investment company, its underwriter or an affiliate. Such filings must include a copy of the data on which the ranking or comparison is based.



(B) Retail communications concerning security futures. The requirements of this paragraph (c)(2)(B) shall not be applicable to:

(i) retail communications concerning security futures that are submitted to another self-regulatory organization having comparable standards pertaining to such retail communications; and

(ii) retail communications in which the only reference to security futures is contained in a listing of the services of a member.

(C) Retail communications concerning bond mutual funds that include or incorporate bond mutual fund volatility ratings, as defined in Rule 2213.

**([2]3) Requirement to File Certain [Material] Retail Communications**

Within 10 business days of first use or publication, a member must file the following communications with the Department:

(A) [Advertisements and sales literature] Retail communications concerning registered investment companies (including mutual funds, exchange-traded funds, variable [contracts] insurance products, [continuously offered] closed-end funds, and unit investment trusts) not included within the requirements of paragraphs (c)(1) or (c)([3]2). The filing of any [advertisement or sales literature] retail communication that includes or incorporates a performance ranking or performance comparison of the investment company with other investment companies

must include a copy of the ranking or comparison used in the [advertisement or sales literature] retail communication.

(B) [Advertisements and sales literature] Retail communications concerning public direct participation programs (as defined in Rule [2810] 2310).

(C) [Advertisements] Retail communications concerning government securities (as defined in Section 3(a)(42) of the Exchange Act).

(D) [a] Any template for written reports produced by, or [advertisements and sales literature] retail communications concerning, an investment analysis tool, as such term is defined in Rule [IM-2210-6] 2214.

(E) Retail communications concerning collateralized mortgage obligations registered under the Securities Act;

(F) Retail communications concerning any security that is registered under the Securities Act 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 subparagraphs (A) through (E) of paragraph (c)(3).

**[(3) Sales Literature Containing Bond Fund Volatility Ratings]**

[Sales literature concerning bond mutual funds that include or incorporate bond mutual fund volatility ratings, as defined in Rule IM-2210-5, shall be filed

with the Department for review at least 10 business days prior to use (or such shorter period as the Department may allow in particular circumstances) for approval and, if changed by NASD, shall be withheld from publication or circulation until any changes specified by NASD have been made or, if expressly disapproved, until the sales literature has been re-filed for, and has received, NASD approval. Members are not required to file advertising and sales literature which have previously been filed and which are used without change. The member must provide with each filing the actual or anticipated date of first use. Any member filing sales literature pursuant to this paragraph shall provide any supplemental information requested by the Department pertaining to the rating that is possessed by the member.]

**[(4) Requirement to File Certain Material Prior to Use]**

[At least 10 business days prior to first use or publication (or such shorter period as the Department may allow), a member must file the following communications with the Department and withhold them from publication or circulation until any changes specified by the Department have been made:]

[(A) Advertisements and sales literature concerning registered investment companies (including mutual funds, variable contracts, continuously offered closed-end funds and unit investment trusts) that include or incorporate performance rankings or performance comparisons of the investment company with other investment companies when the ranking or comparison category is not generally published or is the creation, either directly or indirectly, of the investment company, its

underwriter or an affiliate. Such filings must include a copy of the data on which the ranking or comparison is based.]

[(B) Advertisements concerning collateralized mortgage obligations.]

[(C) Advertisements concerning security futures.]

**[(5) Requirement for Certain Members to File Material Prior to Use]**

[(A) Each member that has not previously filed advertisements with the Department (or with a registered securities exchange having standards comparable to those contained in this Rule) must file its initial advertisement with the Department at least 10 business days prior to use and shall continue to file its advertisements at least 10 business days prior to use for a period of one year.]

[(B) Notwithstanding the foregoing provisions, the Department, upon review of a member's advertising and/or sales literature, and after determining that the member has departed from the standards of this Rule, may require that such member file all advertising and/or sales literature, or the portion of such member's material which is related to any specific types or classes of securities or services, with the Department, at least 10 business days prior to use. The Department will notify the member in writing of the types of material to be filed and the length of time such requirement is to be in effect. Any filing requirement imposed under this paragraph will take effect 21 calendar days after service of the written

notice, during which time the member may request a hearing under Rules 9551 and 9559.]

**(~~16~~4) Filing of Television or Video [Advertisements] Retail Communications**

If a member has filed a draft version or “story board” of a television or video [advertisement] retail communication pursuant to a filing requirement, then the member also must file the final filmed version within 10 business days of first use or broadcast.

**(5) Date of First Use and Approval Information**

A member must provide with each filing the actual or anticipated date of first use, the name, title and Central Registration Depository (CRD®) number of the registered principal who approved the retail communication, and the date that the approval was given.

**(~~17~~6) Spot-Check Procedures**

In addition to the foregoing requirements, each member’s written [and] (including electronic) communications [with the public] may be subject to a spot-check procedure. Upon written request from the Department, each member must submit the material requested in a spot-check procedure within the time frame specified by the Department.

**(~~18~~7) Exclusions from Filing Requirements**

The following [types of material] communications are excluded from the filing requirements of paragraphs (c)(1) through (c)(4) [and (except for the material in paragraphs (G) through (J)) the foregoing spot-check procedures]:

(A) [Advertisements and sales literature] Retail communications that previously have been filed with the Department and that are to be used without material change.

(B) Retail communications that are based on templates that were previously filed with the Department the changes to which are limited to updates of more recent statistical or other non-narrative information.

(C[B]) [Advertisements and sales literature solely related to recruitment or changes in a member's name, personnel, electronic or postal address, ownership, offices, business structure, officers or partners, telephone or teletype numbers, or concerning a merger with, or acquisition by, another member]. Retail communications that do not make any financial or investment recommendation or otherwise promote a product or service of the member.

(D[C]) [Advertisements and sales literature] Retail communications that do no more than identify a national securities exchange symbol of the member or identify a security for which the member is a registered market maker.

(E[D]) [Advertisements and sales literature] Retail communications that do no more than identify the member or offer a specific security at a stated price.

(F[E]) Prospectuses, preliminary prospectuses, fund profiles, offering circulars and similar documents that have been filed with the [Securities and Exchange Commission (the "[SEC]") or any state, or that

is exempt from such registration, except that an investment company prospectus published pursuant to [SEC] Securities Act Rule 482 [under the Securities Act of 1933] and a free writing prospectus that has been filed with the SEC pursuant to Securities Act Rule 433(d)(1)(ii) will not be considered a prospectus for purposes of this exclusion.

(G[F]) [Advertisements] Retail communications prepared in accordance with Section 2(a)(10)(b) of the Securities Act [of 1933], as amended, or any rule thereunder, such as [SEC] Rule 134, and announcements as a matter of record that a member has participated in a private placement, unless the [advertisements] retail communications are related to publicly offered direct participation programs or securities issued by registered investment companies.

(H[G]) Press releases that are made available only to members of the media.

(I[H]) [Independently prepared reprints.] Any reprint or excerpt of any article or report issued by a publisher (“reprint”), provided that:

(i) the publisher is not an affiliate of the member using the reprint or any underwriter or issuer of a security mentioned in the reprint that the member is promoting;

(ii) neither the member using the reprint nor any underwriter or issuer of a security mentioned in the reprint has commissioned the reprinted article or report; and

(iii) the member using the reprint has not materially altered its contents except as necessary to make the reprint consistent with applicable regulatory standards or to correct factual errors.

(J[I]) Correspondence.

(K[J]) Institutional [sales material] communications.

[Although the material described in paragraphs (c)(8)(G) through (J) is excluded from the foregoing filing requirements, investment company communications described in those paragraphs shall be deemed filed with NASD for purposes of Section 24(b) of the Investment Company Act of 1940 and Rule 24b-3 thereunder.]

(L[9]) [Material] Communications that [refers] refer to [investment company securities, direct participation programs, or exempted securities (as defined in Section 3(a)(12) of the Act)] types of investments solely as part of a listing of products or services offered by the member[, is excluded from the requirements of paragraphs (c)(2) and (c)(4)].

### **(8) Communications Deemed Filed with FINRA**

Although the communications described in paragraphs (c)(7)(H) through (K) are excluded from the foregoing filing requirements, investment company communications described in those paragraphs shall be deemed filed with FINRA for purposes of Section 24(b) of the Investment Company Act and Rule 24b-3 thereunder.



**(9[10]) Filing Exemptions**

(A) Pursuant to the Rule 9600 Series, [NASD] FINRA may exempt a member [or person associated with a member] from the pre-use filing requirements of [this] paragraph (c)(1)(A) for good cause shown.

(B) Pursuant to the Rule 9600 Series, FINRA may conditionally or unconditionally grant an exemption from paragraph (c)(3) for good cause shown after taking into consideration all relevant factors, to the extent such exemption is consistent with the purposes of the Rule, the protection of investors, and the public interest.

**(d) Content Standards**

**(1) General Standards [Applicable to All Communications with the Public]**

(A) All member communications [with the public shall] must be based on principles of fair dealing and good faith, must be fair and balanced, and must provide a sound basis for evaluating the facts in regard to any particular security or type of security, industry, or service. No member may omit any material fact or qualification if the omission, in the light of the context of the material presented, would cause the communications to be misleading.

(B) No member may make any false, exaggerated, unwarranted, promissory or misleading statement or claim in any communication [with the public]. No member may publish, circulate or distribute any [public]

communication that the member knows or has reason to know contains any untrue statement of a material fact or is otherwise false or misleading.

(C) Information may be placed in a legend or footnote only in the event that such placement would not inhibit an investor's understanding of the communication.

(D) Members must ensure that statements are clear and not misleading within the context in which they are made, and that they provide balanced treatment of risks and potential benefits.  
Communications must be consistent with the risks of fluctuating prices and the uncertainty of dividends, rates of return and yield inherent to investments.

(E) Members must consider the nature of the audience to which the communication will be directed and must provide details and explanations appropriate to the audience.

([D]E) Communications [with the public] may not predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast; provided, however, that this paragraph (d)(1)(F) does not prohibit:[.]

(i) A hypothetical illustration of mathematical principles [is permitted], provided that it does not predict or project the performance of an investment or investment strategy;

(ii) An investment analysis tool, or a written report produced by an investment analysis tool, that meets the requirements of Rule 2214; and

(iii) 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.

[(E) 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.]

**[(2) Standards Applicable to Advertisements and Sales Literature]**

[(A) Advertisements or sales literature providing any testimonial concerning the investment advice or investment performance of a member or its products must prominently disclose the following:]

[(i) The fact that the testimonial may not be representative of the experience of other clients.]

[(ii) The fact that the testimonial is no guarantee of future performance or success.]

[(iii) If more than a nominal sum is paid, the fact that it is a paid testimonial.]

**(2) Comparisons**

[(B)] Any comparison in [advertisements or sales literature] retail communications between investments or services must 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.

**(3) Disclosure of Member's Name**

[(C)] All [advertisements and sales literature] retail communications and correspondence must:

((i)A) prominently disclose the name of the member, or the name under which the member's broker-dealer business primarily is conducted as disclosed on the member's Form BD, and may also include a fictional name by which the member is commonly recognized or which is required by any state or jurisdiction;

((ii)B) reflect any relationship between the member and any non-member or individual who is also named; and

((iii)C) if it includes other names, reflect which products or services are being offered by the member.

This paragraph (d)(3)[(C)] does not apply to so-called "blind" advertisements used to recruit personnel.

**(4) Tax Considerations**

(A) In retail communications and correspondence, 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. If income from an investment company investing in municipal bonds is subject to state or local income taxes, this fact must be stated, or the illustration must otherwise make it clear that income is free only from federal income tax.

(B) Communications may not characterize 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.

(C) A comparative illustration of the mathematical principles of tax-deferred versus taxable compounding must meet the following requirements:

(i) 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.

(ii) The illustration must use and identify actual federal income tax rates.

(iii) The illustration may 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.

(iv) Tax rates used in an illustration that 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.

(v) If the illustration covers the payout period for an investment, the illustration must reflect the impact of taxes during this period.

(vi) The illustration may not assume an unreasonable period of tax deferral.

(vii) The illustration must disclose, as applicable:

a. the degree of risk in the investment's assumed rate of return, including a statement that the assumed rate of return is not guaranteed;

b. the possible effects of investment losses on the relative advantage of the taxable versus the tax-deferred investments;

c. the extent to which tax rates on capital gains and dividends would affect the taxable investment's return;

d. its underlying assumptions;

e. the potential impact resulting from federal or state tax penalties (e.g., for early withdrawals or use on non-qualified expenses); and

f. 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.

**([3]5) Disclosure of Fees, Expenses and Standardized Performance**

(A) [Communications with the public, other than institutional sales material and public appearances,] Retail communications and correspondence that present non-money market fund open-end management investment company performance data as permitted by Securities Act Rule 482 [under the Securities Act of 1933] and Rule 34b-1 under the Investment Company Act [of 1940] must disclose:

(i) the standardized performance information mandated by Securities Act Rule 482 and Rule 34b-1 under the Investment Company Act; and

(ii) to the extent applicable:

a. the maximum sales charge imposed on purchases or the maximum deferred sales charge, as stated in the investment company's prospectus current as of the date of distribution or submission for publication of [an advertisement] a communication [for publication, or as of the date of distribution of other communications with the public]; and

b. the total annual fund operating expense ratio, gross of any fee waivers or expense reimbursements, as stated in the fee table of the investment company's prospectus described in paragraph (d)(5)(A)(ii)(a).

(B) All of the information required by paragraph (d)(5)(A) must be set forth prominently, and in any print advertisement, in a prominent text box that contains only the required information and, at the member's option, comparative performance and fee data and disclosures required by Securities Act Rule 482 and Rule 34b-1 under the Investment Company Act.

**(6) Testimonials**

(A) If any testimonial in a communication concerns a technical aspect of investing, the person making the testimonial must have the knowledge and experience to form a valid opinion.

(B) Retail communications or correspondence providing any testimonial concerning the investment advice or investment performance of a member or its products must prominently disclose the following:

(i) The fact that the testimonial may not be representative of the experience of other customers.

(ii) The fact that the testimonial is no guarantee of future performance or success.

(iii) If more than \$100 in value is paid for the testimonial, the fact that it is a paid testimonial.

**(7) Recommendations**

(A) Retail communications and public appearances as described in paragraph (f) that include a recommendation of securities must have a



reasonable basis for the recommendation and must disclose, if applicable, the following:

(i) that at the time the communication was published or distributed, the member was making a market in the security being recommended, or in the underlying security if the recommended security is an option or security future, or that the member or associated persons will sell to or buy from customers on a principal basis;

(ii) that the member or any associated person with the ability to influence the content of the communication has a financial interest in any of the securities of the issuer whose securities are recommended, and the nature of the financial interest (including, without limitation, whether it consists of any option, right, warrant, future, long or short position), unless the extent of the financial interest is nominal; and

(iii) that the member was manager or co-manager of a public offering of any securities of the recommended issuer within the past 12 months.

(B) A member must provide, or offer to furnish upon request, available investment information supporting the recommendation. When a member recommends an equity security, the member must provide the price at the time the recommendation is made.

(C) A retail communication or correspondence may not refer, directly or indirectly, to past specific recommendations of the member that were or would have been profitable to any person; provided, however, that a retail communication or correspondence may 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 member within the immediately preceding period of not less than one year, if the communication or list:

(i) states the name of each such security recommended, the date and nature of each such recommendation (e.g., whether to buy, sell or hold), the market price at that time, the price at which the recommendation was to be acted upon, and the market price of each such security as of the most recent practicable date; and

(ii) contains the following cautionary legend, which must appear prominently within the communication or list: “it should not be assumed that recommendations made in the future will be profitable or will equal the performance of the securities in this list.”

(D) This paragraph (d)(7) does not apply to any communication that:

(i) meets the definition of “research report” or is a public appearance by a research analyst for purposes of NASD Rule 2711 and includes all of the applicable disclosures required by that Rule; or

(ii) recommends only registered investment companies or variable insurance products.

\* \* \* \* \*

**[IM-2210-4](e) Limitations on Use of FINRA's Name and Any Other Corporate Name Owned by FINRA**

Members may indicate FINRA membership in conformity with Article XV, Section 2 of the FINRA By-Laws in one or more of the following ways:

(1) in any communication [with the public, provided] that [the communication] complies with the applicable standards of this Rule [2210] and neither states nor implies that FINRA, or any other corporate name or facility owned by FINRA, or any other regulatory organization endorses, indemnifies, or guarantees the member's business practices, selling methods, the class or type of securities offered, or any specific security[;], and provided further that any reference to the Department's review of a communication is limited to either "Reviewed by FINRA" or "FINRA Reviewed";

(2) in a confirmation statement for an over-the-counter transaction that states: "This transaction has been executed in conformity with the [NASD] FINRA Uniform Practice Code[.]"; and

(3) on a member's [internet Web site]website, provided that the member provides a hyperlink to FINRA's internet home page, [www.finra.org](http://www.finra.org), in close proximity to the member's indication of FINRA membership. A member is not required to provide more than one such hyperlink on its [Web ]website. If the member's [Web ]website contains more than one indication of FINRA

membership, the member may elect to provide any one hyperlink in close proximity to any reference reasonably designed to draw the public's attention to FINRA membership. This provision also shall apply to an internet [Web ]website relating to the member's investment banking or securities business maintained by or on behalf of any person associated with a member.

\* \* \* \* \*

**(f) Public Appearances**

(1) When sponsoring or participating in a seminar, forum, radio or television interview, or when otherwise engaged in public appearances or speaking activities that are unscripted and do not constitute retail communications, institutional communications or correspondence, members and persons associated with members must follow the standards of paragraph (d)(1), and if a member or associated person recommends a security, paragraph (d)(7).

(2) Each member shall establish written procedures that are appropriate to its business, size, structure, and customers to supervise its associated persons' public appearances. Such procedures must include provision for the education and training of associated persons who make public appearances as to the firm's procedures, documentation of such education and training, and surveillance and follow-up to ensure that such procedures are implemented and adhered to. Evidence that these supervisory procedures have been implemented and carried out must be maintained and made available to FINRA upon request.

(3) Any scripts, slides, handouts or other written (including electronic) materials used in connection with public appearances are considered

communications for purposes of this Rule, and members must comply with all applicable provisions of this Rule based on those communications' audience, content and use.

**([e]g) Violation of Other Rules**

Any violation by a member of any rule of the SEC, the Securities Investor Protection Corporation or the Municipal Securities Rulemaking Board applicable to member communications [with the public] will be deemed a violation of this Rule 2210.

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**• • • Supplementary Material: -----**

**.01 Internal Communications.** A member's internal written (including electronic) communications that are intended to educate or train registered persons about the products or services offered by a member are considered institutional communications pursuant to paragraph (a)(3) of this Rule. Accordingly, such internal communications are subject to both the provisions of this Rule and NASD Rule 3010(d) (Review of Correspondence).

**[IM-2210-1. Guidelines to Ensure That Communications With the Public Are Not Misleading]**

[Every member is responsible for determining whether any communication with the public, including material that has been filed with the Department, complies with all applicable standards, including the requirement that the communication not be misleading. In order to meet this responsibility, member communications with the public must conform with the following guidelines. These guidelines do not represent an

exclusive list of considerations that a member must make in determining whether a communication with the public complies with all applicable standards.]

[(1) Members must ensure that statements are not misleading within the context in which they are made. A statement made in one context may be misleading even though such a statement could be appropriate in another context. An essential test in this regard is the balanced treatment of risks and potential benefits. Member communications should be consistent with the risks of fluctuating prices and the uncertainty of dividends, rates of return and yield inherent to investments.]

[(2) Members must consider the nature of the audience to which the communication will be directed. Different levels of explanation or detail may be necessary depending on the audience to which a communication is directed. Members must keep in mind that it is not always possible to restrict the audience that may have access to a particular communication with the public. Additional information or a different presentation of information may be required depending upon the medium used for a particular communication and the possibility that the communication will reach a larger or different audience than the one initially targeted.]

[(3) Member communications must be clear. A statement made in an unclear manner can cause a misunderstanding. A complex or overly technical explanation may be more confusing than too little information.]

[(4) In communications with the public, income or investment returns may not be characterized as tax-free or exempt from income tax when tax liability is merely postponed or deferred, such as when taxes are payable upon redemption.]

[(5) 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. For example, if income from an investment company investing in municipal bonds is subject to state or local income taxes, this fact must be stated, or the illustration must otherwise make it clear that income is free only from federal income tax.]

[(6) Recommendations]

[(A) In making a recommendation in advertisements and sales literature, whether or not labeled as such, a member must have a reasonable basis for the recommendation and must disclose any of the following situations which are applicable:]

[(i) that at the time the advertisement or sales literature was published, the member was making a market in the securities being recommended, or in the underlying security if the recommended security is an option or security future, or that the member or associated persons will sell to or buy from customers on a principal basis;]

[(ii) that the member and/or its officers or partners have a financial interest in any of the securities of the issuer whose securities are recommended, and the nature of the financial interest (including, without limitation, whether it consists of any option, right, warrant, future, long or short position), unless the extent of the financial interest is nominal;]

[(iii) that the member was manager or co-manager of a public offering of any securities of the recommended issuer within the past 12 months.]

[(B) The member shall also provide, or offer to furnish upon request, available investment information supporting the recommendation.

Recommendations on behalf of corporate equities must provide the price at the time the recommendation is made.]

[(C) A member may use material referring to past recommendations if it sets forth all recommendations as to the same type, kind, grade or classification of securities made by a member within the last year. Longer periods of years may be covered if they are consecutive and include the most recent year. Such material must also name each security recommended and give the date and nature of each recommendation (e.g., whether to buy or sell), the price at the time of the recommendation, the price at which or the price range within which the recommendation was to be acted upon, and indicate the general market conditions during the period covered.]

[(D) Also permitted is material that does not make any specific recommendation but which offers to furnish a list of all recommendations made by a member within the past year or over longer periods of consecutive years, including the most recent year, if this list contains all the information specified in subparagraph (C). Neither the list of recommendations, nor material offering such list, shall imply comparable future performance. Reference to the results of a previous specific recommendation, including such a reference in a follow-up



research report or market letter, is prohibited if the intent or the effect is to show the success of a past recommendation, unless all of the foregoing requirements with respect to past recommendations are met.]

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**[IM-2210-3]2212. Use of [Rankings in] Investment Companies Rankings in Retail Communications [Advertisements and Sales Literature]**

**(a) Definition of “Ranking Entity”**

For purposes of [the following guidelines] this Rule, the term “Ranking Entity” refers to any entity that provides general information about investment companies to the public, that is independent of the investment company and its affiliates, and whose services are not procured by the investment company or any of its affiliates to assign the investment company a ranking.

**(b) General Prohibition**

Members may not use investment company rankings in any [advertisement or item of sales literature] retail communication other than (1) rankings created and published by Ranking Entities or (2) rankings created by an investment company or an investment company affiliate but based on the performance measurements of a Ranking Entity. Rankings in [advertisements and sales literature] retail communications also must conform to the following requirements.

**(c) Required Disclosures**

**(1) Headlines/Prominent Statements**

A headline or other prominent statement must not state or imply that an investment company or investment company family is the best performer in a category unless it is actually ranked first in the category.

**(2) Required Prominent Disclosure**

All [advertisements and sales literature] retail communications containing an investment company ranking must disclose prominently:

(A) the name of the category (e.g., growth);

(B) the number of investment companies or, if applicable, investment company families, in the category;

(C) the name of the Ranking Entity and, if applicable, the fact that the investment company or an affiliate created the category or subcategory;

(D) the length of the period (or the first day of the period) and its ending date; and

(E) criteria on which the ranking is based (e.g., total return, risk-adjusted performance).

**(3) Other Required Disclosure**

All [advertisements and sales literature] retail communications containing an investment company ranking also must disclose:

(A) the fact that past performance is no guarantee of future results;

(B) for investment companies that assess front-end sales loads, whether the ranking takes those loads into account;

(C) if the ranking is based on total return or the current SEC standardized yield, and fees have been waived or expenses advanced during the period on which the ranking is based, and the waiver or advancement had a material effect on the total return or yield for that period, a statement to that effect;

(D) the publisher of the ranking data (e.g., “ABC Magazine, June [2003] 2011”); and

(E) if the ranking consists of a symbol (e.g., a star system) rather than a number, the meaning of the symbol (e.g., a four-star ranking indicates that the fund is in the top 30% of all investment companies).

**(d) Time Periods**

**(1) Current Rankings**

Any investment company ranking included in [an item of sales literature] a retail communication must be, at a minimum, current to the most recent calendar quarter ended prior to use[. Any investment company ranking included in an advertisement must be, at minimum, current to the most recent calendar quarter ended prior to the] or submission for publication. If no ranking that meets this requirement is available from the Ranking Entity, then a member may only use the most current ranking available from the Ranking Entity unless use of the most current ranking would be misleading, in which case no ranking from the Ranking Entity may be used.

**(2) Rankings Time Periods; Use of Yield Rankings**

Except for money market mutual funds:

(A) [advertisements and sales literature] retail communications may not present any ranking that covers a period of less than one year, unless the ranking is based on yield;

(B) an investment company ranking based on total return must be accompanied by rankings based on total return for a one year period for investment companies in existence for at least one year; one and five year periods for investment companies in existence for at least five years; and one, five and ten year periods for investment companies in existence for at least ten years supplied by the same Ranking Entity, relating to the same investment category, and based on the same time period; provided that, if rankings for such one, five and ten year time periods are not published by the Ranking Entity, then rankings representing short, medium and long term performance must be provided in place of rankings for the required time periods; and

(C) an investment company ranking based on yield may be based only on the current SEC standardized yield and must be accompanied by total return rankings for the time periods specified in paragraph (d)(2)(B).

**(e) Categories**

(1) The choice of category (including a subcategory of a broader category) on which the investment company ranking is based must be one that provides a sound basis for evaluating the performance of the investment company.

(2) An investment company ranking must be based only on (A) a published category or subcategory created by a Ranking Entity or (B) a category

or subcategory created by an investment company or an investment company affiliate, but based on the performance measurements of a Ranking Entity.

(3) [An advertisement or sales literature] Retail communications must not use any category or subcategory that is based upon the asset size of an investment company or investment company family, whether or not it has been created by a Ranking Entity.

**(f) Multiple Class/Two-Tier Funds**

Investment company rankings for more than one class of investment company with the same portfolio must be accompanied by prominent disclosure of the fact that the investment companies or classes have a common portfolio and different expense structures.

**(g) Investment Company Families**

[Advertisements and sales literature] Retail communications may contain rankings of investment company families, provided that these rankings comply with [the guidelines above] this Rule, and further provided that no [advertisement or sales literature] retail communication for an individual investment company may provide a ranking of an investment company family unless it also prominently discloses the various rankings for the individual investment company supplied by the same Ranking Entity, as described in paragraph (d)(2)(B). For purposes of this [IM-2210-3] Rule, the term “investment company family” means any two or more registered investment companies or series thereof that hold themselves out to investors as related companies for purposes of investment and investor services.

**(h) Independently Prepared Reprints**

This Rule shall not apply to any reprint or excerpt of any article or report that is excluded from the FINRA Advertising Regulation Department filing requirements pursuant to Rule 2210(c)(7)(I).

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**[IM-2210-5]2213. Requirements for the Use of Bond Mutual Fund Volatility Ratings**

**(a) Definition of Bond Mutual Fund Volatility Ratings**

For purposes of this Rule and any interpretation thereof, the term “bond mutual fund volatility rating” is a description issued by an independent third party relating to the sensitivity of the net asset value of a portfolio of an open-end management investment company that invests in debt securities to changes in market conditions and the general economy, and is based on an evaluation of objective factors, including the credit quality of the fund’s individual portfolio holdings, the market price volatility of the portfolio, the fund’s performance, and specific risks, such as interest rate risk, prepayment risk, and currency risk.

**(b) Prohibitions on Use**

Members and persons associated with a member may use a bond mutual fund volatility rating only in a communication that is accompanied or preceded by a prospectus for the bond mutual fund (“supplemental sales literature”) and only when the following requirements are satisfied:

- (1) The rating does not identify or describe volatility as a “risk” rating.

(2) The supplemental sales literature incorporates the most recently available rating and reflects information that, at a minimum, is current to the most recently completed calendar quarter ended prior to use.

(3) The criteria and methodology used to determine the rating must be based exclusively on objective, quantifiable factors. The rating and the Disclosure Statement that accompanies the rating must be clear, concise, and understandable.

(4) The supplemental sales literature conforms to the disclosure requirements described in paragraph (c).

(5) The entity that issued the rating provides detailed disclosure on its rating methodology to investors through a toll-free telephone number, a web[  
]site, or both.

**(c) Disclosure Requirements**

(1) Supplemental sales literature containing a bond mutual fund volatility rating shall include a Disclosure Statement containing all the information required by this Rule. The Disclosure Statement may also contain any additional information that is relevant to an investor's understanding of the rating.

(2) Supplemental sales literature containing a bond mutual fund volatility rating shall contain all current bond mutual fund volatility ratings that have been issued with respect to the fund. Information concerning multiple ratings may be combined in the Disclosure Statement, provided that the applicability of the information to each rating is clear.

(3) All bond mutual fund volatility ratings shall be contained within the text of the Disclosure Statement. The following disclosures shall be provided with respect to each such rating:

(A) the name of the entity that issued the rating;

(B) the most current rating and date of the current rating, with an explanation of the reason for any change in the current rating from the most recent prior rating;

(C) a description of the rating in narrative form, containing the following disclosures:

(i) a statement that there is no standard method for assigning ratings;

(ii) a description of the criteria and methodologies used to determine the rating;

(iii) a statement that not all bond funds have volatility ratings;

(iv) whether consideration was paid in connection with obtaining the issuance of the rating;

(v) a description of the types of risks the rating measures (e.g., short-term volatility);

(vi) a statement that the portfolio may have changed since the date of the rating; and



(vii) a statement that there is no guarantee that the fund will continue to have the same rating or perform in the future as rated.

**[IM-2210-6]2214. Requirements for the Use of Investment Analysis Tools**

**(a) General Considerations**

This [Interpretive Material] Rule provides a limited exception to [NASD Rule 2210(d)(1)(D)] Rule 2210(d)(1)(F).<sup>[1]</sup> No member may imply that [NASD] FINRA endorses or approves the use of any investment analysis tool or any recommendation based on such a tool. A member that offers or intends to offer an investment analysis tool under this [Interpretive Material] Rule (whether customers use the member's tool independently or with assistance from the member) must, within 10 business days of first use, (1) provide [NASD's] FINRA's Advertising Regulation Department ("Department") access to the investment analysis tool and, (2) pursuant to [Rule 2210(c)(2)(D)] Rule 2210(c)(3)(D), file with the Department any template for written reports produced by, or [advertisements and sales literature] retail communications concerning, the tool.<sup>[2]</sup> [The member also must provide any supplemental information requested by the Department. The Department may require that the member modify the investment analysis tool, written-report template, advertisement or sales literature. The Department also may require that the member not offer or continue to offer or use the tool, written-report template, advertisement or sales literature until all changes specified by the Department have been made by the member.]

[A member that offers an investment analysis tool exclusively to "institutional investors," as defined in Rule 2211(a)(3), is not subject to the post-use access and filing

requirement in this paragraph if the communications relating to or produced by the tool meet the criteria for “institutional sales material,” as defined in Rule 2211(a)(2). A member that intends to make the tool available to, or that intends to use the tool with, any person other than an institutional investor (such as an employee benefit plan participant or a retail broker-dealer customer) will be subject to the filing and access requirements, however.]

[As in all cases, a member’s compliance with this Interpretive Material does not mean that the member is acting in conformity with other applicable laws and rules. A member that offers an investment analysis tool under this Interpretive Material (whether customers use the member’s tool independently or with assistance from the member) is responsible for ensuring that use of the investment analysis tool and all recommendations based on the investment analysis tool (whether made via the automated tool or a written report) comply, as applicable, with NASD’s suitability rule (Rule 2310), the other provisions of Rule 2210 (including, but not limited to, the principles of fair dealing and good faith, the prohibition on exaggerated, unwarranted or misleading statements or claims, and any other applicable filing requirements for advertisements and sales literature), the federal securities laws (including, but not limited to, the antifraud provisions), the Securities and Exchange Commission rules (including, but not limited to, SEC Rule 156 under the Securities Act of 1933) and other NASD rules.]

**(b) Definition**

For purposes of this [Interpretive Material] Rule and any interpretation thereof, an “investment analysis tool” is an interactive technological tool that produces simulations and statistical analyses that present the likelihood of various investment outcomes if

certain investments are made or certain investment strategies or styles are undertaken, thereby serving as an additional resource to investors in the evaluation of the potential risks and returns of investment choices.

**(c) Use of Investment Analysis Tools and Related Written Reports and [Sales Material] Retail Communications**

A member may provide an investment analysis tool (whether customers use the member's tool independently or with assistance from the member), written reports indicating the results generated by such tool and related [advertisements and sales literature<sup>3</sup>] retail communications only if the tool, written report or related retail communication:

(1) [the member] describes the criteria and methodology used, including the investment analysis tool's limitations and key assumptions;

(2) [the member] explains that results may vary with each use and over time;

(3) if applicable, [the member] describes the universe of investments considered in the analysis, explains how the tool determines which securities to select, discloses if the tool favors certain securities and, if so, explains the reason for the selectivity,<sup>[4]</sup> and states that other investments not considered may have characteristics similar or superior to those being analyzed; and

(4) [the member] displays the following additional disclosure:

“IMPORTANT: The projections or other information generated by [name of investment analysis tool] regarding the likelihood of various investment outcomes

are hypothetical in nature, do not reflect actual investment results and are not guarantees of future results.”

**(d) Disclosures**

The disclosures and other required information discussed in paragraph (c) must be clear and prominent and must be in written [or](which may be electronic) narrative form.

**• • • Supplementary Material: -----**

**.01 Relationship to Rule 2210(d)(1)(F).** Rule 2210(d)(1)(F) states that

“[c]ommunications may not predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast.” This Rule allows member firms to offer investment analysis tools (whether customers use the member’s tool independently or with assistance from the member), written reports indicating the results generated by such tools and related retail communications in certain circumstances. Rule 2210(d)(1)(F) does not prohibit, and this Rule does not apply to, hypothetical illustrations of mathematical principles that do not predict or project the performance of an investment or investment strategy.

**.02 Advertising Regulation Department Requests.** A member subject to this Rule must provide any supplemental information requested by the Department. The Department may require that the member modify the investment analysis tool, written-report template, or retail communication. The Department also may require that the member not offer or continue to offer or use the tool, written-report template, or retail communication until all changes specified by the Department have been made by the member.

**.03 Material Changes to Disclosures.** After the Department has reviewed the investment analysis tool, written-report template, or retail communication, a member must notify the Department and provide additional access to the tool and re-file any template, or retail communication if it makes a material change to the presentation of information or disclosures as required by paragraphs (c) and (d).

**.04 Investment Analysis Tools Used with Institutional Investors.** A member that offers an investment analysis tool exclusively to “institutional investors,” as defined in Rule 2210(a)(4), is not subject to the post-use access and filing requirement in paragraph (a) of this Rule if the communications relating to or produced by the tool meet the criteria for “institutional communication,” as defined in Rule 2210(a)(3). A member that intends to make the tool available to, or that intends to use the tool or any related report with, any “retail investor,” as defined in Rule 2210(a)(6) (such as an employee benefit plan participant or a retail broker-dealer customer), will be subject to the filing and access requirements, however.

**.05 Compliance with Other Applicable Laws and Rules.** As in all cases, a member’s compliance with this Rule does not mean that the member is acting in conformity with other applicable laws and rules. A member that offers an investment analysis tool under this Rule (whether customers use the member’s tool independently or with assistance from the member) is responsible for ensuring that use of the investment analysis tool and all recommendations based on the investment analysis tool (whether made via the automated tool or a written report) comply, as applicable, with FINRA’s suitability rule (NASD Rule 2310), the other provisions of Rule 2210 (including, but not limited to, the principles of fair dealing and good faith, the prohibition on exaggerated, unwarranted or

misleading statements or claims, and any other applicable filing requirements for retail communications), the federal securities laws (including, but not limited to, the antifraud provisions), the SEC rules (including, but not limited to, Securities Act Rule 156) and other FINRA rules.

**.06 Incidental References to Investment Analysis Tools.** A retail communication that contains only an incidental reference to an investment analysis tool (e.g., a brochure that merely mentions a member’s tool as one of the services offered by the member) need not include the disclosures required by this Rule and would not need to be filed with the Department, unless otherwise required by the other provisions of Rule 2210. A retail communication that refers to an investment analysis tool in more detail but does not provide access to the tool or the results generated by the tool must provide the disclosures required by paragraphs (c)(2) and (c)(4), but may exclude the disclosures required by paragraphs (c)(1) and (c)(3).

**.07 Investment Analysis Tools that Favor Certain Securities.** The disclosure required by paragraph (c)(3) must indicate, among other things, whether the investment analysis tool searches, analyzes or in any way favors certain securities within the universe of securities considered based on revenue received by the member in connection with the sale of those securities or based on relationships or understandings between the member and the entity that created the investment analysis tool. The disclosure also must indicate whether the investment analysis tool is limited to searching, analyzing or in any way favoring securities in which the member makes a market, serves as underwriter, or has any other direct or indirect interest. Members are not required to provide a “negative” disclosure (i.e., a disclosure indicating that the tool does not favor certain securities).

[<sup>1</sup>] [NASD Rule 2210(d)(1)(D) states that “[c]ommunications with the public may not predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast.” This Interpretive Material allows member firms to offer investment analysis tools (whether customers use the member’s tool independently or with assistance from the member), written reports indicating the results generated by such tools and related advertisements and sales literature in certain circumstances.]

[Rule 2210(d)(1)(D) does not prohibit, and this Interpretive Material does not apply to, hypothetical illustrations of mathematical principles that do not predict or project the performance of an investment or investment strategy.]

[<sup>2</sup>] [After the Department has reviewed the investment analysis tool, written-report template, advertisement or sales literature, a member must notify the Department and provide additional access to the tool and re-file any template, advertisement or sales literature if it makes a material change to the presentation of information or disclosures as required by paragraphs (c) and (d).]

[<sup>3</sup>] [An advertisement or sales literature that contains only an incidental reference to an investment analysis tool (e.g., a brochure that merely mentions a member’s tool as one of the services offered by the member) need not include the disclosures required by this Interpretive Material and would not need to be filed with the Department, unless otherwise required by the other provisions of Rule 2210.]

[<sup>4</sup>] [This disclosure must indicate, among other things, whether the investment analysis tool searches, analyzes or in any way favors certain securities within the

universe of securities considered based on revenue received by the member in connection with the sale of those securities or based on relationships or understandings between the member and the entity that created the investment analysis tool. The disclosure also must indicate whether the investment analysis tool is limited to searching, analyzing or in any way favoring securities in which the member makes a market or has any other direct or indirect interest. Members are not required to provide a “negative” disclosure (i.e., a disclosure indicating that the tool does not favor certain securities).]

**[IM-2210-7]2215. [Guidelines for] Communications with the Public Regarding Security Futures**

**(a) [NASD Approval] FINRA Filing Requirements [and Review Procedures]**

(1) As set forth in paragraph (c)([4]2) of Rule 2210, a member must submit all [advertisements] retail communications concerning security futures [shall be submitted] to [the] FINRA’s Advertising Regulation Department [of NASD] at least [ten]10 business days prior to first use [for approval and, if changed by NASD, shall be withheld from circulation until any changes specified by NASD have been made or, in the event of disapproval, until the advertisement has been refiled for, and has received, NASD approval].

(2) The requirements of this paragraph (a) shall not be applicable to:

(A) [advertisements] retail communications concerning security futures that are submitted to another self-regulatory organization having comparable standards pertaining to such [advertisements] retail communications, and



(B) [advertisements] retail communications in which the only reference to security futures is contained in a listing of the services of a member[ organization].

**(b) [Disclosure Statement] Standards Applicable to Security Futures**

**Communications**

**(1) Communications Used Prior to Delivery of the Security Futures Risk**

**Disclosure Statements**

[(1)A] All communications concerning security futures shall be accompanied or preceded by the security futures risk disclosure statement unless they meet the following requirements:

[(A)i] Such communications [shall] must be limited to general descriptions of the security futures being offered.

[(B)ii] Such communications [shall] must contain contact information for obtaining a copy of the security futures risk disclosure statement.

[(C)iii] Such communications [shall] must not contain recommendations or past or projected performance figures, including annualized rates of return, or names of specific securities.

[(2)B] Communications concerning security futures that meet the requirements of [sub-]paragraph (b)(1)(A)(i) through (iii) may have the following characteristics:

[(A)i] the text of the communication may contain a brief description of security futures, including a statement that identifies registered clearing agencies for security futures. The text may also contain a brief description of the general attributes and method of operation of the securit[y]ies exchange or notice-registered securities exchange on which such security futures are traded, including a discussion of how a security future is priced;

[(B)ii] the communication may include any statement required by any state law or administrative authority; and

[(C)iii] advertising designs and devices, including borders, scrolls, arrows, pointers, multiple and combined logos and unusual type faces and lettering as well as attention-getting headlines and photographs and other graphics may be used, provided such material is not misleading.

**[(c) Recordkeeping]**

[Consistent with paragraph (b)(2) of Rule 2210, a member shall keep a separate file of all advertisements and sales literature concerning security futures, including the name(s) of the person(s) who prepared them and approved their use for a period of three years from the date of each use. In addition, members shall meet the same recordkeeping requirements for all correspondence concerning security futures. In the case of sales literature concerning security futures, a member shall record the source of any recommendation contained therein.]

[(d)2] [Specific] General Standards

(A) No member or associated person of a member shall distribute or make available any communication concerning a security future that:

(i) contains any statement suggesting the certain availability of a secondary market for security futures;

(ii) fails to reflect [(1) The special] the risks attendant to security futures transactions and the complexities of certain security futures investment strategies; [shall be reflected in any communications that discuss the uses or advantages of security futures. Any statement referring to the potential opportunities or advantages presented by security futures shall be balanced by a statement of the corresponding risks. The risk statement shall reflect the same degree of specificity as the statement of opportunities, and broad generalities should be avoided.]

[(2) Security futures communications shall]

(iii) fails to include a warning to the effect that security futures are not suitable for all investors [and such communications shall not] or contains suggestions to the contrary; or[.]

(iv[3]) [Security futures communications shall state] fails to include a statement that supporting documentation for any claims (including any claims made on behalf of security futures programs or the security futures expertise of sales persons), comparisons, recommendations, statistics or other technical data, will be supplied upon request.

(B) Paragraphs (b)(2)(A)(iii) and (b)(2)(A)(iv) do not apply to institutional communications as defined in Rule 2210(a)(3).

(C) Any statement referring to the potential opportunities or advantages presented by security futures must be balanced by a statement of the corresponding risks. The risk statement must reflect the same degree of specificity as the statement of opportunities, and must avoid broad generalities.

[(4) No cautionary statements or caveats, often called hedge clauses, may be used in communications with the public if they are not legible, are misleading, or are inconsistent with the content of the material.]

[(5) Statements suggesting the certain availability of a secondary market for security futures shall not be made.]

[(e)3] Projections

Notwithstanding the provisions of Rule 2210(d)(1)([D]E), security futures [sales literature and correspondence] communications may contain projected performance figures (including projected annualized rates of return), provided that:

[(1)A] all such [sales literature and correspondence] communications must be accompanied or preceded by the security futures risk disclosure statement;

[(2)B] no suggestion of certainty of future performance is made;

[(3)C] parameters relating to such performance figures are clearly established;

(([4]D) all relevant costs, including commissions, fees, and interest charges (as applicable) are disclosed and reflected in the projections;

(([5]E) such projections are plausible and are intended as a source of reference or a comparative device to be used in the development of a recommendation;

(([6]E) all material assumptions made in such calculations are clearly identified;

(([7]G) the risks involved in the proposed transactions are [also] disclosed; and

(([8]H) in communications relating to annualized rates of return, that such returns are not based upon any less than a [sixty]60-day experience; any formulas used in making calculations are clearly displayed; and a statement is included to the effect that the annualized returns cited might be achieved only if the parameters described can be duplicated and that there is no certainty of doing so.

(([f]4) Historical Performance

Security futures [sales literature and correspondence] communications may feature records and statistics that portray the performance of past recommendations or of actual transactions, provided that:

(([1]A) all such [sales literature and correspondence] communications must be accompanied or preceded by the security futures risk disclosure statement;

((2)B) any such portrayal is done in a balanced manner, and consists of records or statistics that are confined to a specific “universe” that can be fully isolated and circumscribed and that covers at least the most recent 12-month period;

((3)C) such communications include the date of each initial recommendation or transaction, the price of each such recommendation or transaction as of such date, and the date and price of each recommendation or transaction at the end of the period or when liquidation was suggested or effected, whichever was earlier; provided that if the communications are limited to summarized or averaged records or statistics, in lieu of the complete record there may be included the number of items recommended or transacted, the number that advanced and the number that declined, together with an offer to provide the complete record upon request;

((4)D) [such communications disclose] all relevant costs, including commissions, fees, and daily margin obligations (as applicable) are disclosed and reflected in the performance;

((5)E) whenever such communications contain annualized rates of return, [such communications shall disclose] all material assumptions used in the process of annualization are disclosed;

((6)F) an indication is provided of the general market conditions during the period(s) covered, and any comparison made between such records and statistics and the overall market (e.g., comparison to an index) is valid;

([7]G) such communications state that the results presented should not and cannot be viewed as an indicator of future performance; and

([8]H) a principal qualified to supervise security futures activities determines that the records or statistics fairly present the status of the recommendations or transactions reported upon and so initials the report.

**([g]c) Security Futures Programs**

In communications regarding a security futures program (i.e., an investment plan employing the systematic use of one or more security futures strategies), the cumulative history or unproven nature of the program and its underlying assumptions [shall] must be disclosed.

**([h]d) Standard Forms of Worksheets**

Such worksheets must be uniform within a member[ firm]. If a member has adopted a standard form of worksheet for a particular security futures strategy, nonstandard worksheets for that strategy may not be used.

**([i]e) Recordkeeping**

Communications that portray performance of past recommendations or actual transactions and completed worksheets shall be kept at a place easily accessible to the sales office for the accounts or customers involved.

**[IM-2210-8]2216. Communications with the Public About Collateralized Mortgage Obligations (CMOs)**

**(a) Definition**

For purposes of [the following guidelines] this Rule, the term “collateralized mortgage obligation” (CMO) refers to a multi-class debt instrument backed by a pool of

mortgage pass-through securities or mortgage loans, including real estate mortgage investment conduits (REMICs) as defined in the Tax Reform Act of 1986.

**(b) Disclosure Standards and Required Educational Material**

**(1) Disclosure Standards**

All [advertisements, sales literature] retail communications and correspondence concerning CMOs:

- (A) must include within the name of the product the term “Collateralized Mortgage Obligation”;
- (B) may not compare CMOs to any other investment vehicle, including a bank certificate of deposit;
- (C) must disclose, as applicable, that a government agency backing applies only to the face value of the CMO and not to any premium paid; and
- (D) must disclose that a CMO’s yield and average life will fluctuate depending on the actual rate at which mortgage holders prepay the mortgages underlying the CMO and changes in current interest rates.

**(2) Required Educational Material**

Before the sale of a CMO to any person other than an institutional investor, as defined in Rule 2210(a)(4), a member must offer to the [customer] person educational material that includes the following:

- (A) a discussion of:
  - (i) characteristics and risks of CMOs including credit quality, prepayment rates and average lives, interest rates



(including their effect on value and prepayment rates), tax considerations, minimum investments, transaction costs and liquidity;

(ii) the structure of a CMO, including the various types of tranches that may be issued and the rights and risks pertaining to each (including the fact that two CMOs with the same underlying collateral may be prepaid at different rates and may have different price volatility); and

(iii) the relationship between mortgage loans and mortgage securities;

(B) questions an investor should ask before investing; and

(C) a glossary of terms.

**(c) Promotion of Specific CMOs**

In addition to the standards set forth above, [advertisements, sales literature] retail communications and correspondence that promote a specific security or contain yield information must conform to the standards set forth below. An example of a compliant communication appears at the end of this [section] Rule.

(1) The [advertisement, sales literature] retail communication or correspondence must present the following disclosure sections with equal prominence. The information in Sections 1 and 2 must be included. The information in Section 3 is optional; therefore, the member may elect to include any, all or none of this information. The information in Section 4 may be tailored to the member's preferred signature.

Section 1 Title — Collateralized Mortgage Obligations

Coupon Rate

Anticipated Yield/Average Life

Specific Tranche — Number & Class

Final Maturity Date

Underlying Collateral

Section 2 Disclosure Statement:

“The yield and average life shown above consider prepayment assumptions that may or may not be met. Changes in payments may significantly affect yield and average life. Please contact your representative for information on CMOs and how they react to different market conditions.”

Section 3 Product Features (Optional):

Minimum Denominations

Rating Disclosure

Agency/Government Backing

Income Payment Structure

Generic Description of Tranche (e.g., PAC, Companion)

Yield to Maturity of CMOs Offered at Par

Section 4 Company Information:

Name, Memberships

Address

Telephone Number

Representative's Name

**(2) Additional Conditions**

The following conditions must also be met:

(A) All figures in Section 1 must be in equal type size.

(B) The disclosure language in Section 2 may not be altered and must be given equal prominence with the information in Section 1.

(C) The prepayment assumption used to determine the yield and average life must either be obtained from a nationally recognized service or the member [firm ]must be able to justify the assumption used. A copy of either the service's listing for the CMO or the [firm's] member's justification must be attached to the copy of the communication that is maintained in the [firm's] member's advertising files in order to verify that the prepayment scenario is reasonable.

(D) Any sales charge that the member intends to impose must be reflected in the anticipated yield.

(E) The communication must include language stating that the security is "offered subject to prior sale and price change." This language may be included in any one of the four sections.

(F) If the security is an accrual bond that does not currently distribute principal and interest payments, then Section 1 must include this information.

**(3) Radio/Television Advertisements**

(A) The following oral disclaimer must precede any radio or television advertisement in lieu of the Title information set forth in Section 1:

“The following is an advertisement for Collateralized Mortgage Obligations. Contact your representative for information on CMOs and how they react to different market conditions.”

(B) Radio or television advertisements must contain the following oral disclosure statement in lieu of the legend set forth in Section 2:

“The yield and average life reflect prepayment assumptions that may or may not be met. Changes in payments may significantly affect yield and average life.”

**(4) Standardized CMO Communication Example**

Collateralized Mortgage Obligations

7.50% Coupon

7.75% Anticipated Yield to 22-Year Average Life

FNMA 9532X, Final Maturity March 2023

Collateral 100% FNMA 7.50%

The yield and average life shown above reflect prepayment assumptions that may or may not be met. Changes in payments may significantly affect yield and average life. Please contact your representative for information on CMOs and how they react to different market conditions.

\$5,000 Minimum

Income Paid Monthly

Implied Rating/Volatility Rating

Principal and Interest Payments Backed by FNMA

PAC Bond

Offered subject to prior sale and price change.

Call Mary Representative at (800) 555-1234

Your Company Securities, Inc., Member SIPC

123 Main Street

Anytown, State 12121

\* \* \* \* \*

**[2211. Institutional Sales Material and Correspondence]**

Entire Text Deleted

\* \* \* \* \*

**Text of Incorporated NYSE Rule and NYSE Rule Interpretation  
to Remain  
In the Transitional Rulebook**

\* \* \* \* \*

**Incorporated NYSE Rule**

\* \* \* \* \*

**Rule 472. Communications With The Public**

**(a) Approval of Communications and Research Reports**

(1) Reserved. [Each advertisement, sales literature or other similar type of communication which is generally distributed or made available by a member organization to customers or the public must be approved in

advance by an allied member, supervisory analyst, or qualified person designated under the provisions of Rule 342(b)(1).]

**(2)** No Change.

**(b)** through **(h)** No Change.

**(i) Reserved.[General Standards for All Communications]**

[No member organization shall utilize any communication which contains (i) any untrue statement or omission of a material fact or is otherwise false or misleading; or (ii) promises of specific results, exaggerated or unwarranted claims; or (iii) opinions for which there is no reasonable basis; or (iv) projections or forecasts of future events which are not clearly labeled as forecasts.]

**(j) Reserved.[Specific Standards for Communications]**

**[(1) Recommendations]**

[A recommendation (even though not labeled as a recommendation) must have a basis which can be substantiated as reasonable.]

[When recommending the purchase, sale or switch of specific securities, supporting information must be provided or offered.]

[The market price at the time the recommendation is made must be indicated.]

**[(2) Records of Past Performance]**

[Communications may feature record or statistics which portray the performance of past recommendations or of actual transactions of the member organization provided that the following conditions are met:]

**[(i)]** The portrayal is balanced and consists of records or statistics that are confined to a specific “universe” that can be fully isolated and circumscribed and that covers at least the most recent 12-month period.]

**[(ii)]** The communications include the date and price of each initial recommendation or transaction and the date and price of the recommendation or transaction at the end of the period or when liquidation was suggested or effected, whichever was earlier. Communications may also present summarized or averaged records of statistics or otherwise offer the complete record rather than provide it. This material must include the total number of items recommended or transacted, the number that advanced and declined and an offer to provide the complete record upon request.]

**[(iii)]** The communications disclose the existence of all relevant costs, including commissions and interest charges or other applicable expenses and, whenever annualized rates of return are used, all material assumptions used in the process of annualization.]

**[(iv)]** An indication is provided of the general market conditions during the period covered, and any comparison made between such records and statistics and an overall market (e.g., comparison to an index) is valid.]

**[(v)]** The communications state that the results presented should not and cannot be viewed as an indicator of future performance.]

**[(vi)]** All the original recommendations or evidence of actual transactions on which the record is based are retained for three years by the organization and made available to the Exchange on request.]

**[(3) Projections and Predictions]**

[Any projection or prediction must contain the bases or assumptions upon which they are made and must indicate that the bases or assumptions of the materials upon which such projections and predictions are made are available upon request.]

**[(4) Comparisons]**

[Any comparison of one member organization's service, personnel, facilities or charges with those of other firms must be factually supportable.]

**[(5) Dating Reports]**

[All communications must be appropriately dated. Any significant information that is not reasonably current (usually more than 6 months old-depending upon the industry and circumstances) must be noted.]

**[(6) Identification of Sources]**

[Communications not prepared under the direct supervision of the member organization or its correspondent member organization should show the



person (by name and appropriate title) or outside organization which prepared the material.]

[In distributing communications prepared under the direct supervision of a correspondent member organization, the distributing firm should mention this fact, although it may not be necessary to identify the correspondent by name.]

[Communications about a corporate issuer which are distributed by a member organization but have been prepared and published by the issuer or for the issuer by a party other than the member organization should clearly identify the preparer and publisher.]

#### **[(7) Testimonials]**

[In testimonials concerning the quality of a firm's investment advice, the following points must be clearly stated in the communication:]

**[(i)]** The testimonial may not be representative of the experience of other clients.]

**[(ii)]** The testimonial is not indicative of future performance or success.]

**[(iii)]** If more than a nominal sum is paid, the fact that it is a paid testimonial must be indicated.]

**[(iv)]** If the testimonial concerns a technical aspect of investing, the person making the testimonial must have knowledge and experience to form a valid opinion.]

**(k)** No Change.

**(l) Reserved.[Other Communications Activities]**

[Other communications activities are deemed to include, but are not limited to, conducting interviews with the media, writing books, conducting seminars or lecture courses, writing newspaper or magazine articles, or making radio/TV appearances.]

[Members organizations must establish specific written supervisory procedures applicable to allied members, and employees who engage in these types of communications activities. These procedures must include provisions that require prior approval of such activity by a person designated under the provisions of Rule 342(b)(1). These types of activities are subject to the general standards set forth in paragraph (i). In addition, any activity which includes discussion of specific securities is subject to the specific standards in paragraph (j).]

**(m)** No Change.

**• • • Supplementary Material: -----**

**.10 Definitions**

**(1) Reserved.[Communication]**

[The term “Communication” is deemed to include, but is not limited to advertisements, market letters, research reports, sales literature, electronic communications, communications in and with the press and wires and memoranda to branch offices or correspondent firms which are shown or distributed to customers or the public.]

**(2)** No Change.

**(3) Reserved.[Advertisement]**

[“Advertisement” is defined to include, but is not limited to, any sales communications that is published, or designed for use in any print, electronic or other public media such as newspapers, periodicals, magazines, radio, television, telephone recording, web sites, motion pictures, audio or video device, telecommunications device, billboards or signs.]

**(4) Reserved.[Market letter]**

[“Market letter” is defined as any written communication excepted from the definition of “research report” pursuant to Rule 472.10(2)(a).]

**(5) Reserved.[Sales literature]**

[“Sales literature” is defined as, but is not limited to, written or electronic communications including, but not limited to, telemarketing scripts, performance reports or summaries, form letters, seminar texts, and press releases discussing or promoting the products, services, and facilities offered by a member organization, the role of investment in an individual’s overall financial plan, or other material calling attention to any other communication.]

**.20 through .80** No Change.

**.90 Reserved.**[For purposes of Rule 472(a)(1), a qualified person is one who has passed an examination acceptable to the Exchange.]

**.100 through .140** No Change.

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## **NYSE RULE INTERPRETATION**

\* \* \* \* \*

### **Rule 472 Communications with the Public**

#### **Rule 472.10 Definitions**

##### **/01 Reserved.[“Communication”]**

[The term “communication” is defined in Rule 472.10(1) to include, but is not limited to, advertisements, market letters, research reports, sales literature, electronic communications, communications in and with the press and wires and memoranda to branch offices or correspondent firms which are shown or distributed to customers or the public.]

**/02** No Change.

##### **/03 Reserved.[Advertisement]**

[“Advertisement” is defined in Rule 472.10(3) to include, but is not limited to, any communications that is published or designated for use in any print, electronic or other public media such as newspapers, periodicals, magazines, radio, television, telephone recording, web sites, motion pictures, audio or video device, telecommunications device, billboards, or signs.]

[All advertisements must be approved prior to use by an allied member, supervisory analyst or person designated under the provisions of Rule 342(b)(1), who is other than the preparer. Additionally, member organizations may find it advantageous to clear advertising with their legal counsel, particularly as involving legal or tax questions such as estate planning, trusts and advertisements which may constitute the offering of a “security.”]

[Member organizations are reminded that an advertisement which may be deemed to be the public offering of a “security,” must comply with the registration requirements of the Securities Act of 1933 and applicable rules thereunder.]

[Exchange standards (Rule 472(i) and (j)) apply to all member organizations' advertising, regardless of subject matter. Advertising referring to the market, economic conditions, recruitment, the firm's products, services, or facilities in any area — listed or unlisted stocks, bonds, options (see also Rule 791), commodities, tax shelters, insurance, etc. — is subject to Exchange standards. Member organizations should note that their name must appear on all advertisements except for recruitment ads. The member organization directly bears full responsibility for any publication or broadcast made on its behalf. The member organization should be mindful that before running an ad which has been previously used, re-examination by the firm is necessary in light of continually changing conditions. Ads containing statistics, claims or comparisons with other firms should be carefully reviewed and updated.]

**/04 Reserved. [Market Letters]**

[Market letters are written comments on market conditions. They can also include “follow-ups” to research reports, and articles prepared by member organizations which appear in newspapers and periodicals. Generally, a market letter consists of items of one page or less. Market letters may recommend specific securities but must closely adhere to the specific standards of Rule 472(j). Since market letters are usually limited in the amount of information provided

concerning any recommended securities, supporting information must be offered.

A more extensive treatment is usually considered a research report.]

[Market letters must be approved in advance of distribution. Approval may be given by an allied member, supervisory analyst or person designated under the provisions of Rule 342(b)(1), who is other than the preparer of the letter.]

**/05 Reserved. [Sales Literature]**

[This term refers to written or electronic material (including, but not limited to, telemarketing scripts) discussing or promoting the products, services and facilities offered by a member organization or its personnel, the role of investment in an individual's overall financial plan, or other literature calling attention to any market letters, research reports, brochures, etc. Sales literature must be approved in advance of distribution. Approval may be given by an allied member, supervisory analyst or person designated under the provisions of Rule 342(b)(1), who is other than its preparer.]

**/06 Reserved. [Other Communication Activities]**

[Definition of "Public Appearance"]

[The term "public appearance" as defined in Rule 472.50, is "any participation in a seminar, forum (including an interactive electronic forum), radio or television interview, or other public speaking activity in which a research analyst makes a recommendation or offers an opinion concerning an equity security."]

[Newspaper or magazine articles, radio/TV appearances, seminars, or interviews in and with the media are examples of other communication activities, which must be approved in advance of publication or broadcast. Approval may be given

by an allied member, supervisory analyst, or person designated under the provisions of Rule 342(b)(1). Further, the member organization must establish specific written supervisory procedures applicable to allied members and employees who engage in any of these types of activity.]

[Electronic communications and memoranda to branch offices or correspondent firms, which are shown or distributed to clients, are also subject to the approval requirements and standards of Rule 472. Member organizations should ensure that those communications distributed to customers or the public are not marked “internal” as such designation may lead the recipient to believe that he or she is receiving special and perhaps “inside” information, when, in fact, he or she is not. The activities described in /06 and any other similar activities are subject to the general standards set forth in Rule 472(i) and to the specific standards of Rule 472(j) if the activity includes a discussion of specific securities.]

**/07 Reserved. [Material Externally Prepared]**

[Generally, all communications distributed to or made available to customers or the public must comply with Exchange standards, whether prepared by the member organization or externally. However, consideration will be given to requests for a waiver of this requirement where, among other factors: ]

- [• The member organization has no editorial control over the content, subject matter or timing of the material;]
- [• The material is otherwise obtainable and was not prepared at the request of or commissioned by the member organization;]

- The member organization and the preparer of the material are unaffiliated;]

- The preparer of the material is subject to a parallel and comparable system of regulation; and]

- The material is transmitted in its entirety (i.e., in full text) and does not contain any comment thereon by the member organization.]

[Members are cautioned not to disseminate in its entirety (i.e., in full text) and does not contain any comment thereon by the member.]

**/08 Reserved. [General Standards]**

[All member organization communications are subject to the general standards set forth in Rule 472(i).]

[The general standards prohibit the use of untruthful, misleading or inaccurate statements in any form of communication with the customers or the public, whether written or oral (including radio and television broadcasts, seminars, etc.).]

**[Opinions]**

[Opinions should not be stated as facts and must be reasonable and clearly and distinctly labeled as opinions. Assumptions underlying an opinion should be stated. Substantiation will be required where the material is comparative or where it is otherwise deemed appropriate. Qualifying comparative claims with phrases such as “we believe” or “to the best of our knowledge” will not release the firm from its responsibility of being able to substantiate the underlying claim.]



[The following are statements which are not properly labeled as opinions or which require substantiation:]

[(1) “A better way to accumulate money is through tax deferred annuities.”]

[This would have been acceptable had it been labeled as an opinion.]

[(2) “We believe our compensation package for registered representatives is unsurpassed.”]

[Although stated as an opinion, substantiation would be required. (See Rule 472(i) — Claims and Comparisons).]

[Language]

[Promissory, exaggerated and flamboyant statements and unwarranted superlatives discredit the validity of any communication, reflect poorly on the investment community and are likely to be misleading. Statements which tend to incite an investor to buy or sell on an emotional rather than a reasoned basis are inappropriate in member organization communications with the public.]

[Here are some examples of statements which are unacceptable:]

[Promissory —]

[(1) “Worried about paying too much for a growth stock? Stop worrying. The best is yet to come.”]

[(2) “...commitments may be made at prevailing levels for exceptional capital gains.”]

[(3) “I have seen profits of 50% to 100% taken by people who understand stock movements and adhere to this positive investment program. Any student

of the market can apply the basic rules outlined above and improve his market.”]

[Flamboyant and inflammatory —]

[(1) “Operating in a dynamic growth area with top flight management and strong management and strong finances, the company is an outstanding vehicle for maximum capital appreciation.”]

[(2) “Further projection of sales and earnings is hazardous, but would probably be over-conservative in light of the company's explosive growth potential.”]

[Exaggerated —]

[(1) “This hotel chain is without peer.”]

[(2) “Admittedly late, but at ten times earnings XYZ Corp. still has a tremendous potential...Fear of buying near all-time highs will lead you away from the strongest stock every time.”]

[(3) In describing opportunities for registered representatives, a firm stated that it had a “complete research service.” Investigation revealed that the “service” consisted of one analyst who also handled 45 of his own accounts.]

#### **/09 Reserved. [Specific Standards]**

[The specific standards set forth under Rule 472(j) are illustrative of the general standards in Rule 472(i) but are not exclusive. Compliance with applicable provisions of Rule 472(j) does not necessarily equal compliance with Rule 472(i). For example, disclosures, in a given context, which satisfies Rule 472(i) where additional facts would be material to the customer or reader.]

[Recommendation [See Rule 472(j)(1)]]

[For purposes of these standards, the term “recommendation” includes any advice, suggestion or other statement, written or oral, that is intended, or can reasonably be expected, to influence a customer to purchase, sell or hold a security.]

[When specific securities are recommended in any communication to customers or the public (excluding extemporaneous interviews in and with the media) appropriate disclosures must be made. Disclosures made in written material must be prominent, separate from any general hedge clause and in clear positive language. ]

[a. Market-making/dealing as principal:]

[Making a market, acting as a principal or the intention to do so within one month of a recommendation (if such intent is known at the time of the recommendation) must be explicitly disclosed even if the activity is temporary. The following disclosures would meet Exchange requirements: ]

[(h) “This firm makes a market in the above security.”]

[(ii) “This firm will deal as principal in the above security.”]

[The following disclosure would not meet Exchange requirements if an actual market is then being made:]

[(i) “This firm may from time to time make a market in the above security.”]

[(ii) “This firm usually makes a market in the above security.”]

[An investor should have access to available data in order to make an intelligent investment decision. Therefore, information supporting a recommendation must be provided or offered.]

[The offer of additional information must be prominently displayed in at least the same type as the body copy of the material or in a smaller type of different color or bolder face. It may not be buried in a hedge clause. A simple statement such as, “Additional information is available upon request” is acceptable.]

[The current market price of a recommended security must be disclosed in the original report as well as in follow-up reports, whether written or oral.

[Disclosures Other than by Research Analysts]

[a. Positions: Disclosure should be made if the employees involved in the preparation or issuance of the communication may have positions in securities (including significant options holdings) of the recommended issuer.]

[b. Directorates: If an allied member or employee is a director of a corporation whose security is being recommended, disclosure of this fact must be made.]

[c. Other: When making investment recommendations, member organizations, allied members, and employees involved in preparation of research should disclose to customers any material conflict of interest relating to them which could reasonably be expected to impair their ability to render unbiased and objective advice.]

[N.B.: The attention of member organizations and their personnel is directed to the discussion of “Trading Against Firm Recommendations” which appears under NYSE Rule 401/01 (page 4010) of this HANDBOOK.]

[Past Recommendations [See Rule 472(j)(2)]]

[Portraying the performance of past recommendations or of actual transactions must be done in a manner which fairly and reasonably presents the record in question. Selecting one or a limited number of past recommendation or illustrating the performance of one or a limited number of customer accounts is inappropriate as it would not constitute an acceptable “universe.” Examples of acceptable universes would include firm presentation of a record of all of its past recommendations of at least the most recent 12-month period, or a record of all discretionary accounts under management for at least the most recent 12-month period. Another example of an acceptable universe would include a record of all specific security recommendations within one industry for at least the most recent 12-month period. For example, the firm may publish a monthly market letter or a series of research reports recommending securities within the electric utility industry. If the firm wishes to summarize the performance of the recommendations, it must follow the provisions outlined in Rule 472(j)(2).]

[When referring to the success of past recommendation, all of the conditions outlined in Rule 472(j)(2) must be met. Member organizations which are registered investment advisers must also comply with SEC Rule 206(4)-1 under the Investment Advisers Act of 1940.]

[The following examples improperly promote the successful performance of past research recommendations:]

[(1) “All of the stocks we recommended in last month's market letter are continuing to do well”]

[(2) “We are dropping BCF (24) from our closely followed list. We had originally recommended this stock at \$18, two months ago.]

[(3) “BPF has risen 50% since our recommendation in October and profits may be taken.”

[There is no objection to giving the price history of a specific security but it is neither necessary nor proper to mention the fact that the organization recommended the security at a lower price. Instead of the statement made in example (3), one might say “BPF has risen 50% since October and now appears fully priced. Profits may be taken.”]

[Projections and Predictions [See Rule 472(j)(3)]]

[Past records, charts, tables or other material cannot be used, either explicitly or implicitly, to promise future profits or income from investments. When an advertisement or other communication refers to the yields of particular investments, whether bonds, annuities, GNMA's, etc., the following disclosures may be appropriate:]

[(1) all fees, expenses or charges that may affect the yield calculation (if yield is not net and if other charges have the economic effect of reducing the effective yield, disclosure is required);]

[(2) whether the yield is actual or projected;]

[(3) the basis of the yield; and]

[(4) any expected conditions or circumstances that are likely to change or affect the yield, such as an early call of the security.]

[Estimates must clearly be labeled as such. If, for example, the principal or interest of any annuity or other investment instrument is advertised as guaranteed, disclosure should be made concerning:]

[(1) the identity of the guarantor;]

[(2) the length of time the guarantee is effective, e.g., “12% current annual interest rate”];]

[(3) whether penalties or fees are involved for premature withdrawal of funds; and]

[(4) whether any conditions exist which must be satisfied in order for the guarantee to apply.]

[Forecasts]

[Past performance is not indicative of the future. Such matters as future earnings, dividends or price action cannot be predicted with certainty. Forecasts not sufficiently qualified can be misleading. Here are some examples of forecasts not properly qualified.]

[“...The market has bottomed out and will take off to new highs...”]

[“...1985 will be the eighth consecutive year in which the company will post record sales and earnings...”]

[“...Company philosophy and a pattern of steady growth assure a vigorous and profitable future...”]

[“...The company will be able to double their present receivables from \$11,000,000 to \$22,000,000 in the very near future, which in turn will have a substantial impact on earnings...”]

[Claims and Comparisons [See Rule 472(j)(4)]]

[Competitive claims and comparisons may be used, but the member organization must be prepared to completely and meaningfully substantiate them.]

[Dating [See Rule 472(j)(5)]]

[This guideline is designed to deter the distribution of outdated information. In general, investment literature recommending specific securities should be dated by day, month and year. On the other hand, industry studies containing no recommendations, quarterly investment reviews or economic research papers may be dated by month or season. Dating by year may be acceptable in some instances for brochures, pamphlets, circulars and other generic sales literature.]

[Statistics often become outdated rapidly. Especially in industries or companies where new developments are frequent, significant data might well become outdated in a matter of weeks.]

[Identification of Sources [See Rule 472(j)(6)]]

[Testimonials [See Rule 472(j)(7)]]

[In general, advertising or sales literature is considered to be of a testimonial nature and subject to requirements of Rule 472(j)(7) whenever it includes favorable comments concerning the quality of the firm's investment advice made by any person not clearly identified as being in its employ.]

[However, where it is evident that the comment is made by a non-customer actor, announcer or by way of caricature and where the copy omits any direct or indirect reference to benefits personally gained by the speaker, the comment will not be considered a testimonial.]



[Hedge Clauses]

[Statements in a hedge clause should be consistent with statements made in the main body of sales and investment literature. Hedge clauses do not relieve a firm from its obligation to meet Exchange standards. Many hedge clauses contain the following acceptable language:]

[“The information above has been obtained from sources believed reliable but is not necessarily complete and cannot be guaranteed. Any opinions expressed are subject to change without notice.”]

[A member organization cannot disclaim responsibility for its communications or for opinions expressed by its employees. Hedge clauses must be separate from any disclosures required under Rule 472(j). (Also see: Investment Advisers Act Release No. 58, April 10, 1951).]

**/10 Reserved. [Guidelines for “Discount” Communications]**

[The following guidelines are designed to assist member organizations prepare and approve communications that offer discount commissions to the public. The guidelines, which include examples of appropriate disclosures, are based on specific requirements of Rule 472(i) and (j) that apply to all communications.

The guidelines should help you create effective communications that comply with Exchange rules.]

- [(1) Under some circumstances what is left out may be just as important as what is included. Therefore, any significant conditions or qualifications surrounding discounts must be mentioned. This would include cases where discounts are not available on certain products, such as options,

bonds or securities offered by prospectus, or where services offered to discount customers are limited compared to those offered to non-discount customers.]

[EX.: “Discounts available if you don't want research.”]

[“Discounts apply to cash transactions only.”]

[“Discounts do not apply to options.”]

[“Save commissions on your next stock transactions.”]

[“Prepayment required.”]

[“50% of our usual rates on NYSE orders placed before 9:30 a.m.”]

[“Discounts based on annual volume of trading.”]

[(2) In order to be truthful, as required by Rule 472(i) communications should not be confusing or misleading. Therefore, whenever commission savings are presented in percentage figures:]

[a) The base from which the figures are derived must be given;]

[EX.: “Discounts based on rates of full-commission firms.”]

[b) If percentages represent average savings, it should be indicated;]

[c) Any minimum commission charge should be disclosed.]

[(3) Rule 472(j)(4) required comparisons of one firm's charges and services with those of other firms to be factually supportable. When discount rates are compared to the rates of other brokers, either through rate charts or percentage comparisons, the advertiser should have documentation to support all figures. The Exchange may ask to see rate schedules or request

a breakdown of the number of customers enjoying various discount brackets in order to substantiate the availability of advertised savings.]

[(4) Likewise, claims comparing one firm to another must be factually supportable. Firms should be able to substantiate these claims to the Exchange upon request. Examples of some comparative claims are:]

["We're different from other discounters because we offer discounts and full service too."]

["Our registered representatives are more experienced than those at any other discount firm."]

(5) Rule 472(j)(5) requires significant information that is not reasonably current (usually not more than six months old — depending on the industry and circumstances) to be noted. Therefore, charts illustrating comparative rate schedules must be current (within the last six months). In many cases it may be appropriate to disclose the source and date of the information. In all cases firms must be prepared to substantiate the source and date as current.

[EX.: "All rates based on our [insert appropriate date] telephone survey."]

[(6) In keeping with the Exchange's traditional standard of truthfulness, examples of savings should be based on typical trades by retail customers, not on large transactions affordable by only a very few customers.]

**/11 Reserved. [Other Regulations]**

[Communications are also subject to the general anti-fraud provisions of the Federal securities laws. Additionally, member organizations should note Rule

206(4)-1 under the Investment advisers Act of 1940, Section 17(b) of the Securities Act of 1933 and the tombstone rules under that Act, Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, as well as State law, as may be applicable.]

[See also NYSE Rule 791 — Communications Pertaining to Options.]

/12 No Change.

**(k) (2) Disclosures Required in Public Appearances**

/01 No Change.

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