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November 20, 2009

VIA EMAIL TO PUBCOM@FINRA.ORG

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

Re: Request for Comment on Proposed New Rules Governing Communications with the Public (FINRA Regulatory Notice No. 09-55)

Dear Ms. Asquith:

Vanguard[1] appreciates the opportunity to comment on the recent proposal by FINRA to amend and restructure the rules governing FINRA member firms' communications with the public (the "Proposal"), which has been presented in the context of the consolidation of NASD and NYSE advertising rules.[2]

In addition to generally supporting FINRA's effort to consolidate the advertising rules, Vanguard believes that such rule consolidation presents an ideal opportunity to address advertising-related topics that have quickly become vitally important to FINRA, to member firms, and to investors – namely, social media and interactive technology. Considering the speed with which these new communications platforms and technologies are growing in popularity and use by the general public, it is important for FINRA to provide clarity on their appropriate use and supervision by member firms. Vanguard recommends that FINRA take this opportunity to clarify a few fundamental standards regarding these emerging technologies:

- Content that a member firm posts on a social media platform should be considered a communication with the public by the member firm under applicable FINRA rules.

- Member firms should implement appropriate procedures to monitor third party content on their firm branded social media platforms (such as a member firm's "fan page" on Facebook) and should include appropriate disclosure on those platforms. Under these conditions, such third party content should not be considered to be a member firm's communication with the public under applicable FINRA rules.

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[1] Headquartered in Valley Forge, Pennsylvania, Vanguard offers more than 150 U.S. mutual funds with assets in excess of $1.2 trillion. We serve approximately 23 million shareholder accounts. Vanguard Marketing Corporation, a Vanguard subsidiary, is an SEC registered broker-dealer and FINRA member. Vanguard Marketing Corporation offers brokerage services through its Vanguard Brokerage Services operating division and provides marketing and distribution services for the Vanguard funds and certain 529 plans and annuity programs.

[2] *See* FINRA Regulatory Notice No. 09-55 (September 2009).

- Just as is the case today when a member firm advertises in or submits content to third party traditional media (such as a magazine or newspaper), when a member firm advertises on or submits content to a third party branded social media platform (such as a blog on Morningstar's website), the member firm should have no responsibility under applicable FINRA rules for the third party content on that platform.

- Member firms should use the existing and familiar supervisory framework applicable to "correspondence" to supervise their firms' communications on social media platforms.

- Member firms may expand their permitted use of linking and other interactive technology to present certain disclosures on social media platforms, in content designed for mobile devices, and in other forms of electronic communications.

The foregoing topics are addressed in detail in Section 1 of this letter.

Moreover, with regard to the specific proposed rule changes set forth in the Proposal, Vanguard supports FINRA's efforts to go beyond the few substantive changes which might have been necessitated by rule consolidation to address a number of additional amendments and updates that have become appropriate based on FINRA and industry experience over the past few years. We support most of FINRA's proposed substantive changes. However, we do have specific comments on several of the proposed changes, and those comments are set forth in Section 2 of this letter.

1. Recommendations Regarding Interactive Communications Platforms and Interactive Technologies

Without question, FINRA and its member firms now find themselves in a period of rapid technological change. Websites and communications platforms that did not exist five years ago now have tens of millions of users, and ever-quickening advances in technology are making interactive experiences richer, more feasible, and even expected by investors. However, to the extent applicable, neither the existing nor the proposed advertising rules squarely address issues such as social media or interactive technology. Vanguard is aware that FINRA is interested in addressing these issues and in workable, investor friendly solutions. Vanguard believes strongly that the rule consolidation effort presents an opportunity to update the advertising rules, and provide other guidance, to facilitate member firms' use of these platforms and technologies in a manner that serves investors.[3] Following are areas where Vanguard believes devoting energy and effort now would be a well-spent investment.

A. Social Media and Interactive Communications Platforms

Vanguard has been a leader and early financial services adopter of social media and interactive communications platforms, for example by offering a blog (at VanguardBlog.com) and by developing a Vanguard "fan page" on Facebook. For Vanguard, these efforts have been an extremely positive experience – clients, investors, and other users have engaged with us and each other on a variety of topics, and we have received valuable and unfiltered feedback and

[3] Vanguard requests that FINRA allow member firms an opportunity to comment on any new rulemaking or guidance that FINRA may pursue on the topics addressed in this Section 1, before such rulemaking or guidance were to become effective.

input from this "community." The community has also generally adhered to the behavior guidelines that we posted on our blog and fan page.[4]

On the other hand, Vanguard's experiences with social media and other interactive communications platforms[5] have been somewhat muted, and we have been unable to take full advantage of the enriching and educational opportunities interactive communications platforms provide due to concerns regarding possible interpretations of FINRA rules and standards. Accordingly, as explained below, Vanguard strongly recommends that FINRA produce guidance clarifying that third party content on interactive communications platforms on which member firms participate does not fall under any of the communications categories in existing NASD Rules 2210 or 2211 or proposed FINRA Rule 2210, and that FINRA provide additional rulemaking or guidance to allow member firms to apply the same supervisory structure to the content that firms intend to post on interactive communications platforms as currently applies to "correspondence."[6]

(1) Content on Member Firm Branded Interactive Communications Platforms

All interactive communications platforms are exactly that, interactive. Both member firms and members of the general public, whether clients, investors or otherwise, may participate and post content. And indeed, that is the true value and allure of interactive communications platforms – they are open and available to all.

Vanguard believes that any member firm content that a member may post on any interactive communications platform that the member firm brands as its own,[7] should and would be considered a communication with the public and therefore subject to applicable NASD and/or FINRA rules. For example, if Vanguard were to post content on our branded blog, VanguardBlog.com, regarding our bond index funds, that content would likely be considered an advertisement or sales literature under existing NASD Rule 2210, and would likely be considered a retail communication under proposed FINRA Rule 2210. Vanguard's responsibility with respect to its bond fund content would then be subject to the applicable rules, standards, and guidelines.

Vanguard also believes that it is in member firms' and investors' best interests for members to generally monitor all activity – their own and that of third parties – on their firm branded interactive communications platforms.[8] In this manner, Vanguard believes that member firms should (i) publish appropriate usage guidelines on their firm branded interactive communications platforms (*see, e.g.,* supra note 4), (ii) implement appropriate measures to frequently monitor third party content on such firm branded platforms, and (iii) post disclaimer language on such platforms to remind users that the member firm is not responsible for third party

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[4] These guidelines encourage users to ensure the content they post is (1) relevant to the blog article or fan page, (2) appropriately worded (e.g., is not obscene or offensive), (3) comprised of general opinions, as opposed to investment advice, recommendations or testimonials, which are prohibited, and (4) free from rants, personal attacks, or invective against investment companies, investment professionals, or the author.

[5] The term "social media" is often used to refer to interactive technologies such as blogs and wikis, as well as to specific products and platforms such as Facebook, LinkedIn, Twitter and YouTube. However, the term "social media" may be unintentionally restrictive. For ease and clarity of reference, Vanguard will in this letter refer to all such interactive technologies, platforms, and products as "interactive communications platforms."

[6] Vanguard in this letter is not addressing the issue of whether or how individual registered representatives may use interactive communications platforms.

[7] Examples of member firm branded interactive communications platforms include a member firm's Twitter account, Facebook fan page, or blog.

[8] With regard to any recordkeeping requirements that might apply under applicable SEC rules, Vanguard recognizes that member firms would have to interpret and apply such rules as they see fit.

content.[9] These are reasonable measures designed to appropriately inform and protect investors, and in Vanguard's experience, implementing these measures has not posed any particular difficulties or obstacles operationally.

Assuming those measures are implemented, Vanguard believes that any content that a third party may post or embed on any interactive communications platform, even if the platform is member firm branded, should not be considered a communication with the public by the member firm, and therefore such third party content should not be subject to applicable NASD or FINRA rules.[10] Vanguard's position on this subject is entirely consistent with recent SEC guidance, in which the SEC stated:

> A company is not responsible for the statements that third parties post on a web site the company sponsors, nor is a company obligated to respond to or correct misstatements made by third parties. The company remains responsible for its own statements made ... in a blog or a forum.[11]

In addition, any conclusion that a member firm is responsible for third party content on its branded interactive communications platforms would be contrary to the public's expectations. Simply put, the general public knows that blogs and similar technologies are intended for, and consist largely of communications by, the general public.[12]

Also, such third party content would not have been created by the member firm. Forcing member firms to nevertheless treat such content as their own would be illogical, and could lead to absurd results. For instance, obligating a member firm to add disclosure to third party posts on the member firm's blog, or to add a prospectus offer if an individual makes reference to mutual funds in a member firm's chat room, would serve no useful purpose – and would destroy both the timeliness and authenticity of the interaction. Moreover, because member firms would not be involved in the creation of the third party content, and would neither endorse nor approve that content (they would in fact *disclaim* such), member firms would avoid complications under the "entanglement" and "adoption" theories. (*See* SEC Release 34-58288, supra note 11, at p. 32.) And in this regard, third party content on interactive communications platforms is fundamentally different from third party reprints, the selection and distribution of which on a reprint basis is controlled by the applicable member firm.

Accordingly, with regard to member firm branded interactive communications platforms, Vanguard recommends that FINRA provide guidance clarifying the following:

- Any content that a member firm posts on its firm branded interactive communications platforms will be considered a communication with the public by the member firm under existing NASD Rules 2210 or 2211 or proposed FINRA Rule 2210, as applicable.

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[9] Vanguard further believes that NASD Rule 3010 would not apply to third party content posted on Vanguard branded interactive communications platforms, as the conduct of third parties would not constitute the activities of Vanguard, its registered representatives or its registered principals, among other reasons.

[10] An example of embedded third party content is an advertisement that might appear on the edge of a Facebook fan page, the timing, placement and contents of which are determined solely by Facebook; member firms participating on Facebook currently have no control over such advertisements.

[11] *See* Commission Guidance on the Use of Company Web Sites, SEC Release Nos. 34-58288, IC-28351; File No. S7-23-08 (August 1, 2008), at p. 43.

[12] Any possible confusion would be avoided by current NASD Rule 2210(d)(2)(C) and proposed FINRA Rule 2210(d)(3), each of which requires member firms to prominently disclose their name in certain categories of communications.

- So long as a member firm implements procedures to monitor its member firm branded interactive communications platforms (see measures (i) through (iii), described on page 3, above), then (1) any third party content on such member firm branded interactive communications platforms will not fall under any of the communications categories in existing NASD Rules 2210 or 2211 or proposed FINRA Rule 2210 and will not be considered the member firm's content,[13] and (2) as a result, the member firm will not be obligated to conduct a prior review of such third party content, will not be responsible for principal approval of such content, will not be required to edit or append disclosure to such content, and will not be obligated to file such content with FINRA.

(2) Content on Third Party Branded Interactive Communications Platforms

Similar issues arise in the context of member firms' participation in interactive communications platforms that are sponsored or branded by third parties, examples of which include a blog on Morningstar's website or interactive commentary on CNN.com. Vanguard believes that the current rule consolidation effort presents an opportunity to clarify the application of FINRA advertising rules to member firm participation in such platforms.

Here again, Vanguard believes that any member firm content that a member may post on such an interactive communications platform should and would be considered the member firm's communication with the public and therefore be subject to applicable NASD and/or FINRA rules. With respect to the third party content on that platform, Vanguard believes that the member firm should have no responsibility under applicable FINRA rules for such content, just as member firms are not responsible today for the third party content in a magazine or newspaper in which they happen to advertise.

Furthermore, unlike with member firm branded interactive communications platforms where a member firm is responsible for supervising its content and should monitor third party activity as a best practice, Vanguard believes that member firms do not have any obligation, under NASD Rule 3010 or otherwise, to supervise or monitor third party branded interactive communications platforms, even after the member firm has posted content to that platform.

Accordingly, with regard to third party branded interactive communications platforms, Vanguard recommends that FINRA provide guidance clarifying the following:

- Any content that a member firm posts on third party branded interactive communications platforms will be considered a communication with the public by the member firm under existing NASD Rules 2210 or 2211 or proposed FINRA Rule 2210, as applicable.

- Any third party content on that platform will not be considered the member firm's communication under any of the communications categories in existing NASD Rules 2210 or 2211 or proposed FINRA Rule 2210.[14]

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[13] In particular, Vanguard recommends that FINRA clarify that third party content on interactive communications platforms on which member firms participate does not constitute an advertisement, sales literature, correspondence, institutional sales material, public appearance or independently prepared reprint by the member firm under existing NASD Rules 2210 or 2211, and does not constitute a retail communication, institutional communication or correspondence by the member firm under proposed FINRA Rule 2210.

[14] It would be reasonable to obligate member firms to include disclosure in their post that they have not verified, and are not responsible for, the other content on that blog.

- Member firms do not have an obligation to supervise or monitor third party interactive communications platforms under applicable FINRA rules.

(3) Timing of Registered Principal Approval of Content That Member Firms Post to Interactive Communications Platforms

Of critical importance when engaging in interactive communications is the timeliness of responding. Sometimes, firms need to prevent harm, either to investors or to the member firm,[15] and at other times they need to continue an interactive communication. Having a registered principal conduct a prior review of a member firm's materials would consume valuable time, which would detract from, or wholly defeat the purpose of, interactive communications, and it would impede firms' ability to quickly address incorrect or misleading information posted by others.[16] Recognizing the particular issues involved with interactive communications, Vanguard believes that member firms should have the flexibility to conduct a principal post-review under certain circumstances. And, to ensure that such flexibility is properly supervised and regulated, Vanguard recommends that FINRA adopt a familiar and well-established approach – namely, that applicable to "correspondence" – to govern such post-review.

Treating member firm communications over firm branded and third party branded interactive communications platforms as "correspondence" would be similar to the approach recently adopted by FINRA for the supervision of market letters,[17] and would be consistent with FINRA's guidance on the supervision of electronic communications.[18] Of course, an appropriate supervisory structure must first be in place, to ensure investor protection. Accordingly, Vanguard believes member firm communications should be treated as correspondence only if: (1) the communication is intended for an interactive communications platform, (2) the member firm has established procedures to oversee and supervise such postings, including by describing the process in the member firm's written supervisory procedures, and (3) the person actually writing and posting the content has been properly trained by the member firm on the applicable content standards, rules and procedures in general, and on the specifics of interactive communications in particular. Such an approach is tailored narrowly to fit the needs at hand, and would mirror a framework with which both member firms and FINRA are familiar.

Accordingly, Vanguard recommends that FINRA provide guidance clarifying that member firms may review, approve and supervise their firms' communications over interactive communications platforms under the same rules and standards as apply to "correspondence."

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[15] One example is when a third party posts blatantly inaccurate or false information about a member firm to a blog, such as a rumor that a popular fund manager is leaving the firm. Under that scenario, the member firm certainly wants, and should have, the ability to immediately post a blog comment to correct the inaccuracy (provided that appropriate supervision is in place, as described below) before the inaccuracies are spread any further or negatively impact existing investors.

[16] Absent the above guidance from FINRA, it seems likely that content a member firm might post to an interactive communication platform regarding the firm's products or services would be considered advertisements or sales literature under existing NASD Rule 2210 or retail communication under proposed FINRA Rule 2210. And if so, then both the existing and proposed rules would likely require that a registered principal approve that content in advance.

[17] *See* FINRA Regulatory Notice No. 09-10 (February 2009).

[18] *See* FINRA Regulatory Notice No. 07-59 (December 2007).

B. Disclosures Displayed by Linking and Through Interactive Technology

There have been significant technological advances recently, and member firms are introducing new technologies at greater speed and with greater frequency. Nowhere is that more pronounced than with regard to the web and other electronic communications, including social media and mobile devices. For example, among Vanguard's 23 million fund shareholder accounts, more than 80% of contact between Vanguard and those shareholders now takes place over the web. Vanguard fund shareholders, and by implication other investors, are thriving on the information and capabilities offered by the web. The investing public is accustomed to web and online technology, they are huge consumers of it from member firms and other sources, and they have come to expect it from their investment services providers.

Vanguard believes the rule consolidation effort presents an opportunity to modernize the FINRA advertising rules in a way that allows member firms greater flexibility in the presentation of required disclosures, yet still protects investors' interests. For instance, web features such as links, "mouse-overs," and other interactive applications have made it possible to quickly and prominently provide far more disclosure and other information than was previously possible. With mouse-overs, a user can hover his or her mouse over certain content on a web page and immediately see relevant information, instead of having to scroll to the bottom of a web page to find it. And that technology is widely available on non-financial websites; web users are now accustomed to it. Links and other features and functionality also allow users to rapidly access information to help them make an investment decision, all as they feel necessary.[19] As the SEC has stated, "[i]nteractive data has the potential to increase the speed, accuracy and usability of financial and other disclosure, and eventually to reduce costs." (*See* SEC Release 34-58288, supra note 11, at p. 8.)[20]

We acknowledge that FINRA has allowed limited use of linking to required disclosures under certain circumstances. One notable instance is so-called "banner ads" on the web, in which FINRA, recognizing the significant space constraints inherent in such ads, has permitted member firms to place certain disclosures, such as the prospectus offer, "one click away." Vanguard believes this initial permitted use of linking has worked well, and that the principles that facilitated the use of links in banner ads can and should be applied elsewhere.[21]

Accordingly, Vanguard recommends that FINRA allow greater use of linking and other interactive technology features to display required disclosures on websites, in content designed for mobile devices, and in electronic media. Publishing guidance on these matters would allow member firms to take full advantage of this functionality, and thereby provide investors with even more relevant information more readily and in a more engaging manner. Likewise, Vanguard recommends that FINRA also expressly allow linking in the context of interactive communications platforms, such as using links to provide any disclosures that may be triggered by a member firm's content on Twitter (which imposes a 140-character limit on its communications, called "tweets"). Vanguard views the current consolidation effort as an opportunity to modernize the advertising rules to address, and properly regulate, this rapidly evolving technological landscape.

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[19] It would be reasonable to require firms adopting this approach to position the links prominently and to word the link itself using appropriately conspicuous language, such as "Important Risk Information" or the like.

[20] That SEC Release, at p. 42, goes on to state that the SEC "acknowledge[s] the utility these interactive web site features afford companies and shareholders alike, and want[s] to promote their growth as important means for companies to maintain a dialogue with their various constituencies."

[21] For instance, member firms should be permitted to use links or interactive technology to display general or specific investment risk disclosures.

2. Vanguard's Comments on the Proposal.

A. FINRA's Proposed New Communications Categories.

Vanguard generally supports the replacement of the six current communication categories with the three categories contained in the Proposal, namely retail communications, institutional communications, and correspondence. Simplification of the categories in this manner is appropriate and seems to reflect member firms' actual practices. However, our concern is that this simplification of the communication categories will unnecessarily result in significant additional filing requirements for member firms.

Under current NASD Rules 2210 and 2211, letters and electronic mail messages and market letters distributed to one or more existing retail customers, or to fewer than 25 prospective retail customers within a 30-day period, are considered "correspondence" and are thus exempted from the filing requirements. However, under proposed FINRA Rule 2210(a), any written communication distributed to more than 25 retail investors, even a letter or email, would now be considered a "retail communication" and would therefore be newly subject to filing requirements under proposed Rule 2210(c).

Vanguard does not support this change. The change would burden member firms, both by requiring them to revamp the supervision they have effectively applied to these materials for years, and by obligating them to file significantly more materials and thereby incur substantially higher filing costs. There is no need to require the filing of these materials; under the current rule structure, correspondence – including letters and emails to more than 25 retail customers – is subject to supervisory oversight, content standards and recordkeeping requirements, as well as FINRA examination and inspection. Because this sound oversight structure is already in place to supervise these materials, the additional burden and cost associated with filing such materials seems unnecessary for investor protection. And indeed, FINRA has not provided any justification for this significant change and the burden it would impose, nor are we aware of any such justification.[22] Accordingly, Vanguard recommends preserving the definition of "correspondence" currently contained in NASD Rule 2211(a)(1).[23]

B. Changes to Filing Requirements.

1. Filing Inclusions

We support requiring member firms to file retail communications concerning publicly offered structured products prior to use, and we also support requiring firms to file retail communications concerning closed-end funds within 10 days of first use, including those materials that are distributed after the fund's IPO period, as set forth in proposed FINRA Rules 2210(c)(2)(B) and 2210(c)(3)(A), respectively. These filing requirements are consistent with investor protection, would serve investor interests, and would improve the effectiveness of advertising compliance.

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[22] Endnote 5 of the Proposal does explain that FINRA believes the change to the definition of "correspondence" addresses the issue of market letters, but the Proposal does not otherwise provide any rationale for the other concerns and impacts created by the definitional change.

[23] Preserving the definition of "correspondence" currently contained in NASD Rule 2211(a)(1) may require specifically excepting correspondence from the proposed definition of "retail communication," to avoid confusion and overlap.

2. Filing Exclusions

We support proposed FINRA Rule 2210(c)(7)(A), which has been amended to exclude from the filing requirements retail communications that are based on templates that were previously filed and that contain statistical or non-narrative updates. This proposal is both reasonable and practical.

In addition, we support proposed FINRA Rule 2210(c)(7)(B), which contains a filing exclusion for retail communications that are "solely administrative in nature." This proposal would apparently replace the language in current NASD Rule 2210(c)(8)(B), which exempts from filing materials that are "solely related to" a delineated list of topics, such as recruitment and changes in a member firm's name, personnel, or electronic or postal address. However, for purposes of clarity, we recommend that proposed FINRA Rule 2210(c)(7)(B) be revised to retain the delineated list of items set forth in current NASD Rule 2210(c)(8)(B), and that the phrase "and other communications which are solely administrative in nature" be added to the end of that delineated list. Doing so would both explicitly preserve the existing exclusions and effectuate FINRA's objective of freeing member firms from filing retail communications that are administrative in nature and not prepared for the purpose of promoting a product or service.

C. Comments Regarding Disclosure Issues.

1. Freshness of Expense Ratio Disclosure

Under current NASD Rule 2210(d)(3), member firms that present non-money market mutual fund performance information in certain categories of materials must also disclose the fund's maximum sales charge and operating expense ratio – not such information that is actually currently effective at the time that material is used, but as set forth in the fund's most recent prospectus fee table (though they are often the same). When adopted, this rule presented implementation difficulties for Vanguard (and, we believe, others) because there may be a lag between the date a fund's expense ratio is determined and the actual publication date of the prospectus in which that expense ratio will appear. Indeed, Vanguard has had to revise its systems and implement manual processes to accommodate that lag and ensure compliance with NASD Rule 2210(d)(3).

Under proposed FINRA Rule 2210(d)(5)(A), member firms that present non-money market mutual fund performance information in retail communications or correspondence must also disclose the fund's maximum sales charge and operating expense ratio as set forth in the fund's prospectus *or* annual report, *whichever is more current* as of the date of publication of the material in question (emphasis added).

Although this change to the freshness of sales charge and expense ratio disclosure would require yet additional internal systems and process changes, Vanguard supports it, with the modifications discussed below. Requiring member firms to disclose the most currently available sales charge and expense ratio information is generally the right result, not just from the member firm's viewpoint but from the investor's viewpoint. Vanguard understands that others in the industry may object to being required to make systems modifications to accommodate the rule change, but Vanguard believes those objections are outweighed by the benefit to investors of having more timely information.

However, as drafted, proposed Rule 2210(d)(5)(A) could result in a practical problem. The expense ratios shown in a fund's annual report and prospectus typically are identical, because both numbers are taken from the same source – the fund's audited financial statements for the recently completed fiscal year. The annual report and prospectus are published

approximately 45-60 days and 110-120 days, respectively, after the end of the fiscal year.[24] The primary benefit of proposed FINRA Rule 2210(d)(5)(A), therefore, will be that for the two-month period between publication of its annual report and publication of its updated prospectus, a fund can advertise its current expense ratio (as reflected in its most recent audited financial statements) rather than a year-old number.

Unfortunately, there are circumstances where proposed FINRA Rule 2210(d)(5)(A) could result in investors receiving misleading information. To understand why, it is important to know that the expense ratios shown in a fund's annual report and prospectus can differ. Whereas the expense ratio shown in the annual report will always be the number in the financial statements, the expense ratio shown in the prospectus can be adjusted for either of two reasons. First, the prospectus number can be updated to reflect "an increase or decrease in expenses that occurred during the most recent fiscal year or that is expected to occur during the current fiscal year." [25] Second, a fund can show a higher expense ratio in its prospectus than the number from its financial statements to reflect a decrease in assets since the end of the preceding fiscal year.[26] These exceptions make sense because, whereas the annual report presents a historical view, the prospectus is a forward looking document that is "evergreen."

If FINRA Rule 2210(d)(5)(A) is adopted as proposed, it is possible that a fund would be forced to advertise an expense ratio number from a recently published annual report that is not as reflective of an investor's going-forward experience as the number from an earlier prospectus. To remedy this potential problem, Vanguard recommends that proposed Rule 2210(d)(5)(A)(ii)(b) be revised to read as follows (additions in italics and underlined, and deletions marked with strikethroughs):

> 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 or annual report ~~described in paragraph (d)(5)(A)(ii)(a),~~ *whichever is more current as of the date of publication of a communication; provided, however, that if the annual report is more current but the expense ratio shown therein would not accurately reflect the reasonable expectation of what the expense ratio will be during the current fiscal year, then disclose the expense ratio as stated in the investment company's most recent prospectus fee table*.

2. Investment Analysis Tool Disclosure

Both NASD IM 2210-6(c) and proposed FINRA Rule 2214(c) require that materials related to the use of investment analysis tools include disclosure as to the tool's criteria and

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[24] So, for example, a fund with a December 31 fiscal year end would publish its annual report in late February and its updated prospectus in late April.

[25] Form N-1A, Item 3, Instruction 3(d)(ii) and (iii). Perhaps the best example of this would be if the fund entered into a new agreement with its investment adviser that called for a higher or lower advisory fee than was in effect for the preceding fiscal year.

[26] This exception is rarely invoked because (a) it is not expressly required by Form N-1A or any SEC rule, and (b) it is not common for a fund to lose significant assets from one year to the next. Vanguard restated up several of its stock funds' expense ratios in 2009 to reflect declining asset values in the market downdraft of 2008-09. Note that, under Form N-1A, Item 3, Instruction 3(d)(iii), a fund cannot restate down its expense ratio to reflect economies of scale or breakpoints in a fee arrangement resulting from an increase in fund assets.

methodology, the universe of investments considered by the tool, the results generated by the tool over time, and other details about the tool and its calculations. IM 2210-6(c)(4) and proposed Rule 2214(c)(4) also require the inclusion of a specific, "important" prescribed disclosure. The required disclosures are lengthy and complicated and must be presented prominently.

Current endnote 3 to IM 2210-6 and Supplementary Material paragraph (.06) to proposed Rule 2214 contain an exception to the disclosure requirement, such that material containing only an "incidental reference" to an investment analysis tool need not include the aforementioned disclosures. The exception makes perfect sense – why include lengthy disclosure about the tool's criteria, methodology, or results if neither the tool nor results or data obtained from the tool are actually presented? However, in Vanguard's experience, the term "incidental reference" has been very narrowly interpreted by FINRA, such that, according to FINRA, a mere passing mention of the name of an investment analysis tool, even without any description of what the tool is or does or any presentation of the tool itself, triggers the need for the lengthy disclosure.

Vanguard believes that the Supplementary Material to proposed Rule 2214 should be revised and the exception to the disclosure requirement modestly expanded. If marketing material refers to an investment analysis tool and contains a brief description of the tool, or contains a reference to the availability of the tool on a website, but does not include the tool itself or any data or results produced by the tool, then the disclosure should not be required.[27] Requiring marketing material to include lengthy disclosure about a tool that is not actually available in that material is confusing to investors. Vanguard believes that investors' interests would best be served by requiring the disclosure to accompany the tool itself, and/or the results and data generated by the tool, not merely a short mention or description of it in separate material. Vanguard therefore recommends that the disclosure exception in paragraph (.06) of the Supplementary Materials to proposed Rule 2214 be expanded to apply not only to an "incidental reference" to an investment analysis tool, but also to a brief description of the tool or its availability which is not accompanied by the tool itself or the results or data it generates.

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We commend FINRA for taking these important steps to consolidate and improve the rules governing member firms' communications with the public, and we appreciate this opportunity to comment. If you would like to discuss these comments further, or if you have any questions, please feel free to contact me at 610-503-4049.

Sincerely,

Matthew R. Walker, Esq.
Principal and Counsel

cc: Heidi Stam
Managing Director & General Counsel

[27] In such an instance, the required disclosures would appear on the web page or other material where the tool resides or its output is presented.