

August 24, 2011

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: FINRA Proposal to Adopt NASD Rules Regarding
Communications with the Public as FINRA Rules 2210 and 2212
through 2216 (SR-FINRA-2011-035)

Dear Ms. Murphy:

The Investment Company Institute¹ welcomes the opportunity to express its views on proposed amendments to Financial Industry Regulatory Authority, Inc. (“FINRA”) rules governing communications with the public.² The Proposed Final Rule would significantly change several requirements related to member communications with the public. Among other things, it would: (i) replace the existing categories of communications with three new communications categories; (ii) require member firms to file all retail communications concerning closed-end funds within ten business days of first use; (iii) codify interpretive guidance that conditionally exempts from prior principal approval any retail communication that is posted on an online interactive electronic forum; (iv) provide FINRA with authority to grant exemptions from the principal approval, pre-use and other filing requirements; (v) expressly permit the use of templates; and (vi) apply new disclosure requirements to public appearances.

¹ The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding and otherwise advance the interests of funds, their shareholders directors, and advisers. Members of ICI manage total assets of \$13.1 trillion and serve over 90 million shareholders.

² See FINRA Notice of Filing of Proposed Rule Change to Adopt FINRA Rules 2210, 2212, 2214, 2215, and 2216 in the Consolidated FINRA Rulebook, 76 Fed. Reg. 46870 (August 3, 2011) (“Proposed Final Rule”) available at <http://www.sec.gov/rules/sro/finra/2011/34-64984.pdf>. See also FINRA Regulatory Notice No. 09-55 (September 2009) (“2009 Proposal”). See also Letter to Marcia E. Asquith, Senior Vice President and Corporate Secretary, Office of the Corporate Secretary, FINRA from Dorothy M. Donohue, Senior Associate Counsel, Investment Company Institute, dated November 19, 2009 (commenting on the 2009 Proposal) (“2009 Letter”).

We are pleased that FINRA addressed many of the concerns raised in our 2009 Letter and therefore support many elements of the Proposed Final Rule. We continue to be concerned, however, with several aspects of the Proposed Final Rule and accordingly recommend that FINRA revise the Proposed Final Rule before the Securities and Exchange Commission (“SEC”) approves a final rule. Our views on the Proposed Final Rule are provided below. We also provide our views on how FINRA’s regulation of social media could be improved.

I. Recommended Changes to the Proposed Final Rule

A. Content Standards

Public Appearances. Proposed Rule 2210(f) would apply new disclosure standards to public appearances³ that include securities recommendations. We, along with several of our members, objected to this same requirement when it was put forth in the 2009 Proposal. In the Proposed Final Rule, FINRA stated that it disagreed with the comments that the disclosure requirements regarding recommendations would be impossible to monitor or supervise, stating that members that employ research analysts already must meet similar requirements under NASD Rule 2711 (the rule governing research analysts and research reports). We believe that FINRA’s reliance on Rule 2711 is misplaced because the disclosure and related oversight obligations imposed by Rule 2711 differ significantly from those that would be imposed on public appearances under the Proposed Final Rule. Some of the more significant differences between Rule 2711 and the Proposed Final Rule are described below.

- The Proposed Final Rule would require a portfolio manager to disclose whether its employer was a manager or co-manager of a public offering of any securities of the recommended issuer within the past 12 months. Under Rule 2711, similar disclosure is required in research *reports* but not in a public appearance by a research analyst.⁴
- The Proposed Final Rule would require disclosure that the *member* or any associated person with the ability to influence the content of the communication has a financial interest in the securities being recommended. Rule 2711, in contrast, more narrowly circumscribes the required disclosure; it relates only to the personal financial interest of

³ Under the Proposed Final Rule, the current provision defining public appearances would be eliminated and the substance of the definition and other requirements regarding public appearances would be moved to Rule 2210(f). To avoid creating the perception that public appearances are no longer subject to Rule 2210, we recommend including a cross reference to the public appearance provision in Rule 2210’s definitional section.

⁴ See Rule 2711(h)(2)(A). Under current IM-2210-1, this disclosure is required to appear in advertisements and sales literature but not with respect to public appearances.

the research analyst making the public appearance (and the financial interest of anyone in his or her household).⁵

- The Proposed Final Rule would require a member to provide the price of an equity security at the time the recommendation is made and to provide, or offer to furnish upon request, available investment information supporting the recommendation. Rule 2711 does not require any of these disclosures to be made in public appearances by research analysts.⁶

From what we can tell, FINRA has never before required such extensive disclosures in the context of public appearances by research analysts or other FINRA members. In our conversations with Institute members on the Proposed Final Rule, this element was repeatedly identified as the most troubling by far. In particular, a requirement to monitor spontaneous remarks of individuals for compliance with detailed and prescriptive disclosure requirements in venues, such as interviews or seminars, where much of the communication is conversational would be unworkable as a practical matter.⁷ Further, as a general matter, it is inappropriate to mechanically apply to unscripted oral communications the same standards that apply to written materials or prepared oral remarks, the content of which generally is within the member's control. For these reasons, we strongly urge FINRA not to apply the proposed disclosure requirements regarding recommendations to public appearances.⁸

We would not object, however, to the imposition of a more general requirement that a person making a public appearance must disclose any of his or her actual, material conflicts of interest related to a particular recommendation of which the person knows or has reason to know at the time of the public appearance. Revising the requirement in this manner would more closely align the Proposed

⁵ Under current IM-2210-1, disclosure comparable to that which would be required under the Proposed Final Rule with respect to public appearances is required to appear in advertisements and sales literature but not with respect to public appearances.

⁶ Under current IM-2210-1, the price of an equity security at the time the recommendation is made is not required in public appearances, advertisements, or sales literature.

The Proposed Final Rule also would require disclosure as to whether the member was making a market in the security being recommended at the time the communication was published or distributed. Under current IM-2210-1, this disclosure is required to appear in advertisements and sales literature but is not required with respect to public appearances.

⁷ Consistent with our 2009 Letter, we do not object to the disclosures in the context of scripted public appearances (or retail communications or correspondence).

⁸ In addition, we recommend that Rule 2210(f)(2) be eliminated because public appearances already are supervised under Rule 3010. FINRA does not offer any rationale for imposing what appears to be a largely duplicative, and thus unnecessary, requirement. Alternatively, we request that FINRA explain the rationale for adding this requirement to Rule 2210.

Final Rule's requirements with those of Rule 2711.⁹ It also would seem to address the concern underlying the various proposed disclosure requirements – that the public should be made aware that conflicts of interest may exist – while providing the flexibility necessary to communicate that message within an unscripted environment.

Text Box Requirement. A fund currently is required to present its standardized performance information, maximum sales charge, and annual expense ratio in a prominent text box in print advertisements. We reiterate the view expressed in our 2009 Letter that FINRA should eliminate this presentation requirement because it is unnecessary to achieve the goal of ensuring that the required information is sufficiently prominent. Rather, FINRA should revise Rule 2210 to require funds to *prominently* present standardized performance, maximum sales charges, and expense ratios. Our recommended approach would help to ensure that certain key items of information are presented in a manner that promotes investor awareness while providing funds with more flexibility in designing their print retail communications. It also would make FINRA's requirements regarding print retail communications consistent with its requirements regarding other retail communications.¹⁰

FINRA states in the Proposed Final Rule that it disagrees with the recommendation that the text box requirement be eliminated for print advertisements and that it 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.” We simply do not understand why a prominence requirement would not adequately address this concern while also having the benefits described above.

B. Filing and Principal Approval Requirements

Exemptive Authority. Proposed Rule 2210(b)(1)(E) would allow FINRA to grant exemptions from the principal pre-use approval requirements “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 Rule 2210(c)(9) would provide for

⁹ See Rule 2711(h)(1)(C).

¹⁰ We are pleased that FINRA responded to our technical comment intended to clarify that the text box requirement only applies to “print advertisements.” See Proposed Final Rule at p. 65. We sought this clarification because the term “advertisement” would no longer be defined, potentially making the scope of the text box requirement unclear. If FINRA does not follow our recommendation to eliminate the text box requirement, for ease of compliance, we reiterate the recommendation from our 2009 Letter that FINRA incorporate the precise scope of the requirement in the rule itself.

similar exemptive authority from the pre-use and other filing requirements. Exemptions would be granted pursuant to FINRA's Rule 9600 Series.¹¹

The Institute supports the proposed exemptive authority, which could allow for greater efficiency and cost savings (*e.g.*, if FINRA provided more flexibility with respect to the management of the great volume of communications generated from the use of social media). In order to use FINRA's resources efficiently and assist our members, we recommend that the new authority be exercised in a way that assists as many member firms as possible. This could be accomplished by timely announcing in a regulatory notice the availability to all member firms of exemptive relief already individually granted to some number of firms.¹² The Institute also recommends that FINRA provide periodic notification of new exemptive letters through FINRA's weekly email update or some other public venue.¹³

In any event, in order to assist the industry's understanding of FINRA's planned exercise of this authority, any final release should include a more fulsome discussion of the new exemptive authority by addressing, for example, under what circumstances and how FINRA likely would codify exemptive letters, and the circumstances under which requests for confidential treatment would be granted.

Communications with the Media. The Proposed Final Rule would reinstate the filing exclusion for press releases that are made available only to members of the media. The Proposed Final Rule does not explicitly address how firms should treat other types of communications with the media. Firms often provide background and educational materials concerning products, services, and market information to the media with the purpose of educating the media on investing concepts and alerting

¹¹ FINRA's current exemptive authority with respect to Rule 2210 is very limited. Under current requirements, a FINRA member only may seek exemptive relief from Rule 2210's requirement for pre-filing for a member's first year of existence when, for example, a member is the subject of a reorganization and is substantially similar to the predecessor entity. A member must file an application with a detailed statement of the grounds for granting the exemption, which is then reviewed by FINRA staff and followed by a written decision setting forth the staff's conclusions. Decisions are made publicly available unless the staff determines that the applicant has shown good cause for treating the application or decision as confidential. A member may appeal the staff's decision, which appeal would be decided by the National Adjudicatory Council. Members are required to file the appeal with FINRA's Office of General Counsel with notice of the appeal given to the appropriate FINRA staff. *See* FINRA Rules 9610, 9620 and 9630.

¹² This could be modeled on the type of guidance FINRA recently provided in FINRA Regulatory Notice 10-06, Social Media Web Sites: Guidance on Blogs and Social Networking Web Sites (January 2010) ("2010 Guidance") and in FINRA Regulatory Notice 11-39, Social Media Web Sites and the Use of Personal Devices for Business Communications (August 2011) ("2011 Guidance").

¹³ Our recommendations regarding enhanced transparency with respect to the parameters of the new exemptive authority is consistent with a recent Government Accountability Office ("GAO") study which recommended that FINRA develop sufficient mechanisms to notify all fund companies about changes in its interpretations for fund advertising. *See United States Government Accountability Office Report to Congressional Committees: Mutual Fund Advertising: Improving How Regulators Communicate New Rule Interpretations to Industry Would Further Protect Investors* (July 2011), available at <http://gao.gov/mobile/products/GAO-11-697>.

them to new research, products, and services. While we are pleased that many of these documents would be excluded from filing because they “do not make any financial or investment recommendation or otherwise promote a product or service of the member”¹⁴ others, such as talking points on a new product, would not necessarily be excluded from filing. Accordingly, we recommend that FINRA clarify that communications, such as talking points, provided solely to the media may be treated as “correspondence.”¹⁵ This approach would avoid unnecessary filing and review costs.

Templates. Proposed Rule 2210(c)(7) would exclude from filing two types of templates: (i) retail communications that previously have been filed with FINRA and that are to be used without material change; and (ii) retail communications that are based on templates that were previously filed with FINRA, the changes to which are limited to updates of more recent statistical or other non-narrative information.

We recommend that FINRA additionally exclude from filing those retail communications that are based on templates that were previously filed with FINRA if the only change is a narrative factual update provided by an entity that: (i) provides general information about investment companies to the public; and (ii) is independent of the investment company and its affiliates.¹⁶ Our understanding is that under current FINRA staff practice, any time a fund changes the description of an investment strategy in a fact sheet, that fact sheet must be re-filed with FINRA. Many of our members produce fact sheets for a great number of funds provided through retirement and other platforms. When the only change to the information in that type of communication is provided by an independent, recognizable entity (*e.g.*, third party commentary), we do not believe filing that piece is necessary for investor protection. Eliminating these filings will result in substantial cost savings for many firms and allow FINRA to allocate its resources more efficiently.

C. Supervision of Internal Communications

Supplementary Material .01 would be added to Rule 2210 and would provide 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 the member are considered “institutional communications” subject to Rule 2210(a)(3). This means that under the Proposed Final Rule, internal communications would be subject to: (i) Rule 2210’s general content standards; (ii) principal review prior to use (unless the member provides for the education and training of associated person’s as to the firm’s procedures governing institutional communications, documentation of such

¹⁴ See Rule 2210(c)(7)(C).

¹⁵ We are seeking this clarification because Rule 2210’s definition of “correspondence” rests on communications distributed to “retail investors,” which categorization does not seem to capture members of the media.

¹⁶ We based this on the language on the definition of “ranking entity” in proposed Rule 2212.

education and training, and surveillance and follow-up to ensure that such procedures are implemented and adhered to); and (iii) a requirement that evidence that these supervisory procedures have been implemented and carried out be maintained and made available to FINRA upon request.

This new proposed standard of supervision was not part of the 2009 Proposal, and FINRA offers no rationale for instituting this new requirement. We believe that internal communications already are subject to sufficient oversight. Internal communications currently are, and should continue to be, supervised under Rule 3010, which is a rule specifically designed to address a member's supervision of its registered representatives' activities.¹⁷ In addition, it simply does not make sense for *internal* communications to be subject to the review requirements of Rule 2210, a rule for "Communications with the *Public*" (emphasis added). We therefore recommend that FINRA eliminate this part of the Proposed Final Rule.

II. Areas of Support

A. Content Standards

Sales Charge and Expense Disclosure. In a change from the 2009 Proposal, proposed Rule 2210(d)(5) would maintain the current standard requiring that disclosure of the maximum sales charge and total operating expense ratio in certain retail communications be based on the fund's prospectus.

We strongly support the modification in the Proposed Final Rule. In the 2009 Proposal, FINRA had proposed requiring these communications to disclose the maximum sales charge and total operating expense ratio as stated in the fund's prospectus or annual report, whichever was more current. As we pointed out in our 2009 Letter, to require funds to sometimes provide expense information from one source and other times from a second source will require them to significantly revamp their systems and, in some cases, obtain a second feed from a third party vendor at substantial cost.¹⁸ Enormous administrative burdens would have been placed on all firms, regardless of whether expense information is generated in-house or obtained from a third party. This particularly would have been the case in instances where this information appears in a communication for a large number of funds, such as in materials prepared for fund marketplaces. In addition, we were concerned that requiring the source of expense information to be repeatedly modified inevitably would lead to inadvertent processing errors, a result that would not serve the best interests of investors. We therefore strongly support the revised

¹⁷ Rule 3010 provides, in part, that "[e]ach member shall establish and maintain a system to supervise the activities of each registered representative, registered principal, and other associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable NASD Rules."

¹⁸ One feed would be required to obtain expense information that appears in prospectuses and a second feed would be required to obtain information that appears in annual reports.

approach requiring sales charges and expense information in certain retail communications to be based on the fund's prospectus.

B. Filing and Principal Approval Requirements

The Proposed Final Rule would eliminate the current NASD definitions of: (i) advertisement; (ii) sales literature; (iii) institutional sales material; (iv) public appearance; (v) independently prepared reprint; and (vi) correspondence. The Proposed Final Rule also would eliminate the current NYSE definitions of: (i) communication; (ii) advertisement; (iii) market letter; and (iv) sales literature. The definitions would be replaced by the following three communication categories:

- “Institutional communication” would include any written (including electronic) communication that is distributed or made available only to institutional investors;
- “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 a member firm; and
- “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.

Retail Communications. In a change from the 2009 Proposal, FINRA has proposed excluding from the filing and principal approval requirements communications to retail investors that do not make any financial or investment recommendation or otherwise promote a product or service of the member. The Institute strongly supports this change, which is consistent with Institute comments on the 2009 Proposal. This feature of the rule is critical because otherwise, communications such as periodic account statements, notices of changes in required minimum account balances, and privacy statements could be considered to be retail communications subject to filing and principal approval. Subjecting such communications to filing and principal approval requirements would generate enormous costs without any corresponding benefit.

Interactive Retail Communications. We support proposed Rule 2210(b)(1)(D), which would except from the principal approval requirements any retail communication that is posted on an online interactive electronic forum, provided that the member supervises and reviews such communications in the same manner as required for supervising correspondence. This is a good first step in modernizing the regulation of social media.¹⁹ It allows firms the flexibility to design procedures for overseeing

¹⁹ This provision codifies a current interpretation of the rules governing communications with the public set forth in the 2010 Guidance.

interactive communications appropriate to each firm's business model and responsive to evolving technology.²⁰

Thirty-Day Measuring Period. In another change from the 2009 Proposal, FINRA will use a 30-day calendar period against which to count the number of persons who have received a communication so as to determine whether to categorize it as "correspondence" or a "retail communication." This delineation is important because, in general, retail communications need to be filed with FINRA while correspondence does not. The Institute supports this aspect of the Proposed Final Rule, which will permit our members (particularly our smaller members) to continue to manage the volume of their correspondence in a way that limits their filing obligations.

Market Letters. In another change from the 2009 Proposal, FINRA would not require prior principal approval of market letters. We believe this is an important change and support it. It will permit firms to send out market letters to their retail customers in a timely fashion, a practice FINRA and our members have recently endorsed, particularly given the recent market volatility.²¹

Press Releases. Proposed Rule 2210(c)(7)(H) would preserve the current filing exclusion for press releases made available only to members of the media. This is a change from the 2009 Proposal (which would have eliminated this filing exclusion) and will permit firms to continue to determine whether to provide a press release only to the press or to make it available more widely (*e.g.*, posting it to their websites). The proposed approach would avoid unnecessarily increasing filing costs for many FINRA member firms and we therefore support it.

Closed-End Funds. Proposed Rule 2210(c)(3)(A) would require firms to file all retail communications concerning closed-end funds within ten business days of first use, including those distributed after the fund's initial public offering ("IPO"). We support the proposed change. Investors should have the same protections concerning retail communications about closed-end funds that are distributed after the IPO as those distributed during the IPO.

Templates. Proposed Rule 2210(c)(7) would exclude from filing two types of templates: (i) retail communications that previously have been filed with FINRA and that are to be used without material change; and (ii) retail communications that are based on templates that were previously filed with FINRA, the changes to which are limited to updates of more recent statistical or other non-

²⁰ As already discussed, the Institute also supports FINRA's proposed new exemptive authority, which presumably would permit it to exclude from filing and principal approval requirements other types of communications in response to changes in technology.

²¹ See FINRA Regulatory Notice 09-10 (February 2009) (permitting post-use principal approval of market letters, based on the recognition that pre-use approval might inhibit the timely flow of information to traders and investors who base their investment decisions on timely market analysis).

narrative information. We believe that excluding these types of retail communications from filing will result in cost savings without sacrificing any investor protections and therefore support the two filing exclusions.

Listing of Products or Services. The Institute supports the proposed filing exclusion in proposed Rule 2210(c)(7)(L) for communications that refer to types of investments solely as part of a listing of products or services. It seemingly would apply to, among other documents, a retirement plan enrollment guide, which includes a listing of a plan's investment options. We do not believe investor protection would be enhanced in any way by a requirement to file a document with this type of content.

C. Recordkeeping Requirements

Proposed Rule 2210(b)(4)(A)(ii) provides that 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. The Institute strongly supports the proposed approach, which seemingly recognizes (unlike the 2009 Proposal) that keeping records of persons distributing communications would be onerous for member firms. For example, it would be particularly difficult to track everyone who distributes a communication made available as a template and used by multiple advisers or retirement plan sponsors.

III. Other Matters

A. Social Media

Many members of the fund industry leverage social media to communicate with the public, and others are exploring doing so.²² Social media presents funds with an opportunity to communicate with shareholders and the public in a more dynamic and interactive way than was possible in the past. For example, before the advent of social media, a fund typically would publicize a research report by means of a press release and posting on the firm's website. Social media provides the opportunity to additionally post the report on Facebook, tweet about it over Twitter, and have a portfolio manager discuss its findings on YouTube. Third parties may disseminate this information even more broadly. The benefits of social media include educating shareholders, enhancing a fund's brand, responding to consumer demand, increasing the visibility of portfolio managers, and assisting in sales efforts. Therefore, it is critical to the fund industry that overly prescriptive requirements not jeopardize the industry's efforts to effectively communicate through new media that are quickly becoming more popular than old communications media.

²² See, e.g., kasina, *Harnessing Social Media To Drive Business Results* (2011), showing that the number of asset managers active in at least one social media channel rose to 80% in 2011 from 48% in 2010.

FINRA states that it will consider further guidance or rulemaking as issues related to social media arise, but that the current rulemaking is not the appropriate vehicle to address all issues raised by new technologies. We believe that a longer-term, comprehensive approach that is based on a strong understanding of evolving media and technological capabilities, and that considers the costs and benefits associated with regulation, is worthy of pursuit. This effort should include an examination of such complex issues as how regulatory requirements can be squared with the lack of clear demarcation between personal and professional communications, and how the exploding use of electronic media networks along with unified communications (video, voice, and data) make retention of every record related to “business as such” impractical, unsustainable, and costly.²³

As part of this effort, regulators should consider the advantages of a more flexible regulatory regime rather than requiring broker-dealers to supervise and maintain a record of *every* communication related to business as such, without weighing the costs and benefits of such requirements. Rather, the Institute and its members would like to work with FINRA and SEC staff to modernize requirements in a way that permits the use of today’s and tomorrow’s technologies in a cost-effective way consistent with investor protection.²⁴

To develop a new framework that provides regulatory clarity and accommodates the use of communications media over the long term, FINRA should continuously engage with the industry more broadly, and leverage the industry’s extensive experience with such media.

B. Need for a Reasonable Transition Period

While FINRA has not proposed a transition period in connection with the proposed requirements, we are pleased that it will consider members’ needs to adopt new policies and procedures necessary to comply with the new rules. Therefore, consistent with, and for the same reasons articulated in our 2009 Letter, we recommend that FINRA provide a compliance date for the rule changes of ten business days after the second calendar quarter end following the adoption of the final rule changes.

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²³ See, e.g., 2010 Guidance and 2011 Guidance (discussing recordkeeping requirements in the context of social media). The technology infrastructure required to comply across all operating systems and networks is costly as is the vast amount of storage capacity required.

²⁴ We recognize that member firms must comply with both FINRA rules and SEC rules regarding recordkeeping. We would seek to work with the SEC to effectuate changes to Securities Exchange Act Rule 17a-4 to develop a reasonable framework for recordkeeping related to electronic communications.

Elizabeth M. Murphy

August 24, 2011

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The Institute appreciates the opportunity to comment on this significant proposal. If you have any questions or need additional information, please contact me at (202) 218-3563.

Sincerely,

Dorothy M. Donohue
Senior Associate Counsel

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