

MEMO# 25621

November 7, 2011

SEC Publishes Additional Proposed Amendments to FINRA Advertising Rules; November 15th Conference Call

URGENT/ACTION REQUESTED

[25621]

November 7, 2011

TO: ADVERTISING COMPLIANCE ADVISORY COMMITTEE No. 14-11
CLOSED-END INVESTMENT COMPANY COMMITTEE No. 49-11
SEC RULES COMMITTEE No. 98-11 RE: SEC PUBLISHES ADDITIONAL PROPOSED
AMENDMENTS TO FINRA ADVERTISING RULES; NOVEMBER 15TH CONFERENCE CALL

As we previously informed you, the Financial Industry Regulatory Authority filed with the Securities and Exchange Commission earlier this year proposed new rules and rule amendments governing member communications with the public (“Proposed Final Rules”). [1] The new rules would replace current NASD Rules 2210 and 2211, the Interpretive Materials that follow NASD Rule 2210, and portions of NYSE Rule 472 and related interpretive material. The Investment Company Institute filed a comment letter on the Proposed Final Rules in August. [2] Most recently, the SEC published for comment FINRA’s Partial Amendment No. 1 to the Proposed Final Rules (“Amended Proposal”). [3] The Amended Proposal is summarized below.

Comments on the Amended Proposal must be filed with the SEC by December 7th. We will hold a conference call to discuss the Institute’s comments on the Amended Proposal on Tuesday, November 15th at 2:00 ET. If you or someone else from your firm would like to participate, please email Gwen Kelly at gwen.kelly@ici.org for the dial-in information. If you cannot participate on the call, you can email your comments to Dorothy Donohue at ddonohue@ici.org.

The Amended Proposal

FINRA has proposed making several modifications to the Proposed Final Rule. First, it would be clarified that a member is required to have a principal approve a retail communication that is excepted from the definition of “research report” if the retail communication makes any financial or investment recommendation. Second, the filing requirement for retail

communications concerning government securities would be eliminated. Third, it would be clarified that a comparative illustration of the mathematical principles of tax- deferred versus taxable compounding must disclose that ordinary income tax rates will apply to withdrawals from a tax-deferred investment. Fourth, it would be clarified that Rule 2210(d)'s content standards do not apply to prospectuses, preliminary prospectuses, fund profiles, and similar documents that have been filed with the Commission. Related to that, it would clarified that Rule 2210(d)'s content standards do apply to Rule 482 prospectuses and free writing prospectuses.

In addition, the disclosure requirements for retail communications and public appearances that include securities recommendations would be modified in several respects. With respect to retail communications, the scope of the persons whose financial interests would have to be disclosed would be revised to include any associated person "that is directly and materially involved in the preparation of the content." That person would have to disclose that he or she has a financial interest in any of the securities of the issuer whose securities are being recommended and the nature of the financial interest, unless the extent of the financial interest is nominal. [\[4\]](#)

Most of the disclosure requirements would not apply to retail communications that recommend only registered investment companies or variable insurance products; however such communications would be required to have a reasonable basis for the recommendation. In addition, the member would be required to provide, or offer to furnish, upon request, available investment information supporting the recommendation.

With respect to public appearances, associated persons would have to disclose, if applicable, his or her own financial interests in any of the securities of the issuer of the recommended security, and the nature of the financial interest, unless the interest is nominal. The associated person also would have to disclose any actual, material conflict of interest of the associated person or member of which the associated person knows or has reason to know at the time of the public appearance. The disclosure requirements would not apply to a recommendation of investment company securities or variable insurance products; provided, however, that the associated person would have to have a reasonable basis for the recommendation.

The Commission sought specific comments on several additional aspects of the Amended Proposal, including: (i) the scope of the definition of institutional investor for purposes of these rules; (ii) the reason to believe standard under Proposed Rule 2210(a)(4)(F), which provides that 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;" (iii) the requirements applicable to internal communications; and (iv) the scope of the proposed exclusion from the content standards for prospectuses and similar documents filed with the Commission.

Dorothy M. Donohue
Senior Associate Counsel

endnotes

[\[1\]](#) See [Memorandum](#) to Advertising Compliance Advisory Committee No. 5-11, Closed-End

Investment Company Committee No. 37-11, and SEC Rules Committee No. 65-11 [25348], dated July 22, 2011.

[2] See [Memorandum](#) to Advertising Compliance Advisory Committee No. 10-11, Closed-End Investment Company Members No. 37-11, and SEC Rules Members No. 105-11, [25435] dated August 25, 2011 (summarizing the comment letter).

[3] See File No. SR-FINRA-2011-35 (November 1, 2011), which is available on the SEC's website at <http://www.sec.gov/rules/sro/finra/2011/34-65663.pdf>. The text of the Amended Proposal (provided in alternative formats) and a FINRA staff letter responding to comments are available on FINRA's website at

<http://www.finra.org/web/groups/industry/@ip/@reg/@rulfil/documents/rulefilings/p124982.pdf> ,

<http://www.finra.org/web/groups/industry/@ip/@reg/@rulfil/documents/rulefilings/p125034.pdf>

and

<http://www.finra.org/web/groups/industry/@ip/@reg/@rulfil/documents/rulefilings/p124991.pdf> respectively. See also

<http://www.gpo.gov/fdsys/pkg/FR-2011-11-07/pdf/2011-28716.pdf> (proposal as published in the Federal Register).

[4] FINRA did not expressly exclude indirect holdings from the disclosure requirements, but explained that the disclosure requirements apply to any securities of the issuer whose security is being recommended and that the requirements do not apply to the portfolio investments of an investment company or other fund owned by the member or an associated person.