

**MEMO# 25684**

November 30, 2011

# **Institute Draft Comment Letter on FINRA's Proposed Amendments to Advertising Rules; Your Comments Requested by December 5th**

URGENT/ACTION REQUESTED

[25684]

November 30, 2011

TO: ADVERTISING COMPLIANCE ADVISORY COMMITTEE No. 16-11  
CLOSED-END INVESTMENT COMPANY COMMITTEE No. 51-11  
SEC RULES COMMITTEE No. 103-11 RE: INSTITUTE DRAFT COMMENT LETTER ON FINRA'S  
PROPOSED AMENDMENTS TO ADVERTISING RULES; YOUR COMMENTS REQUESTED BY  
DECEMBER 5TH

As we previously informed you, the Financial Industry Regulatory Authority ("FINRA") filed with the Securities and Exchange Commission ("SEC") proposed new rules and rule amendments governing member communications with the public. [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. [2] Most recently, the SEC published for comment FINRA's Partial Amendment No. 1 ("Proposed Final Rule"). [3] The Institute has prepared a draft comment letter on the Proposed Final Rule, which is attached and summarized below.

Comments on the Amended Proposal must be filed with the Commission no later than December 7th. Please provide any comments on the draft letter no later than December 5th to Dorothy Donohue by email at [ddonohue@ici.org](mailto:ddonohue@ici.org) or phone at (202) 218-3563.

## **Summary of Draft Letter**

The draft letter states that the Institute commends FINRA for undertaking the initiative to modernize its rules relating to public communications by member firms, and that we generally support the Proposed Final Rule. We are pleased that many of the recommendations we made to FINRA on the 2009 Proposal and July 2011 Proposal are

reflected in the Proposed Final Rule. It notes that the Institute particularly welcomes the revised disclosure standards for public appearances that include securities recommendations. The draft letter recommends, however, that FINRA reconsider particular comments that were not incorporated in the Proposed Final Rule. In addition, the draft letter recommends that FINRA exempt shareholder reports from FINRA filing and content requirements because Securities and Exchange Commission requirements already provide sufficient protections for investors.

## **Shareholder Reports**

The draft letter recommends that shareholder reports, like prospectuses and other documents filed with the Commission, be excluded from Rule 2210's filing and content requirements. The draft letter reasons that shareholder reports are subject to extensive requirements that address investor protection concerns. It points out that funds are required to file shareholder reports with the Commission; shareholder reports are subject to specific content requirements under the federal securities laws; a fund's principal executive and principal financial officers must certify the information in shareholder reports; shareholder reports are subject to SEC oversight during routine and special examinations as well as periodic reviews required by the Sarbanes-Oxley Act; and they also are subject to FINRA spot checks and review during FINRA examinations.

## **Supervision of Internal Communications**

The draft letter opposes treating internal communications as "institutional communications." It points out 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. The letter therefore recommends that FINRA eliminate this part of the Proposed Final Rule.

Note that pages 4-5 of the draft letter describe current industry practice regarding oversight of internal communications under Rule 3010. To strengthen our argument, please let me know if there are any additional aspects of supervision that should be described in our final letter.

## **Templates**

The draft letter recommends that FINRA 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 funds to the public; and (ii) is independent of the fund and its affiliates. It reasons that when the only change to the information in that type of communication is provided by an independent third party, filing is not necessary for investor protection.

## **Press Releases**

The draft letter points out that many closed-end funds are listed on the New York Stock Exchange ("NYSE") and, therefore are subject to the NYSE's "immediate release policy" that encourages them to disseminate "quickly to the public any news or information which might reasonably be expected to materially affect the market for its securities. It also points out that it is not clear if this type of press release would be excluded from filing and principal approval by, for example, being deemed a retail communication that does not promote a member's products or services. The draft letter therefore requests that FINRA clarify in any final release or subsequent notice to members that press releases issued pursuant to Section 202.06 of the NYSE Listed Company Manual are excluded from pre-use

principal approval and filing. It reasons that the increased time and costs associated with pre-use principal approval and filing would come with little apparent benefit, as these press releases would remain subject to content standards, supervision, and recordkeeping.

Dorothy M. Donohue  
Senior Associate Counsel

### [Attachment](#)

#### **endnotes**

[1] See Institute Memorandum No. [25348](#), dated July 22, 2011 (summarizing the July 2011 Proposal). See also Institute Memorandum No. [25435](#), dated August 25, 2011 (summarizing the Institute's comments on the July 2011 Proposal).

[2] The rule filing was preceded by FINRA Regulatory Notice No. 09-55 (September 2009) ("2009 Proposal") on which the Institute commented. See [Letter](#) to Ms. 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.

[3] See Institute Memorandum No. [25621](#), dated November 7, 2011.

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