

MEMO# 25606

November 2, 2011

FINRA Guidance on Advertising Issues

[25606]

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TO: ADVERTISING COMPLIANCE ADVISORY COMMITTEE No. 13-11
ETF ADVISORY COMMITTEE No. 67-11
SEC RULES MEMBERS No. 127-11 RE: FINRA GUIDANCE ON ADVERTISING ISSUES

The Financial Industry Regulatory Authority (“FINRA”) recently provided guidance on certain issues related to the application of NASD Rule 2210 and the filing of sales material for review with FINRA’s Advertising Regulation Department. [\[1\]](#) According to the Notice, FINRA will be periodically issuing guidance to the industry concerning significant interpretive issues or other issues related to the FINRA rules governing communications with the public. The Notice is briefly summarized below.

Research Reports for Exchange-Traded Products

The Notice states that, under Rule 2210, firms must file advertisements and sales literature concerning registered investment companies within ten business days of first use or publication. This requirement applies to, among others, exchange-traded funds registered under the Investment Company Act of 1940 (hereinafter referred to as “registered ETFs”). The Notice then reminds firms that these filing requirements apply to research reports on any registered ETF that meet the definition of advertisement or sales literature. Therefore, these research reports must be filed within ten business days of first use or publication.

Treasury Inflation-Protected Securities Funds (“TIPS”)

The Notice points out that a number of mutual funds and registered ETFs invest primarily in TIPS (“TIPS funds”), [\[2\]](#) and these firms advertise yield as permitted by SEC Rule 482. Because TIPS have an inflation adjustment component that is not specifically addressed in SEC Rule 482, firms have adopted various treatments of the inflation adjustment when calculating a TIPS fund’s yield. Some firms have included the inflation adjustment in a TIPS fund current yield calculation, while other firms have not. This discrepancy in the calculation method has led to significant differences in the yields advertised by similar TIPS funds for the same periods. The Notice states FINRA’s concern that investors may not understand that these differences are not attributable to differences in performance of the

funds.

Because of this, according to the Notice, FINRA has interpreted NASD Rule 2210(d) to require certain disclosures in advertisements and sales literature that include a TIPS fund's current yield. Specifically, if the fund's current yield is adjusted monthly based on changes in the rate of inflation, then the communication must explain that these changes can cause the yield to vary substantially from one month to the next. In addition, if an advertisement or sales literature includes an exceptionally high current yield for a TIPS fund, the material must disclose that the yield is attributable to the rise in the inflation rate, which might not be repeated.

Use of FINRA in Firm Trademarks

The Notice states that FINRA has observed that some firms have filed applications to register trademarks with the U.S. Patent and Trademark Office that included the FINRA trademark and a reference to membership. It goes on to state that firms and their associated persons may not include the FINRA trademark or references to FINRA membership in any trademark of the firm or associated person, as such usages violate IM-2210-4.

Identification of Related Prior Filings When Submitting New Filings for Review

The Notice reminds firms filing sales material for review to identify the reference number of any previously filed material that is similar to the current filing.

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endnotes

[1] See Regulatory Notice 11-49 (October 2011) ("Notice"), which is available at <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p124925.pdf>.

[2] TIPS are described as marketable Treasury securities whose par value is adjusted based on changes in the Consumer Price Index.