

MEMO# 23836

October 1, 2009

FINRA Requests Comment on Proposed Amendments to Advertising Rules; October 7th Conference Call

[23836]

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TO: ADVERTISING COMPLIANCE ADVISORY COMMITTEE No. 2-09
CLOSED-END INVESTMENT COMPANY COMMITTEE No. 23-09
SEC RULES COMMITTEE No. 59-09 RE: FINRA REQUESTS COMMENT ON PROPOSED
AMENDMENTS TO ADVERTISING RULES; OCTOBER 7TH CONFERENCE CALL

The Financial Industry Regulatory Authority has requested comment on proposed new rules 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. The proposal would replace the existing six categories of communications with three new communications categories. In addition, it 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 period ("IPO"). The proposal is summarized below.

Comments on the proposal must be filed with FINRA by November 20, 2009. We will be having a conference call to discuss the Institute's comments on the proposal on Wednesday, October 7th at 2:00 EDT. If you or someone else from your firm would like to participate on the call, please contact 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.

Communications Categories

The proposal would eliminate the current definitions of “advertisement,” “sales literature,” “institutional sales material,” “public appearance,” and “independently prepared reprint” in Rule 2210, as well as “correspondence” and all other definitions in NASD Rule 2211. The proposal also would eliminate the definitions of “communication,” “advertisement,” “market letter,” and “sales literature” in NYSE Rule 472. The definitions would be replaced by three communication categories:

- Institutional communication would include communications that fall under the current definition of “institutional sales material” (i.e., communications that are 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. “Retail investor” would include any person other than an institutional investor, regardless of whether the person is an existing or prospective customer.
- Correspondence would include any written (including electronic) communication that is distributed or made available to 25 or fewer retail investors, regardless of whether they are existing or prospective customers. [\[2\]](#)

Approval, Review and Recordkeeping Requirements

A registered principal would be required to approve each retail communication before the earlier of its use or filing with FINRA. [\[3\]](#) The supervision and review standards for correspondence and institutional communications (currently found in NASD Rules 2211 and 3010(d)) would be retained.

Proposed FINRA Rule 2210(b)(4)(A) would incorporate by reference the recordkeeping form and time period requirements of Securities Exchange Act of 1934 Rule 17a-4. Proposed FINRA Rule 2210(b)(4) would maintain the current recordkeeping requirements for correspondence (by means of cross-referencing NASD Rules 3010(d) and 3110(a)).

Filing Requirements and Review Procedures

Firms would be required to file at least ten business days prior to use any retail communication for a period of one year beginning on the effective date a member becomes registered with FINRA. Firms would be required to file retail communications concerning any registered investment company that includes self-created rankings, and retail communications that include bond mutual fund volatility ratings at least ten business days prior to use and to withhold them from use until any changes specified by FINRA staff have been made.

Firms would be required to file all retail communications concerning closed-end funds within ten business days of first use, including those distributed after the fund’s IPO. The Notice states that FINRA believes that investors deserve the same protections concerning

retail communications about closed-end funds that are distributed after the IPO as those that are distributed during the IPO.

The current exclusions for certain communications from the filing requirements generally would be retained. The proposal would add an exclusion for 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.”

Certain independently prepared reprints would be excluded from filing requirements (almost to the same extent as currently provided). Investment company research reports would be deemed to be part of the category of independently prepared reprints exempt from filing.

The proposal would eliminate an existing filing exclusion for press releases that are made available only to members of the media. According to the Notice, generally firms have not used this exclusion because they almost always post press releases on their websites.

Content Standards

According to the Notice, the proposal would reorganize, but largely incorporate, the current content standards applicable to communications with the public currently found in NASD Rule 2210(d), NASD IM-2210-1, and NASD IM-2210-4. [\[4\]](#) Content standards that currently apply to advertisements and sales literature generally would apply to retail communications. Some of the more significant changes to the content standards include: (i) new rule language that would clarify that previous FINRA guidance concerning comparative illustrations of tax-deferred versus taxable compounding applies whether that illustration appears in a communication promoting variable insurance products or some other communication, such as one discussing the benefits of investing through a retirement plan or account; (ii) required disclosure for retail communications and correspondence that present mutual fund performance data of the maximum sales charge and total operating expense ratio based on the fund’s prospectus or annual report, whichever is more current as of the date of publication or submission for publication; (iii) modified disclosure requirements for retail communications and correspondence that include past recommendations; [\[5\]](#) and (iv) the same disclosure requirements for associated persons who recommend securities in public appearances as research analysts who recommend securities in public appearances.

Investment Company Rankings in Retail Communications

Proposed FINRA Rule 2212 would generally replicate the requirements currently applicable to the use of investment company rankings in communications with two changes. First, the requirements would apply to retail communications instead of advertisements and sales literature; and second, reprints and excerpts of certain articles or reports would be

excluded from the requirements.

Investment Analysis Tools

The requirements for the use of investment analysis tools would remain the same and now would appear in FINRA Rule 2214.

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endnotes

[1] See FINRA Regulatory Notice No. 09-55 (September 2009), which can be accessed at <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p120005.pdf> (“Notice”).

[2] The definitions of “public appearance” and “independently prepared reprint” would be eliminated. They would remain excepted from the filing requirements, and the content standards applicable to them would remain limited.

[3] The principal approval requirement would not apply to any retail communication that is solely administrative in nature.

[4] NASD IM-2210-1 provides general guidelines to ensure that communications with the public are not misleading and NASD IM-2210-4 contains limitations on the use of FINRA’s name in communications with the public.

[5] The modified requirements would be based on Investment Advisers Act of 1940 Rule 206(4)-1 (requiring disclosure for investment adviser advertisements that include past recommendations).