

MEMO# 25769

January 5, 2012

SEC Publishes Additional Proposed Amendments to FINRA Advertising Rules; Comments Due to ICI by January 10th

URGENT/ACTION REQUESTED

[25769]

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TO: ADVERTISING COMPLIANCE ADVISORY COMMITTEE No. 2-12
CLOSED-END INVESTMENT COMPANY COMMITTEE No. 1-12 RE: SEC PUBLISHES ADDITIONAL PROPOSED AMENDMENTS TO FINRA ADVERTISING RULES; COMMENTS DUE TO ICI BY JANUARY 10TH

The Securities and Exchange Commission ("SEC") has published for comment an additional amendment filed by the Financial Industry Regulatory Authority ("FINRA") to revise its advertising rules. As you may recall, FINRA had filed with the 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] The Investment Company Institute filed a comment letter on the proposal in August. [3] The SEC then published for comment FINRA's Partial Amendment No. 1 on which the Institute commented. [4] FINRA then filed both a letter responding to the comments received on Partial Amendment No. 1 and Partial Amendment No. 2 to revise certain aspects of the proposal. [5] It is Partial Amendment No. 2, summarized below, which the SEC has published for comment.

Comments on the proposal must be filed with the SEC by January 18th. The Institute is considering whether to file a comment letter. Please provide your comments for possible inclusion in such a letter as soon as possible, but no later than January 10th, to Dorothy Donohue by email (ddonohue@ici.org) or phone at (202) 218-3563.

Supervision of Internal Communications

Consistent with Institute recommendations, under Partial Amendment No. 2, internal

communications that are intended to educate or train registered persons about the products or services offered by a member would be governed by Rule 3010, rather than Rule 2210. [\[6\]](#)

Shareholder Reports

FINRA refused to exempt a fund's shareholder report's Management's Discussion of Fund Performance ("MDFP") from Rule 2210's filing requirements to the extent it is used with prospective investors. The Institute had recommended such an exemption given that, among other reasons, funds are required to file shareholder reports with the SEC. FINRA reasoned that it reviews MDFPs more frequently than the SEC staff reviews fund shareholder reports, and that FINRA review of the MDFP does not impose a large burden on members relative to the benefit to investors by ensuring that the MDFP is fair, balanced, and accurate.

Interactive Retail Communications

In response to comments, FINRA proposed amending Rule 2210 to exclude from FINRA's filing requirements retail communications that are posted on online interactive electronic forums.

Templates

Despite the Institute's recommendation, FINRA refused to expand the proposed exclusion from filing for templates when the only change is a narrative factual update provided by an entity that is independent of the fund and its affiliates. FINRA reasoned that because third-party providers often receive their information about a fund from an affiliate of the fund, the information would not be considered to be from an independent source.

Closed-End Fund Press Releases

Consistent with Institute recommendations, FINRA agreed to exclude closed-end fund press releases issued pursuant to Section 202.06 of the NYSE Listed Company Manual from pre-use principal approval and filing. Also, to the extent that a member distributes or makes available a press release about a closed-end fund that does not make any financial or investment recommendation or otherwise promote a product or service of the member, neither filing nor principal approval would be required.

Dorothy M. Donohue
Senior Associate Counsel

endnotes

[\[1\]](#) See Institute [Memorandum](#) No. 25349, dated July 22, 2011 (summarizing the July 2011 Proposal).

[\[2\]](#) The rule filing was preceded by FINRA Regulatory Notice No. 09-55 (September 2009) 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. 25435, dated August 25, 2011 (summarizing the comment letter).

[4] See Institute Memorandum No. 25622, dated November 7, 2011 (summarizing Partial Amendment No. 1) and Institute [Memorandum](#) No. 25696, dated December 8, 2011 (summarizing the comment letter).

[5] See Institute [Memorandum](#) No. 25742, dated December 23, 2011 (summarizing FINRA's letter and Partial Amendment No. 2).

[6] FINRA disagreed with the comment that the definition of "institutional sales material" under Rule 2211 does not currently include internal communications and has proposed to amend that definition to expressly exclude internal communications.

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