

MEMO# 25817

January 19, 2012

FINRA Notice Regarding the Applicability of Rules 2210 AND 2211 to DOL Rule 404a-5 Disclosure Documents

[25817]

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TO: ADVERTISING COMPLIANCE ADVISORY COMMITTEE No. 5-12
PENSION MEMBERS No. 4-12
SEC RULES COMMITTEE No. 6-12 RE: FINRA NOTICE REGARDING THE APPLICABILITY OF
RULES 2210 AND 2211 TO DOL RULE 404A-5 DISCLOSURE DOCUMENTS

FINRA recently issued a notice stating that it would treat information provided by a member firm to plan participants that is required by and complies with the disclosure requirements set forth in a regulation under section 404(a)(5) of ERISA ("DOL Rule 404a-5") as if it were a communication that satisfies the content and filing requirements of NASD Rule 2210 and 2211. [\[1\]](#) Under the guidance, firms are not required to file that information with FINRA, nor is the information subject to the content requirements of Rule 2210(d). The FINRA guidance is consistent with a recent SEC no-action letter issued to the Department of Labor on this same topic. [\[2\]](#)

The Notice pointed out that to the extent a firm includes in an advertisement or sales literature content that promotes a product or service of the firm, and is in addition to what is required by DOL Rule 404a-5, the non-required content is subject to the requirements of NASD Rule 2210 and 2211. FINRA provides as an example, that if a firm prepares a brochure with required and non-required promotional content, it would have to file that brochure for review of the content not required by the DOL Rule. Conversely, content that is not promotional in nature, such as blended returns of more than one appropriate broad-based index, that is included in such a brochure would not be the type of content subject to its filing and content standards.

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endnotes

[1] See Regulatory Notice 12-02 (January 2012) (“Notice”), which is available at <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p125393.pdf>.

[2] See Institute [Memorandum](#) No. 25602 (October 31, 2011).

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