INVESTMENT COMPANY INSTITUTE

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December 7, 2011

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: FINRA Proposal to Adopt NASD Rules Regarding Communications with the Public as FINRA Rules 2210 and 2212 through 2216 (SR-FINRA-2011-035)

Dear Ms. Murphy:

The Investment Company Institute[1] welcomes the opportunity to express its views on the most recent set of proposed amendments to Financial Industry Regulatory Authority, Inc. ("FINRA") rules governing communications with the public.[2] The Proposed Final Rule would amend several requirements related to member communications with the public, including: (i) revising the disclosure standards for public appearances that include securities recommendations; (ii) excluding from the filing and principal approval requirements communications to retail investors that do not make any financial or investment recommendation or otherwise promote a product or service of the member; (iii) requiring member firms to file all retail communications concerning closed-end funds within ten business days of first use; (iv) excluding from filing certain types of templates; and (v) treating internal

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[1] The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding and otherwise advance the interests of funds, their shareholders directors, and advisers. Members of ICI manage total assets of $12.5 trillion and serve over 90 million shareholders.

[2] *See* FINRA Notice of Filing of Partial Amendment No. 1 and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change, as modified by Partial Amendment No. 1, to Adopt FINRA Rules 2210, 2212, 2214, 2215, and 2216 in the Consolidated FINRA Rulebook, 76 Fed. Reg. 68800 (November 7, 2011) ("Proposed Final Rule"), available at http://www.gpo.gov/fdsys/pkg/FR-2011-11-07/pdf/2011-28716.pdf. *See also* FINRA Notice of Filing of Proposed Rule Change to Adopt FINRA Rules 2210, 2212, 2214, 2215, and 2216 in the Consolidated FINRA Rulebook, 76 Fed. Reg. 46870 (August 3, 2011) ("July 2011 Proposal") available at http://www.sec.gov/rules/sro/finra/2011/34-64984.pdf. *See also* FINRA Regulatory Notice No. 09-55 (September 2009) ("2009 Proposal").

communications intended to train registered representatives about a member's products or services as "institutional communications" under Rule 2210.

The Institute commends FINRA for undertaking the initiative to modernize its rules relating to public communications by member firms, and 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.[3] The Institute particularly welcomes the revised disclosure standards for public appearances that include securities recommendations, and supports excluding from the filing and principal approval requirements communications to retail investors that do not make any financial or investment recommendation or otherwise promote a product or service of the member. We recommend, however, that FINRA reconsider particular comments discussed below that were not incorporated in the Proposed Final Rule. In addition, as discussed in more detail below, we recommend that FINRA exempt shareholder reports from FINRA filing and content requirements because Securities and Exchange Commission requirements already provide sufficient protections for investors.[4]

I. Recommended Changes to the Proposed Final Rule

A. Shareholder Reports

Proposed Rule 2210(d)(8) would clarify that prospectuses, preliminary prospectuses, fund profiles, offering circulars and similar documents that have been filed with the SEC ("SEC Filed Documents") are not subject to the content standards of Rule 2210(d). These documents currently are, and would continue to be, excluded from Rule 2210's filing requirements.[5] While not stated, the apparent premise is that these documents are sufficiently regulated by the Commission, and additional oversight by FINRA would be duplicative and, therefore, unnecessary.

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[3] *See* Letter to 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 (commenting on the 2009 Proposal) ("2009 Letter") and Letter to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission from Dorothy M. Donohue, Senior Associate Counsel, Investment Company Institute, dated August 24, 2011 ("August 2011 Letter"). A copy of each of these letters is attached.

[4] We provided our views on social media issues in both of our prior letters. In our August 2011 Letter, we recommended that FINRA engage with the industry more broadly to develop a new framework for the regulation of social media that provides regulatory clarity and accommodates the use of communications media over the long term. Since then, we have discussed with FINRA that it establish a Social Media Task Force to develop recommendations to modernize FINRA's regulation of its members' use of electronic communications, including social media. We look forward to working on this effort with FINRA going forward.

[5] *See* Proposed Rule 2210(c)(7)(F).

The Proposed Final Rule does not treat fund annual and semi-annual shareholder reports ("shareholder reports") in the same manner even though their content is subject to Commission regulation, and they are required to be filed with the Commission. Rather, if a member firm makes a shareholder report available to prospective investors, such as by posting on its website, the member firm must file the Management's Discussion of Fund Performance ("MDFP") with FINRA.[6] Member firms are not required to file shareholder reports with FINRA if they are only sent to current shareholders.[7] It is widespread industry practice for member firms to post fund shareholder reports on their websites (along with prospectuses and other information), and, therefore, most mutual fund MDFPs currently are filed with FINRA.[8] In fact, it is noteworthy that the Commission *requires* any fund that uses a summary prospectus to post on its website its most recent shareholder reports.[9]

We believe that making the key information about funds that appears in shareholder reports easily available on websites is in the public interest and should not be discouraged through the imposition of unnecessary and costly filing requirements. The Commission seemingly shared this view when it required funds using summary prospectuses to post their shareholder reports on their websites.[10]

Shareholder reports are subject to extensive requirements that address investor protection concerns. Funds are required to transmit a report to its shareholders semi-annually within 60 days of the end of the period for which the shareholder report is made, and to file the report with the Commission no later than ten days after it has been transmitted to shareholders.[11] Shareholder reports,

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[6] Mutual funds are required to include the MDFP in annual shareholder reports, and many also voluntarily include it in semi-annual shareholder reports..

[7] *See* NASDR Notice to Members - Request for Comment 99-79 (September 1999) (stating that members are not required to file shareholder reports with NASD Regulation if they are only sent to current shareholders. However, if a member uses a shareholder report as sales material with prospective investors, the member must file the MDFP portion of the report with the Advertising Department). In addition, although not stated in Notice 99-79, it is our understanding that FINRA requires filing of any "Letter to Shareholders," which typically precedes the MDFP.

[8] Closed-end fund shareholder reports are not currently required to be filed with FINRA.

[9] *See* Rule 498(e).

[10] *See* Investment Company Act Release No. 28584 (January 13, 2009) at p. 83 (where the Commission stated that it determined to require information to appear on a firm's website to enhance investor access to more detailed information than appears in a summary prospectus).

[11] *See* Section 30(e) and Rule 30e-1 under the Investment Company Act of 1940 (requiring funds to transmit shareholder reports to investors at least semi-annually); Section 30(b)(2) and Rule 30b2-1 (requiring shareholder reports to be filed with the Commission); and Form N-CSR (the form required to be used to file shareholder reports).

including the MDFP, are subject to specific content requirements under Commission rules.[12] They also are subject to subject to the antifraud standards of the federal securities laws.

Shareholder reports are subject to a robust certification process that helps to assure a complete and accurate discussion of the fund and the orderly flow of information to investors.[13] In particular, a fund's principal executive and principal financial officers ("certifying officers") must certify that based on his or her knowledge the report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading.[14] The certifying officers must certify that the fund's shareholder report fairly presents in all material respects the fund's financial condition, results of operations, and changes in net assets and cash flows. The certifying officers also are responsible for establishing and maintaining disclosure controls and procedures and must certify that they have: designed such disclosure controls and procedures to ensure that material information regarding the fund is made known to them; evaluated the effectiveness of the fund's disclosure controls and procedures within 90 days of the report's filing date; and presented their conclusions about the effectiveness of the disclosure controls and procedures.

In addition, the certifying officers are responsible for establishing and maintaining internal controls over financial reporting and must disclose any material change in internal controls over financial reporting that occurred subsequent to the prior period end. With respect to the control structure, the certifying officers must certify that they have disclosed to the fund's auditors and board audit committee significant deficiencies in the design or operation of internal controls that could adversely affect the fund's ability to record, process, summarize and report financial data and also have identified to the fund's auditors and board audit committee any fraud involving management or employees with a significant role in the fund's internal controls.

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[12] Item 27 of SEC Form N-1A sets forth the detailed content requirements for mutual fund annual and semi-annual reports, and Item 27(b)(7) specifically sets forth requirements for the MDFP. Many mutual funds include a Letter to Shareholders as a means of delivering the MDFP and use it to discuss "the factors that materially affected the Fund's performance during the most recently completed fiscal year, including the relevant market conditions and the investment strategies and techniques used by the Fund's investment adviser." *See* Item 27(b)(7)(i) of Form N-1A. The Letter to Shareholders, which typically is part of the shareholder report, also should be excluded from Rule 2210's filing and content requirements because it is subject to the certification requirements discussed herein.

[13] *See* Rule 30a-2 under the Investment Company Act. *See also* Securities Exchange Act Release No. 47262 (January 27, 2003) (adopting the rules requiring certification of shareholder reports) at pp. 5 and 19.

[14] The Commission made clear in the release adopting the certification requirements that certification was not limited to financial information but rather was required with respect to *all* of the information in the shareholder report. *See* Release No. 34-47262, *supra* note 11, at p. 5

In addition to these extensive control and certification procedures, the Commission staff regularly reviews shareholder reports, including the MDFP, as required by the Sarbanes-Oxley Act.[15] Moreover, shareholder reports are subject to Commission oversight during routine and special examinations. Finally, auditors provide a third party check on annual shareholder reports.[16] Layering FINRA filing and content requirements on top of the Commission's extensive requirements would subject funds to duplicative, costly, and unnecessary oversight.

For these reasons, we strongly recommend that shareholder reports, like other SEC Filed Documents, be excluded from Rule 2210's filing and content requirements.[17]

B. Supervision of Internal Communications

Proposed Rule 2210.01 would provide that a member's "internal written (including electronic) communications that are intended to educate or train registered persons about the products or services offered by the member" (hereinafter referred to as "internal communications") are considered "institutional communications" subject to Rule 2210(a)(3). The effect of this provision is to subject internal communications to: (i) Rule 2210's general content standards; (ii) principal review prior to use (unless the member provides for the education and training of associated persons as to the firm's procedures governing institutional communications, documentation of such education and training, and surveillance and follow-up to ensure that such procedures are implemented and adhered to); (iii) a requirement that evidence that these supervisory procedures have been implemented and carried out be maintained and made available to FINRA upon request; (iv) recordkeeping requirements; and (v) Rule 3010's supervision requirements.

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[15] Section 408(c) of the Sarbanes-Oxley Act requires that the SEC staff review the disclosures of all issuers, including funds, at least once every three years. In adopting the requirement that mutual funds include the MDFP in annual reports, the Commission specifically requested the staff to continue to focus on the sufficiency of MDFP disclosure. *See* Investment Company Act Rel. No. 26372 (February 27, 2004) at p. 16. In a recent letter to the industry, the staff made clear that its review includes the MDFP. *See* Letter to Karrie McMillan, General Counsel, Investment Company Institute from Barry D. Miller, Associate Director, Office of Legal and Disclosure, Division of Investment Management, U.S. Securities and Exchange Commission, dated July 30, 2010.

[16] *See* Public Accounting Oversight Board Interim Standard 550, Other Information in Documents Containing Audited Financial Statements (AU 550.04) (stating, among other things, that auditors should read information other than that which appears in the financial statements and consider whether such information is materially inconsistent with the information in the financial statements).

[17] We make this recommendation with respect to both mutual fund and closed-end fund shareholder reports. Even though, as noted above, closed-end fund shareholder reports are not currently required to be filed with FINRA, member firms that post such reports on their websites presumably would become subject to FINRA filing and content requirements for shareholder reports because the Proposed Final Rule would make closed-end fund retail communications distributed subsequent to the initial public offering subject to Rule 2210.

We recommended that FINRA eliminate this part of the Proposed Final Rule in our August letter, in part, on the basis that internal communications already are subject to sufficient oversight under Rule 3010, the rule governing a member's supervision of its registered representatives' activities.[18] FINRA did not make the recommended change, and stated that it "is primarily concerned with ensuring that internal communications that are used in the sales process are fair, balanced, and appropriately supervised."[19]

FINRA also pointed out that the definition of institutional sales material in Rule 2211(a)(2) includes communications made available to members and associated persons, and that this was the basis for their view that internal communications already are subject to Rule 2211. However, the Institute believes that the language at issue can be reasonably interpreted to encompass only communications between a member firm and **other** member firms or **their** associated persons.[20] It is our understanding that many members of the industry have so interpreted this requirement and consequently have supervised internal communications under Rule 3010.

We continue to believe that internal communications are most appropriately supervised under Rule 3010, because this is the rule that is explicitly and specifically designed to address supervision of registered representatives' activities. It is our understanding that, in complying with Rule 3010, it is common practice for firms to develop oversight programs related to the supervision of internal communications and to document them in their written supervisory procedures. For some firms, that supervision consists of conducting a post-use review of internal communications on a spot-check basis, as appropriate. Others, when appropriate, require principal review and approval of internal communications prior to use. Some firms conduct post-use review for some internal communications and prior review for others depending on the content of the communication as well as other factors. These reviews may take place through compliance or other departments. These oversight programs generally are subject to internal audit's testing. As part of FINRA's broker-dealer oversight program, including its examination process, these internal communications and related processes are subject to additional review.

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[18] Rule 3010 provides, in part, that "[e]ach member shall establish and maintain a system to supervise the activities of each registered representative, registered principal, and other associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable NASD Rules."

[19] *See* Letter to Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission from Joseph P. Savage, Vice President & Counsel, Investment Companies Regulation, FINRA, dated October 31, 2011 ("FINRA October Letter") at p. 18.

[20] "Institutional investor," as defined by Rule 2211, includes a variety of external organizations, including various financial institutions, governmental entities or subdivisions thereof, employee benefit plans, qualified plans as defined in Section 3(a)(12)(C) of the Exchange Act, NASD members or registered associated persons of such members, and persons acting solely on behalf of any such institutional investor.

Given this, we believe that requiring additional reviews pursuant to Rule 2210 is duplicative, would impose significant and unnecessary costs, and would not advance investor protection or the public interest.

In addition, it simply does not make sense for *internal* communications to be subject to the review requirements of Rule 2210, a rule for "Communications with the *Public"* (emphasis added). Rule 2210 and its focus on public communications is derived from concerns and abuses associated with communications, such as advertisements and sales literature, that publicly promote the offering of securities. This focus is not directed at those communications solely between underwriters and dealers and their respective associated persons. This is why Section (2)(a)(3) of the 1933 Act excludes these materials from the various definitions of "offer" and "sale." Similarly, Rule 156(c) excludes them from the definition of "sales literature" except where they ultimately fall into the hands of investors.

We note that Proposed Rule 2210.01 was not part of the 2009 Proposal, but, rather, first was included in the July 2011 Proposal as Supplementary Material .01. A very brief discussion of the Supplementary Material was provided.[21]

For these reasons, we reiterate our recommendation that FINRA eliminate this part of the Proposed Final Rule and strongly recommend that FINRA consider instead the appropriate oversight of internal communications as part of its contemplated revisions to Rule 3010. At a minimum, the Commission should conduct a study of the costs and benefits associated with oversight of internal communications under Rule 3010 as compared to oversight under Rule 2210 before approving any final rule.[22]

C. Templates

Proposed Rule 2210(c)(7) would exclude from filing two types of templates: (i) retail communications that previously have been filed with FINRA and that are to be used without material change; and (ii) 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. In our August letter, we recommended that FINRA additionally exclude from filing those retail communications that are based on templates that were previously filed with FINRA if the only

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[21] *See* July 2011 Proposal at note 6 ("FINRA also has added a Supplementary Material to clarify that a member's internal written (including electronic) communications that are intended to educate or train registered persons about the products or services offered by a member are considered institutional communications pursuant to paragraph (a)(3) of proposed FINRA Rule 2210").

[22] *See, e.g.,* Section 3(f) of the Securities Exchange Act (requiring that whenever pursuant to this title the Commission is engaged in rulemaking or, or in the review of a rule of a self-regulatory organization and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.)

change is a narrative factual update provided by an entity that: (i) provides general information about investment companies to the public; and (ii) is independent of the investment company and its affiliates.[23]

FINRA determined not to make the recommended change, stating that it is "concerned about the types of narrative information that would be updated, such as changes to the fund's investment objectives, and believes that in some cases additional review by Department staff may be warranted for updates of such narrative information."[24] We respectfully urge FINRA to reconsider this determination. When the only change to the information in a template is provided by an independent, recognizable entity (*e.g.,* third party commentary), we do not believe that filing each such piece is necessary for investor protection. FINRA still would have the ability to review such templates through spot checks or targeted examinations, and to take appropriate actions against members for violations of FINRA rules. Eliminating these filings will result in substantial cost savings for many firms, particularly those of our members that produce fact sheets for a great number of funds provided through retirement and other platforms. We do not believe that the additional filing costs that would be imposed on firms is warranted, given the protections that can be afforded investors through the use of these regulatory tools.[25]

D. Press Releases

As we pointed out in our July 2009 Letter, 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."[26] This information would include, among other things, dividend announcements, and typically is disseminated through press releases. FINRA has not explicitly addressed this comment to date, and it is not clear to us 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. We therefore request 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. The increased time and costs associated with pre-use principal approval and filing would

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[23] We based this on the language on the definition of "ranking entity" in proposed Rule 2212.

[24] *See* FINRA October 2011 letter at p. 9.

[25] Section 15A(b)(9) of the Securities and Exchange Act requires that FINRA rules not impose burdens on competition not necessary or appropriate to further the purposes of the Exchange Act, which purposes include preventing fraudulent and manipulative acts and practices, promoting just and equitable principles of trade, and, in general, to protect investors and the public interest.

[26] *See* Section 202.06 of the NYSE Listed Company Manual.

come with little apparent benefit, as these press releases would remain subject to content standards, supervision, and recordkeeping.

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The Institute appreciates the opportunity to comment on this significant proposal. If you have any questions or need additional information, please contact me at (202) 218-3563.

Sincerely,

/s/

Dorothy M. Donohue
Senior Associate Counsel

Attachments

cc: Thomas Selman, Executive Vice President
Thomas A. Pappas, Vice President and Director, Advertising Regulation
Joseph P. Savage, Vice President and Counsel, Investment Companies Regulation

Financial Industry Regulatory Authority, Inc.

Susan Nash, Associate Director
Division of Investment Management
U.S. Securities and Exchange Commission

Attachments

INVESTMENT COMPANY INSTITUTE

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202/326-5800 www.ici.org

November 19, 2009

Ms. Marcia E. Asquith
Senior Vice President and Corporate Secretary
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, D.C. 20006-1500

Re: Request for Comment on Proposed New Rules Governing Communications with the Public (FINRA Regulatory Notice No. 09-55)

Dear Ms. Asquith:

The Investment Company Institute[1] welcomes the opportunity to express its views on FINRA's proposed amendments to its rules governing communications with the public.[2] The proposed amendments, among other things, would: (i) replace the existing categories of communications with three new communications categories, which would generate additional filing and principal review obligations for FINRA member firms; (ii) require these firms to file all retail communications concerning closed-end funds within ten business days of first use; (iii) require pre-use filing of retail communications concerning structured notes; (iv) expressly permit the use of templates; (v) alter the requirements regarding the disclosure of expense ratios in retail communications; and (vi) retain the current requirements related to investment analysis tools.

The Institute commends FINRA for undertaking the initiative to simplify its rules governing communications with the public as it carries out the task of consolidating the NASD and NYSE rulebooks. We have several recommendations that would further improve the effectiveness of, and facilitate members' compliance with, these rules. We also provide our views on a few advertising-related issues that are not addressed by the proposal but which are of importance to our members.

Our specific comments on the proposal include the following, all of which are discussed in greater detail below:

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[1] The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of $11.45 trillion and serve almost 90 million shareholders.

[2] *See* FINRA Regulatory Notice No. 09-55 (September 2009) ("Notice"). FINRA is the Financial Regulatory Authority, Inc. (f/k/a National Association of Securities Dealers, Inc. or "NASD").

- Correspondence, as currently defined, should continue to be excluded from principal review and filing with FINRA;

- Retail communications sent to existing customers that are not promotional in nature should not be required to be filed;

- The filing exclusion for press releases that are made available only to members of the media should be retained;

- Retail communications related to structured notes should be required to be filed prior to use;

- Requirements regarding public appearances should be tailored to take into account the nature of the public appearance;

- Retail communications based on templates should be excluded from principal approval, filing, and recordkeeping requirements;

- The proposed modifications with respect to the required sources of expense information to be disclosed in retail communications should be abandoned; and

- The text box presentation requirement for print advertisements should be replaced with a prominence requirement.

The letter contains several recommendations regarding the appropriate regulation of the use of social media by mutual fund firms, recommends that retail communications based on non-interactive investment analysis tools be permitted, and urges FINRA to apply a materiality standard to the disclosure required to accompany subsidized yields.

I. Filing and Principal Review Requirements

The proposal would eliminate the current NASD definitions of: (i) advertisement; (ii) sales literature; (iii) institutional sales material; (iv) public appearance; (v) independently prepared reprint; and (vi) correspondence. The proposal also would eliminate the current NYSE definitions of: (i) communication; (ii) advertisement; (iii) market letter; and (iv) sales literature. The definitions would be replaced by the following 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; and

- 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.

While we commend FINRA for seeking to simplify its categorization of communications, we are concerned that the ultimate effect of these changes would be to increase the filing burdens on FINRA member firms and the volume of communications to be reviewed by principals prior to use. We have several recommendations that would be consistent with the goal of simplification without collaterally increasing burdens on member firms.

Retail Communications. The proposal would require filing and pre-use principal review of all "retail communications" concerning registered investment companies rather than all "advertisements and sales literature" concerning registered investment companies. As a result, some communications with customers currently considered "correspondence" now would be categorized as a retail communication subject to the requirements for pre-use principal review and filing. FINRA has not offered any rationale for expanding firms' review and filing obligations, and we have not been able to discern one. Because correspondence would remain subject to supervisory review under Rule 3010(d), content standards, and recordkeeping requirements, the absence of pre-use principal review and filing should not raise investor protection concerns. Therefore, we recommend continuing to exclude all "correspondence," as that term is currently defined, from principal review and filing.[3]

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[3] The current definition of correspondence includes any written letter or electronic mail message and any market letter distributed by a member to one or more existing retail customers; and fewer than 25 prospective retail customers within any 30 calendar-day period. FINRA senior staff explained at a recent conference that the proposed elimination of the 30-calendar day period was based on firms not tracking the amount of correspondence sent to prospective customers in any 30-day period, thereby indicating the absence of a need for this element of the rule. While our larger members confirmed that this is their practice, smaller members track their correspondence so as to determine if and when they have a filing obligation. They were concerned that their filing obligations would be significantly increased if there was no time period against which to measure the 25 person ceiling. In addition, retaining the current definition of correspondence would permit firms to continue to send out market letters to more than 25 retail customers in a timely fashion, a practice FINRA has recently endorsed and our members have embraced, particularly given the recent market volatility. *See* FINRA Regulatory Notice 09-10 (February 2009) ("Market Letter Notice") (permitting post-use principal approval of market

If FINRA does not to retain the existing definition of correspondence, it is imperative that it continue to exclude from filing and principal review any correspondence to existing retail customers that does not make any financial or investment recommendation or otherwise promote a member product. Otherwise, correspondence such as periodic account statements, notices of changes in required minimum account balances, and privacy statements could be considered to be retail communications subject to filing and principal approval. This appears to be an unintended consequence, given the enormous costs without any corresponding benefit if this was required. FINRA could avoid this unintended result by excepting from the principal approval and filing requirements retail communications that are not promotional in nature (rather than those that are "solely administrative in nature"). We believe that such a change would be consistent with FINRA's intent given that currently non-promotional communications are not subject to prior approval or filing since they typically fall within the definition of correspondence.

Press Releases. The proposal would eliminate a filing exclusion for press releases that are made available only to members of the media. According to the Notice, FINRA believes that firms generally have not used this exclusion because they almost always post press releases on their websites. We disagree with this premise. While we did not formally survey our members, it is our understanding that many firms do not post every press release on their websites. Rather, they make an individual determination as to whether to provide a release solely to the press or to also post it to their websites. Therefore, we recommend retaining the current exclusion to avoid unnecessarily increasing filing costs for many FINRA member firms.

In addition, we recommend treating as correspondence communications provided solely to the media because they are not used with customers or the public. Firms often provide background and educational materials concerning products, services, and market information to the media with the purpose of educating the media on investing concepts and alerting them to new research, products, and services.

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 certain information, including dividend announcements, through press releases.[4] We recommend that FINRA subject press releases that make dividend and other announcements and that do not promote a member's products or services to the same requirements as correspondence. 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.

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letters, recognizing that pre-use approval might inhibit the timely flow of information to traders and investors who base their investment decisions on timely market analysis).

[4] *See* Section 202.06 of the NYSE Listed Company Manual.

Structured Notes. The Institute supports the proposed requirement that member firms file, prior to use, retail communications concerning any publicly offered securities derived from, or based on, a single security, a basket of securities, an index, a commodity, a debt issuance, or a foreign currency. Review will help to ensure that potential customers are provided with fair and balanced disclosure, particularly given the rapid development of structured products with a variety of features.

II. Public Appearances

The proposal would apply new disclosure standards to public appearances[5] that include securities recommendations. While we do not object to the disclosures in the context of scripted public appearances (or retail communications or correspondence), the new disclosures should not be made applicable to public appearances where securities recommendations are made spontaneously in response to an impromptu question posed by an interviewer. For example, a fund portfolio manager might be asked by a financial program moderator about his or her top two stock picks. It would be unreasonable to expect the portfolio manager to disclose along with that recommendation whether its employer was a manager or co-manager of a public offering of any securities of the recommended issuer within the past 12 months. This is information he or she likely would not know, and to require this knowledge in order to be able to make a public appearances is unreasonable.

The proposal would require member firms that sponsor a seminar, forum, radio or television interview to comply with certain content standards. It is not uncommon for member firms to sponsor radio or television programs simply by displaying a firm logo or a "sponsored by" voiceover. It seems unreasonable to require the member firm with this limited involvement to have responsibility for the content of the program.[6] It similarly seems unreasonable to require a firm to be responsible for content created and presented by another firm. This situation arises, for example, where several firms make individual presentations in a single forum. We recommend that FINRA clarify that a member firm would be responsible only for the content of its own presentation, not the entire content of such a program.

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[5] Under the proposal, the current provision defining public appearances would be eliminated and the substance of the definition and other requirements regarding public appearances would be moved to Rule 2210(f). To eliminate creating the perception that public appearances are no longer subject to Rule 2210, we recommend including a cross reference to the public appearance provision in Rule 2210's definitional section.

[6] FINRA previously has recognized the need to tailor requirements when a communication merely identifies a member. *See* Rule 2210(c)(7)(D) (excluding from the filing requirements retail communications that do no more than identify the member).

III. Closed-End Funds

The proposal 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 ("IPO"). We support the proposed change. Investors should have the same protections concerning retail communications about closed-end funds that are distributed after the IPO as those distributed during the IPO.

We have one technical comment that takes into account how closed-end funds are distributed. Some closed-end funds employ a distributor that is a FINRA member firm to prepare communications about the funds. Other closed-end funds or their advisers prepare these communications themselves. Since neither the funds nor their advisers are FINRA member firms, FINRA rules, including the proposed filing requirement, do not apply to them. To avoid any confusion, we request FINRA to explicitly affirm that its rules only reach member firms that prepare closed-end funds communications.[7] We also request that FINRA affirm that the distributor of a closed-end fund is not responsible for communications prepared by unaffiliated broker-dealers that are selling fund shares in the secondary market. We believe statements along these lines are necessary, given the novelty of post-IPO closed-end fund communications being required to be filed with FINRA.

IV. Templates

The proposal would exclude from filing 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. We believe that the proposed exclusion should be implemented in a somewhat modified form. We recommend excluding retail communications based on these templates from principal approval and recordkeeping (in addition to filing) because these updates are not new content to which approval, filing and recordkeeping are intended to apply. Our recommendation is consistent with long-standing FINRA staff guidance.[8]

In addition, we recommend that FINRA exclude from principal review, filing, and recordkeeping any templates that previously were filed with FINRA, the changes to which are limited to non-material changes to narrative data and alternative narrative where such narrative was previously filed with FINRA and its use in the template does not alter its meaning from that which was previously

[7] For the same reasons, we request that FINRA insert the word "member" before the word "communication" in Rule 2210(d)(1)(A) and the words "by a member" after the phrase "correspondence means any written (including electronic) communication that is distributed" in Rule 2210(a)(2). The recommended changes would clarify that the rules apply to FINRA *member* communications.

[8] *See* Letter to Forrest R. Foss, Vice President and Associate Legal Counsel, T. Rowe Price Associates, Inc. from Thomas M. Selman, Senior Vice President, Investment Companies/Corporate Financing, NASD Regulation, Inc., dated January 28, 2002.

filed with FINRA. Our understanding is that this recommendation too would be consistent with current FINRA practice. FINRA requires filing of a template (with content subject to filing) the first time it is used with the public and requires such a template to be filed again only if there are material changes to the template.[9] A non-material narrative changes in templates might include, for example, a company name listed in the field for a fund's top ten portfolio holdings. Templates often are used in material prepared for retirement plans. For example, an enrollment guide might include a listing of a plan's investment options, which include a brief description of each fund. A firm may use that same fund description in a fact sheet prepared for retail customers. We do not believe investor protection would be enhanced in any way if a fact sheet updated to incorporate a more recent fund description from an enrollment guide was required to be filed. We therefore urge FINRA to implement our recommendation, which would reduce filing costs for member firms without eliminating any meaningful FINRA review.

V. Sales Charge and Expense Ratio Disclosure

Rule 2210(d)(3) currently requires communications with the public, other than institutional sales material and correspondence, that present the performance of a non-money market mutual fund to disclose the fund's maximum sales charge and operating expense ratio as set forth in the fund's current prospectus fee table. The proposal would alter this by requiring disclosure of the maximum sales charge and 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 of a communication. No rationale is provided for the proposed change.

In the past, we supported requiring funds to prominently disclose in advertisements and sales literature expense ratios that appeared in shareholder reports rather than those which appeared in the prospectus.[10] We cannot, however, support the rule as proposed. In our conversations with Institute members, this element of the proposal was repeatedly identified as the most troubling because of the great expense and administrative burdens it would impose. To require funds to sometimes provide expense information from one source and other times from a second source will require them to significantly revamp their systems and, in some cases, obtain a second feed from a third party vendor at a substantially increased cost.[11] Enormous administrative burdens will be placed on all firms, regardless of whether expense information is generated in-house or obtained from a third party. This particularly

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[9] The wording of proposed Rule 2210(c)(7)(A) seems to limit non-material changes only to statistical or other non-narrative information.

[10] *See* Letter to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission from Frances M. Stadler, Deputy Senior Counsel, Investment Company Institute, dated September 17, 2004 (recommending that expense ratios be based on the fund's actual expenses for the period covered, which would include any fee waivers or reimbursements).

[11] One feed would be required to obtain expense information that appears in prospectuses and a second feed would be required to obtain information that appears in shareholder reports.

will be the case in instances where this information appears in a communication for a large number of funds, such as in materials prepared for fund marketplaces. In addition, we are concerned that requiring the source of expense information to be repeatedly modified will inevitably lead to inadvertent processing errors, a result that would not serve the best interests of investors. We therefore strongly recommend eliminating this element of the proposal.

A fund currently is required to present its standardized performance information, maximum sales charge, and annual expense ratio in a prominent text box in print advertisements. We recommend eliminating this presentation requirement because it is unnecessary to achieve the goal of ensuring that the required information is sufficiently prominent. Rather, FINRA should revise Rule 2210 to require the presentation of standardized performance, maximum sales charge, and expense ratio prominently. Our recommended approach would help to ensure that certain key items of information are presented in a manner that promotes investor awareness while providing funds with more flexibility in designing their print retail communications. It also would make FINRA's requirements regarding print retail communications consistent with its requirements regarding other retail communications.[12] In addition, FINRA should make clear in any notice to members that compliance with the presentation requirements in Rule 482 under the Securities Act of 1933 regarding standardized performance quotations and maximum sales charges[13] also satisfies Rule 2210's prominence requirement. Our recommendation will provide for consistency between Securities and Exchange Commission ("SEC" or "Commission") and FINRA rules. Such consistency is appropriate where, as here, the rules share the same policy goal of ensuring fair and balanced presentations that effectively communicate important information to investors. Establishing uniform standards also will facilitate compliance by member firms.

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[12] We also have a technical comment intended to clarify the scope of the text box requirement if FINRA determines to retain this requirement. Proposed Rule 2210(d)(5)(B) requires the maximum sales charge and expense ratio information to be placed in a prominent text box in any print advertisement. Because the term, "advertisement," would no longer be defined, the scope of the text box requirement would be unclear. To clarify this, we recommend that FINRA reiterate that the requirement applies only to print advertisements, such as a print newspaper, magazine or other periodical. *See* NASD Notice to Members 06-48 (September 2006) (stating that the text box requirement applies only to advertisements that appear in print advertisements, such as print newspaper, magazine or other periodical and not to printed sales literature, such as fund fact sheets, brochures or form letters nor to Web sites, television or radio commercials, or any other electronic communication).

[13] Rule 482 prescribes specific type size and style requirements for certain required disclosures, including information about a fund's maximum sales charge. In addition, Rule 482 requires certain disclosure (including maximum sales charge information) to be presented in close proximity to performance data and, in a print advertisement, to be presented in the body of the advertisement and not in a footnote. A fund's one, five, and ten year average annual total returns must be set out with equal prominence and any other performance measures must be set out in no greater prominence than the required quotations of total return. *See also* Rule 34b-1(b)(1) under the Investment Company Act of 1940, which extends these presentation requirements to investment company sales literature that contains performance data.

VI. Recordkeeping Requirements

The proposal would add a new requirement that member firms keep a record of the name of any person who prepares or *distributes* any institutional communication. While we do not object to maintaining a record of the person preparing the communication, it will be onerous for member firms to track everyone who distributes a communication, particularly when made available as a template and used by multiple advisers or retirement plan sponsors. Accordingly, we recommend that FINRA eliminate this requirement.

VII. Need for a Reasonable Transition Period

FINRA has not proposed a transition period in connection with the proposed requirements. Adequate lead time is necessary for the preparation of retail communications meeting the new requirements and their filing with, and approval by, FINRA. We recommend that FINRA provide a compliance period of approximately six months. Instead of requiring fund performance materials to comply with revised Rule 2210 within 180 days after adoption or as of an arbitrary effective date, we recommend that the compliance date for the rule changes be ten business days after the second calendar quarter end following the adoption of the final rule changes. Basing the compliance date on a calendar quarter end will enable FINRA members to coordinate their implementation of the rule changes with a regularly scheduled update of fund retail communications.[14] In addition, we recommend that FINRA be flexible so as to permit greater use of templates for filing purposes during this transition period.

VIII. Other Issues Not Addressed By the Proposal

A. Social Media

While the Notice does not address funds' use of social media, we understand that FINRA is interested in hearing industry views on the most appropriate regulation of social media. This is a very important and timely topic. Members of the fund industry have begun to establish social media sites, and others are exploring the possibility of doing so. Uncertainty about the application of current rules to this new media has been an obstacle, inhibiting the greater use of social media in the fund industry to communicate with customers and others. Accordingly, we believe that it is very important for FINRA to provide firms with appropriate guidance regarding their regulatory obligations. We are pleased that toward that end, FINRA has established a Social Networking Task Force consisting of representatives from member firms, including mutual fund firms.

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[14] Ten business days is the amount of time it typically takes funds to update their retail communications after the close of a calendar quarter.

While we have formulated recommendations on a number of the more straightforward issues (*e.g.,* filing requirements with respect to firm and third party content), we have not reached final conclusions on other issues that are more complex, such as the degree of oversight needed, if any, over third party content. We provide our preliminary views on these more complex issues below, but note that, in the future, we may modify our position in response to the particulars of any proposal FINRA might publish and the evolution of this media.

Interactive Retail Communications. Given the desirability of a regulatory regime that accounts for the interactive nature of social media, FINRA should consider establishing a fourth category of communications, titled "interactive retail communications."[15] These communications would be subject to the same requirements as other retail communications except with respect to principal approval. Under this approach, interactive retail communications would be subject to pre-use principal approval to the same extent that retail communications currently are (*e.g.,* those concerning registered investment companies), *except* to the extent that a firm determines that particular communications instead should be subject to post-use principal approval because of the time sensitive nature of the information or other circumstances that warrant its prompt dissemination. This approach would be consistent with views expressed by FINRA with respect to market letters.[16]

To the extent that FINRA takes this approach, it seems reasonable to require firms designating such communications as being subject to principal post-use approval to establish written procedures reasonably designed to assure that the communications comply with applicable standards as appropriate for its business, size, structure, and customers. These procedures could be required, for example, to provide for the education and training of associated persons as to the firm's procedures governing interactive retail communications, documentation of such education and training, and surveillance and follow-up to ensure the implementation and adherence to such procedures. Similar to other contexts, firms might be required to update these policies as appropriate and maintain evidence that they have been properly implemented.

This approach would allow firms the flexibility to design procedures for interactive communications appropriate to each firm's business model and responsive to evolving technology.

[15] We recommend that FINRA consider providing guidance on what types of communications would be part of this category, which might include tweets, Facebook and other social media postings, and other similar communications that involve at or near real-time communications. FINRA also may want to consider permitting firms to designate other communications as interactive communications to allow firms to respond to new technology. We would not object to FINRA, as a more immediate short-term measure, interpreting these communications as correspondence.

[16]*See* Market Letter Notice.

Filing Requirements and Third Party Content. One of the major challenges our members face when using fund sponsored social media sites (*e.g.,* Twitter and Facebook) is to determine which information posted must be filed with FINRA. In our view, member firms should be required to file "tweets"[17] and other postings by the firm concerning registered investment companies (and postings with other content subject to filing under Rule 2210(d)(3)). This type of content is fully under the member's control, and filing would provide FINRA with the opportunity to oversee and influence this burgeoning area of communication.

Member firms should not, on the other hand, be required to file communications posted by third parties. This is not content that is under the control of the member firm, and it would be more reasonable and appropriate to limit a firm's filing obligations to that content that is under its control.[18] This approach would be consistent with SEC guidance provided in the context of companies' use of interactive websites.[19]

FINRA may want to consider requiring member firms to have a reasonable framework of supervisory procedures to oversee third party content to some extent. For example, FINRA might consider requiring firms to have supervisory procedures requiring periodic screening of third party communications for customer complaints.[20] If FINRA were to take this approach, it is important that FINRA not consider a firm's use of objective screening measures as causing third party content to be considered the firm's content. For example, some firms use objective screening criteria to, among other reasons, assist in their compliance with the "Good Samaritan blocking and screening" safe harbor under the Communications and Decency Act[21] to protect from general liability for third party content and postings. Further, firms are likely to have a "content take down" notice policy under the Digital Millenium Copyright Act of 1996 within their website's terms in order to obtain safe harbor protection from copyright infringement claims regarding content posted by third parties.

At FINRA's recent Advertising Regulation Conference, FINRA senior staff indicated that member firms have been permitted to file at one time all the tweets aggregated for one day along with

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[17] Tweets are text-based posts on Twitter.com, a real-time micro blogging site, that are limited to 140 characters.

[18] Similarly, a firm should not be responsible for any Facebook-generated content (*e.g.,* pop up advertisements) that appears on its Facebook page, content which is beyond its control.

[19] *See* SEC Release No. 34-58288 (August 1, 2008) [73 FR 45862, 45873 (August 7, 2008)] ("[a] company is not responsible for the statements that third parties post on a Web site the company sponsors, nor is a company obligated to respond to or correct misstatements made by third parties.")

[20] If FINRA takes this approach, it also should clarify that firms do not have responsibility for handling as complaints anonymous communications that criticize the firm.

[21] 47 U.S.C. Section 230.

one filing fee. We agree with this approach and recommend that FINRA formalize this guidance and expand it to encompass all similar postings for one day.

Required Disclosures. Another issue related to social media is whether and how FINRA and SEC required disclosures should be made. If either FINRA or the SEC requires disclosure to be provided along with any particular content, we recommend permitting firms to link to the appropriate disclosure from a tweet or other communication with space limitations. In addition, this approach would be consistent with FINRA's recognition of the permissible use of hyperlinks to provide investors with information in electronic media.[22] We also encourage FINRA, as a general matter, to interpret its requirements in a flexible manner to permit the fund industry to avail themselves of the advantages of new technologies as they develop.

Recordkeeping. Given that social media is a dynamic, constantly changing, interactive means of communication, there are significant questions about the extent to which member firms are required to keep records related to their social media sites. One possible approach would be to require member firms to maintain a record of their own content, and not that of a third party unless it is necessary to provide context for the firm's content or is otherwise a required record.[23] For example, if a firm posted an article on its blog, third parties commented, and the firm did not respond to those comments, this approach would not require a firm to retain these third party postings.[24] However, if a posting was a complaint or if the firm responded to the third party posting, firms would be required to retain that third party content.

B. Investment Analysis Tools

In recent years, retail investors have increasingly sought access to information to help them make investment decisions, and the mutual fund industry has responded by using increasingly sophisticated technology that includes both interactive and non-interactive investment analysis tools to generate financial educational and other materials.[25]

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[22] *See Ask the Analyst – Electronic Communications and Mutual Funds* (June 1997) (permitting an Internet banner advertisement that contains only a mutual fund or fund family name to link to the home page containing properly disclosed prospectus offering language rather than including the language in the advertisement itself).

[23] We recognize that member firms must comply with both FINRA rules and SEC rules regarding recordkeeping. We would seek to work with the SEC to effectuate changes to Securities Exchange Act Rule 17a-4 to develop a reasonable framework for recordkeeping related to social media.

[24] FINRA's Podcast, Electronic Communications: Blogs, Bulletin Boards, and Chat Rooms (February 23, 2009) seems to support the recommended approach. In that podcast, in a discussion of chat rooms, FINRA staff commented that any remarks by a firm's registered representative would have to be printed out and kept as a required record but there was no mention of any recordkeeping or other obligations with respect to remarks made by other participants in the chat room.

[25] For example, some firms use investment analysis tools whose engines are fueled by Monte Carlo simulations. Monte Carlo simulations randomly select thousands of plausible market scenarios and allow for effective stress testing of investment strategies across scenarios – both those that have, and have not, occurred. Monte Carlo simulations help investors

The proposal would retain, without any change, the current requirements applicable to investment analysis tools and their related reports, advertisements, and sales literature in new FINRA Rule 2214. NASD Interpretive Material 2210-6 currently permits member firms to provide an investment analysis tool, written reports indicating the results generated by such tool and related advertisements and sales literature under certain conditions.[26]

In recent conversations, FINRA staff has informally indicated to us that only sales literature and advertisements that relate to an *interactive* investment analysis tool are permissible.[27] We cannot discern a policy reason for this limitation and believe that investors will be better served by being provided with information generated by both interactive and non-interactive investment analysis tools. This is valuable information that can help investors determine how to allocate their investments to maximize their chance of achieving retirement and other investment goals.

We therefore recommend that FINRA expressly permit member firms to use both interactive and non-interactive tools and disseminate related reports, and retail communications. To help protect investors from misleading communications, we recommend that reports and retail communications related to non-interactive tools be subject to the same disclosure, filing, supervision and other requirements set forth in current requirements. For example, any possible concerns about "cherry picking" superior performance that occurred over certain time periods could be addressed by requiring

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determine how to allocate their assets, how much they should save for retirement and other financial needs, how much retirement income can be withdrawn with a reasonable expectation of not running out of assets in their lifetime, how long they can reasonably expect their retirement assets to last, and a reasonable estimate of remaining assets at the end of a planned retirement period.

[26] Investment analysis tool is defined as "an interactive technological tool that produces simulations and statistical analyses that present the likelihood of various investment outcomes if certain investments are made or certain investment strategies or styles are undertaken, thereby serving as an additional resource to investors in the evaluation of potential risks and returns of investment choices."

[27] Despite these recent statements, the precise scope of current NASD IM-2210(6) is unclear. While it expressly permits member firms to provide customers with access to an interactive tool, a release preceding its adoption suggests that other types of automated tools would not be considered to be prohibited projections of investment strategies and therefore would be permissible in the absence of IM-2210-6. Specifically, the NASD stated in its rule filing with the Commission that "Rule 2210(d)(2)(N) [currently Rule 2210(d)(1)(D)] does not prohibit, and this Interpretive Material does not apply to, automated educational tools that are hypothetical or general in nature. For instance, rule 2210(d)(2)(N) generally does not prohibit, and this Interpretive Material does not cover, portfolio-based planning tools that merely generate a suggested mix of asset classes, broad categories of securities or funds, or probabilities as to how classes of financial assets or styles of investing might perform." *See* SEC Release No. 34-47590 (March 28, 2003) [68 FR 16325 (April 3, 2003) at note 1]. *See also* Letter to Barbara Z. Sweeney, Office of the Corporate Secretary, NASD, from Tamara K. Reed, Associate Counsel, Investment Company Institute, dated October 1, 2002 (noting that NASD members had long been permitted to provide tools that simulate or analyze asset allocations among various asset classes or types of assets and recommending that the NASD clarify this point).

multiple scenarios to be presented in retail communications. (This could be accomplished either through an express condition or through continuing to define investment analysis tool as those tools that present "the likelihood of various investment outcomes.")[28] It would also seem reasonable that specific investment products not be permitted to be identified in these materials, consistent with the materials' general financial educational purposes.

C. Fee Waivers

FINRA has for some time taken the view that if a member firm *voluntarily* subsidizes fund expenses, an advertisement with that fund's yield would have to present both subsidized and unsubsidized yield to be considered fair and balanced under NASD Rule 2210(d)(1)(A). It is our understanding that most recently, FINRA modified that position so that even if fund expenses are subsidized pursuant to a contract with the fund's investment adviser, an advertisement with the fund's yield has to present both subsidized and unsubsidized yields to be considered fair and balanced. This view is inconsistent with Commission views on the disclosure required in advertisements when fund expenses are subsidized. In particular, when the Commission proposed, and later adopted, Rule 482 under the Securities Act of 1933, it stated that the obligation to disclose the effects of subsidization is imposed under the antifraud rules[29] and that failure to disclose subsidization where the subsidization affects the performance in a material manner would cause the advertisement to omit to state a material fact.[30] These statements suggest that investors would not always need to know the fact of subsidization and the fund's unsubsidized yield, but rather, that investors needed to be provided with this information only if it was material. We agree. Given the variety of possible subsidization arrangements, a materiality standard helps assure that investors are provided with the information they need to know to make an informed investment decision. We therefore recommend that FINRA permit funds whose investment adviser has waived fees to only disclose the fact of subsidization and provide both the subsidized and unsubsidized yields in retail communications if the effect of the subsidization on performance is material.

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[28] We recommend that investment analysis tools offered exclusively to institutional investors and related written reports or communications be subject to the same requirements with the exception of post-use access and filing. *See, e.g.,* IM-2210-6 (regarding use of these materials with institutional investors).

[29] In explaining the materiality standard, the Commission distinguished between voluntary and contractual subsidizations. *See* Investment Company Act Release No. IC-15315, (September 17, 1986) at note 55.

[30] *See* Investment Company Act Release No. 16245 (February 2, 1988) at text preceding and following note 37.

The Institute appreciates the opportunity to comment on this significant proposal. If you have any questions or need additional information, please contact me at (202) 218-3563.

Sincerely,

/s/

Dorothy M. Donohue
Senior Associate Counsel

cc: Susan Nash, Associate Director
Douglas J. Scheidt, Associate Director and Chief Counsel

Division of Investment Management
U.S. Securities and Exchange Commission

Thomas Selman, Executive Vice President
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August 24, 2011

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: FINRA Proposal to Adopt NASD Rules Regarding Communications with the Public as FINRA Rules 2210 and 2212 through 2216 (SR-FINRA-2011-035)

Dear Ms. Murphy:

The Investment Company Institute[1] welcomes the opportunity to express its views on proposed amendments to Financial Industry Regulatory Authority, Inc. ("FINRA") rules governing communications with the public.[2] The Proposed Final Rule would significantly change several requirements related to member communications with the public. Among other things, it would: (i) replace the existing categories of communications with three new communications categories; (ii) require member firms to file all retail communications concerning closed-end funds within ten business days of first use; (iii) codify interpretive guidance that conditionally excepts from prior principal approval any retail communication that is posted on an online interactive electronic forum; (iv) provide FINRA with authority to grant exemptions from the principal approval, pre-use and other filing requirements; (v) expressly permit the use of templates; and (vi) apply new disclosure requirements to public appearances.

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[1] The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding and otherwise advance the interests of funds, their shareholders directors, and advisers. Members of ICI manage total assets of $13.1 trillion and serve over 90 million shareholders.

[2] *See* FINRA Notice of Filing of Proposed Rule Change to Adopt FINRA Rules 2210, 2212, 2214, 2215, and 2216 in the Consolidated FINRA Rulebook, 76 Fed. Reg. 46870 (August 3, 2011) ("Proposed Final Rule") available at http://www.sec.gov/rules/sro/finra/2011/34-64984.pdf. *See also* FINRA Regulatory Notice No. 09-55 (September 2009) ("2009 Proposal"). *See also* Letter to 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 (commenting on the 2009 Proposal) ("2009 Letter").

We are pleased that FINRA addressed many of the concerns raised in our 2009 Letter and therefore support many elements of the Proposed Final Rule. We continue to be concerned, however, with several aspects of the Proposed Final Rule and accordingly recommend that FINRA revise the Proposed Final Rule before the Securities and Exchange Commission ("SEC") approves a final rule. Our views on the Proposed Final Rule are provided below. We also provide our views on how FINRA's regulation of social media could be improved.

I. Recommended Changes to the Proposed Final Rule

A. Content Standards

Public Appearances. Proposed Rule 2210(f) would apply new disclosure standards to public appearances[3] that include securities recommendations. We, along with several of our members, objected to this same requirement when it was put forth in the 2009 Proposal. In the Proposed Final Rule, FINRA stated that it disagreed with the comments that the disclosure requirements regarding recommendations would be impossible to monitor or supervise, stating that members that employ research analysts already must meet similar requirements under NASD Rule 2711 (the rule governing research analysts and research reports). We believe that FINRA's reliance on Rule 2711 is misplaced because the disclosure and related oversight obligations imposed by Rule 2711 differ significantly from those that would be imposed on public appearances under the Proposed Final Rule. Some of the more significant differences between Rule 2711 and the Proposed Final Rule are described below.

- The Proposed Final Rule would require a portfolio manager to disclose whether its employer was a manager or co-manager of a public offering of any securities of the recommended issuer within the past 12 months. Under Rule 2711, similar disclosure is required in research *reports* but not in a public appearance by a research analyst.[4]

- The Proposed Final Rule would require disclosure that the *member* or any associated person with the ability to influence the content of the communication has a financial interest in the securities being recommended. Rule 2711, in contrast, more narrowly circumscribes the required disclosure; it relates only to the personal financial interest of

[3] Under the Proposed Final Rule, the current provision defining public appearances would be eliminated and the substance of the definition and other requirements regarding public appearances would be moved to Rule 2210(f). To avoid creating the perception that public appearances are no longer subject to Rule 2210, we recommend including a cross reference to the public appearance provision in Rule 2210's definitional section.

[4] *See* Rule 2711(h)(2)(A). Under current IM-2210-1, this disclosure is required to appear in advertisements and sales literature but not with respect to public appearances.

the research analyst making the public appearance (and the financial interest of anyone in his or her household).[5]

- The Proposed Final Rule would require a member to provide the price of an equity security at the time the recommendation is made and to provide, or offer to furnish upon request, available investment information supporting the recommendation. Rule 2711 does not require any of these disclosures to be made in public appearances by research analysts.[6]

From what we can tell, FINRA has never before required such extensive disclosures in the context of public appearances by research analysts or other FINRA members. In our conversations with Institute members on the Proposed Final Rule, this element was repeatedly identified as the most troubling by far. In particular, a requirement to monitor spontaneous remarks of individuals for compliance with detailed and prescriptive disclosure requirements in venues, such as interviews or seminars, where much of the communication is conversational would be unworkable as a practical matter.[7] Further, as a general matter, it is inappropriate to mechanically apply to unscripted oral communications the same standards that apply to written materials or prepared oral remarks, the content of which generally is within the member's control. For these reasons, we strongly urge FINRA not to apply the proposed disclosure requirements regarding recommendations to public appearances.[8]

We would not object, however, to the imposition of a more general requirement that a person making a public appearance must disclose any of his or her actual, material conflicts of interest related to a particular recommendation of which the person knows or has reason to know at the time of the public appearance. Revising the requirement in this manner would more closely align the Proposed

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[5] Under current IM-2210-1, disclosure comparable to that which would be required under the Proposed Final Rule with respect to public appearances is required to appear in advertisements and sales literature but not with respect to public appearances.

[6] Under current IM-2210-1, the price of an equity security at the time the recommendation is made is not required in public appearances, advertisements, or sales literature.

The Proposed Final Rule also would require disclosure as to whether the member was making a market in the security being recommended at the time the communication was published or distributed. Under current IM-2210-1, this disclosure is required to appear in advertisements and sales literature but is not required with respect to public appearances.

[7] Consistent with our 2009 Letter, we do not object to the disclosures in the context of scripted public appearances (or retail communications or correspondence).

[8] In addition, we recommend that Rule 2210(f)(2) be eliminated because public appearances already are supervised under Rule 3010. FINRA does not offer any rationale for imposing what appears to be a largely duplicative, and thus unnecessary, requirement. Alternatively, we request that FINRA explain the rationale for adding this requirement to Rule 2210.

Final Rule's requirements with those of Rule 2711.[9] It also would seem to address the concern underlying the various proposed disclosure requirements – that the public should be made aware that conflicts of interest may exist – while providing the flexibility necessary to communicate that message within an unscripted environment.

Text Box Requirement. A fund currently is required to present its standardized performance information, maximum sales charge, and annual expense ratio in a prominent text box in print advertisements. We reiterate the view expressed in our 2009 Letter that FINRA should eliminate this presentation requirement because it is unnecessary to achieve the goal of ensuring that the required information is sufficiently prominent. Rather, FINRA should revise Rule 2210 to require funds to *prominently* present standardized performance, maximum sales charges, and expense ratios. Our recommended approach would help to ensure that certain key items of information are presented in a manner that promotes investor awareness while providing funds with more flexibility in designing their print retail communications. It also would make FINRA's requirements regarding print retail communications consistent with its requirements regarding other retail communications.[10]

FINRA states in the Proposed Final Rule that it disagrees with the recommendation that the text box requirement be eliminated for print advertisements and that it created this requirement "due to past abuses in which non-standardized performance was prominently displayed in print advertisements, while disclosures regarding standardized performance and expenses were placed in footnotes." We simply do not understand why a prominence requirement would not adequately address this concern while also having the benefits described above.

B. Filing and Principal Approval Requirements

Exemptive Authority. Proposed Rule 2210(b)(1)(E) would allow FINRA to grant exemptions from the principal pre-use approval requirements "for good cause shown after taking into consideration all relevant factors, provided that the exemption is consistent with the purposes of FINRA Rule 2210, the protection of investors, and the public interest." Proposed Rule 2210(c)(9) would provide for

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[9] *See* Rule 2711(h)(1)(C).

[10] We are pleased that FINRA responded to our technical comment intended to clarify that the text box requirement only applies to "print advertisements." *See* Proposed Final Rule at p. 65. We sought this clarification because the term "advertisement" would no longer be defined, potentially making the scope of the text box requirement unclear. If FINRA does not follow our recommendation to eliminate the text box requirement, for ease of compliance, we reiterate the recommendation from our 2009 Letter that FINRA incorporate the precise scope of the requirement in the rule itself.

similar exemptive authority from the pre-use and other filing requirements. Exemptions would be granted pursuant to FINRA's Rule 9600 Series.[11]

The Institute supports the proposed exemptive authority, which could allow for greater efficiency and cost savings (*e.g.,* if FINRA provided more flexibility with respect to the management of the great volume of communications generated from the use of social media). In order to use FINRA's resources efficiently and assist our members, we recommend that the new authority be exercised in a way that assists as many member firms as possible. This could be accomplished by timely announcing in a regulatory notice the availability to all member firms of exemptive relief already individually granted to some number of firms.[12] The Institute also recommends that FINRA provide periodic notification of new exemptive letters through FINRA's weekly email update or some other public venue.[13]

In any event, in order to assist the industry's understanding of FINRA's planned exercise of this authority, any final release should include a more fulsome discussion of the new exemptive authority by addressing, for example, under what circumstances and how FINRA likely would codify exemptive letters, and the circumstances under which requests for confidential treatment would be granted.

Communications with the Media. The Proposed Final Rule would reinstate the filing exclusion for press releases that are made available only to members of the media. The Proposed Final Rule does not explicitly address how firms should treat other types of communications with the media. Firms often provide background and educational materials concerning products, services, and market information to the media with the purpose of educating the media on investing concepts and alerting

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[11] FINRA's current exemptive authority with respect to Rule 2210 is very limited. Under current requirements, a FINRA member only may seek exemptive relief from Rule 2210's requirement for pre-filing for a member's first year of existence when, for example, a member is the subject of a reorganization and is substantially similar to the predecessor entity. A member must file an application with a detailed statement of the grounds for granting the exemption, which is then reviewed by FINRA staff and followed by a written decision setting forth the staff's conclusions. Decisions are made publicly available unless the staff determines that the applicant has shown good cause for treating the application or decision as confidential. A member may appeal the staff's decision, which appeal would be decided by the National Adjudicatory Council. Members are required to file the appeal with FINRA's Office of General Counsel with notice of the appeal given to the appropriate FINRA staff. *See* FINRA Rules 9610, 9620 and 9630.

[12] This could be modeled on the type of guidance FINRA recently provided in FINRA Regulatory Notice 10-06, Social Media Web Sites: Guidance on Blogs and Social Networking Web Sites (January 2010) ("2010 Guidance") and in FINRA Regulatory Notice 11-39, Social Media Web Sites and the Use of Personal Devices for Business Communications (August 2011) ("2011 Guidance").

[13] Our recommendations regarding enhanced transparency with respect to the parameters of the new exemptive authority is consistent with a recent Government Accountability Office ("GAO") study which recommended that FINRA develop sufficient mechanisms to notify all fund companies about changes in its interpretations for fund advertising. *See United States Government Accountability Office Report to Congressional Committees: Mutual Fund Advertising: Improving How Regulators Communicate New Rule Interpretations to Industry Would Further Protect Investors* (July 2011), available at http://gao.gov/mobile/products/GAO-11-697.

them to new research, products, and services. While we are pleased that many of these documents would be excluded from filing because they "do not make any financial or investment recommendation or otherwise promote a product or service of the member"[14] others, such as talking points on a new product, would not necessarily be excluded from filing. Accordingly, we recommend that FINRA clarify that communications, such as talking points, provided solely to the media may be treated as "correspondence."[15] This approach would avoid unnecessary filing and review costs.

Templates. Proposed Rule 2210(c)(7) would exclude from filing two types of templates: (i) retail communications that previously have been filed with FINRA and that are to be used without material change; and (ii) 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.

We recommend that FINRA additionally 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 investment companies to the public; and (ii) is independent of the investment company and its affiliates.[16] Our understanding is that under current FINRA staff practice, any time a fund changes the description of an investment strategy in a fact sheet, that fact sheet must be re-filed with FINRA. Many of our members produce fact sheets for a great number of funds provided through retirement and other platforms. When the only change to the information in that type of communication is provided by an independent, recognizable entity (*e.g.,* third party commentary), we do not believe filing that piece is necessary for investor protection. Eliminating these filings will result in substantial cost savings for many firms and allow FINRA to allocate it resources more efficiently.

C. Supervision of Internal Communications

Supplementary Material .01 would be added to Rule 2210 and would provide that a member's internal written (including electronic) communications that are intended to educate or train registered persons about the products or services offered by the member are considered "institutional communications" subject to Rule 2210(a)(3). This means that under the Proposed Final Rule, internal communications would be subject to: (i) Rule 2210's general content standards; (ii) principal review prior to use (unless the member provides for the education and training of associated person's as to the firm's procedures governing institutional communications, documentation of such

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[14] *See* Rule 2210(c)(7)(C).

[15] We are seeking this clarification because Rule 2210's definition of "correspondence" rests on communications distributed to "retail investors," which categorization does not seem to capture members of the media.

[16] We based this on the language on the definition of "ranking entity" in proposed Rule 2212.

education and training, and surveillance and follow-up to ensure that such procedures are implemented and adhered to); and (iii) a requirement that evidence that these supervisory procedures have been implemented and carried out be maintained and made available to FINRA upon request.

This new proposed standard of supervision was not part of the 2009 Proposal, and FINRA offers no rationale for instituting this new requirement. We believe 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.[17] In addition, it simply does not make sense for *internal* communications to be subject to the review requirements of Rule 2210, a rule for "Communications with the *Public*" (emphasis added). We therefore recommend that FINRA eliminate this part of the Proposed Final Rule.

II. Areas of Support

A. Content Standards

Sales Charge and Expense Disclosure. In a change from the 2009 Proposal, proposed Rule 2210(d)(5) would maintain the current standard requiring that disclosure of the maximum sales charge and total operating expense ratio in certain retail communications be based on the fund's prospectus.

We strongly support the modification in the Proposed Final Rule. In the 2009 Proposal, FINRA had proposed requiring these communications to disclose the maximum sales charge and total operating expense ratio as stated in the fund's prospectus or annual report, whichever was more current. As we pointed out in our 2009 Letter, to require funds to sometimes provide expense information from one source and other times from a second source will require them to significantly revamp their systems and, in some cases, obtain a second feed from a third party vendor at substantial cost.[18] Enormous administrative burdens would have been placed on all firms, regardless of whether expense information is generated in-house or obtained from a third party. This particularly would have been the case in instances where this information appears in a communication for a large number of funds, such as in materials prepared for fund marketplaces. In addition, we were concerned that requiring the source of expense information to be repeatedly modified inevitably would lead to inadvertent processing errors, a result that would not serve the best interests of investors. We therefore strongly support the revised

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[17] Rule 3010 provides, in part, that "[e]ach member shall establish and maintain a system to supervise the activities of each registered representative, registered principal, and other associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable NASD Rules."

[18] One feed would be required to obtain expense information that appears in prospectuses and a second feed would be required to obtain information that appears in annual reports.

approach requiring sales charges and expense information in certain retail communications to be based on the fund's prospectus.

B. Filing and Principal Approval Requirements

The Proposed Final Rule would eliminate the current NASD definitions of: (i) advertisement; (ii) sales literature; (iii) institutional sales material; (iv) public appearance; (v) independently prepared reprint; and (vi) correspondence. The Proposed Final Rule also would eliminate the current NYSE definitions of: (i) communication; (ii) advertisement; (iii) market letter; and (iv) sales literature. The definitions would be replaced by the following three communication categories:

- "Institutional communication" would include any written (including electronic) communication that is 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 within any 30 calendar-day period. "Retail investor" would include any person other than an institutional investor, regardless of whether the person has an account with a member firm; and

- "Correspondence" would include any written (including electronic) communication that is distributed or made available to 25 or fewer retail investors within any 30 calendar-day period.

Retail Communications. In a change from the 2009 Proposal, FINRA has proposed excluding from the filing and principal approval requirements communications to retail investors that do not make any financial or investment recommendation or otherwise promote a product or service of the member. The Institute strongly supports this change, which is consistent with Institute comments on the 2009 Proposal. This feature of the rule is critical because otherwise, communications such as periodic account statements, notices of changes in required minimum account balances, and privacy statements could be considered to be retail communications subject to filing and principal approval. Subjecting such communications to filing and principal approval requirements would generate enormous costs without any corresponding benefit.

Interactive Retail Communications. We support proposed Rule 2210(b)(1)(D), which would except from the principal approval requirements any retail communication that is posted on an online interactive electronic forum, provided that the member supervises and reviews such communications in the same manner as required for supervising correspondence. This is a good first step in modernizing the regulation of social media.[19] It allows firms the flexibility to design procedures for overseeing

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[19] This provision codifies a current interpretation of the rules governing communications with the public set forth in the 2010 Guidance.

interactive communications appropriate to each firm's business model and responsive to evolving technology.[20]

Thirty-Day Measuring Period. In another change from the 2009 Proposal, FINRA will use a 30-day calendar period against which to count the number of persons who have received a communication so as to determine whether to categorize it as "correspondence" or a "retail communication." This delineation is important because, in general, retail communications need to be filed with FINRA while correspondence does not. The Institute supports this aspect of the Proposed Final Rule, which will permit our members (particularly our smaller members) to continue to manage the volume of their correspondence in a way that limits their filing obligations.

Market Letters. In another change from the 2009 Proposal, FINRA would not require prior principal approval of market letters. We believe this is an important change and support it. It will permit firms to send out market letters to their retail customers in a timely fashion, a practice FINRA and our members have recently endorsed, particularly given the recent market volatility.[21]

Press Releases. Proposed Rule 2210(c)(7)(H) would preserve the current filing exclusion for press releases made available only to members of the media. This is a change from the 2009 Proposal (which would have eliminated this filing exclusion) and will permit firms to continue to determine whether to provide a press release only to the press or to make it available more widely (*e.g.,* posting it to their websites). The proposed approach would avoid unnecessarily increasing filing costs for many FINRA member firms and we therefore support it.

Closed-End Funds. Proposed Rule 2210(c)(3)(A) 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 ("IPO"). We support the proposed change. Investors should have the same protections concerning retail communications about closed-end funds that are distributed after the IPO as those distributed during the IPO.

Templates. Proposed Rule 2210(c)(7) would exclude from filing two types of templates: (i) retail communications that previously have been filed with FINRA and that are to be used without material change; and (ii) 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-

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[20] As already discussed, the Institute also supports FINRA's proposed new exemptive authority, which presumably would permit it to exclude from filing and principal approval requirements other types of communications in response to changes in technology.

[21] *See* FINRA Regulatory Notice 09-10 (February 2009) (permitting post-use principal approval of market letters, based on the recognition that pre-use approval might inhibit the timely flow of information to traders and investors who base their investment decisions on timely market analysis).

narrative information. We believe that excluding these types of retail communications from filing will result in cost savings without sacrificing any investor protections and therefore support the two filing exclusions.

Listing of Products or Services. The Institute supports the proposed filing exclusion in proposed Rule 2210(c)(7)(L) for communications that refer to types of investments solely as part of a listing of products or services. It seemingly would apply to, among other documents, a retirement plan enrollment guide, which includes a listing of a plan's investment options. We do not believe investor protection would be enhanced in any way by a requirement to file a document with this type of content.

C. Recordkeeping Requirements

Proposed Rule 2210(b)(4)(A)(ii) provides that a member would not have to keep records of the person who *distributed* a retail communication or institutional communication, if the records included either the registered principal who approved the communication, or the person who prepared the communication. The Institute strongly supports the proposed approach, which seemingly recognizes (unlike the 2009 Proposal) that keeping records of persons distributing communications would be onerous for member firms. For example, it would be particularly difficult to track everyone who distributes a communication made available as a template and used by multiple advisers or retirement plan sponsors.

III. Other Matters

A. Social Media

Many members of the fund industry leverage social media to communicate with the public, and others are exploring doing so.[22] Social media presents funds with an opportunity to communicate with shareholders and the public in a more dynamic and interactive way than was possible in the past. For example, before the advent of social media, a fund typically would publicize a research report by means of a press release and posting on the firm's website. Social media provides the opportunity to additionally post the report on Facebook, tweet about it over Twitter, and have a portfolio manager discuss its findings on YouTube. Third parties may disseminate this information even more broadly. The benefits of social media include educating shareholders, enhancing a fund's brand, responding to consumer demand, increasing the visibility of portfolio managers, and assisting in sales efforts. Therefore, it is critical to the fund industry that overly prescriptive requirements not jeopardize the industry's efforts to effectively communicate through new media that are quickly becoming more popular than old communications media.

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[22] *See, e.g.,* kasina, *Harnessing Social Media To Drive Business Results* (2011), showing that the number of asset managers active in at least one social media channel rose to 80% in 2011 from 48% in 2010.

FINRA states that it will consider further guidance or rulemaking as issues related to social media arise, but that the current rulemaking is not the appropriate vehicle to address all issues raised by new technologies. We believe that a longer-term, comprehensive approach that is based on a strong understanding of evolving media and technological capabilities, and that considers the costs and benefits associated with regulation, is worthy of pursuit. This effort should include an examination of such complex issues as how regulatory requirements can be squared with the lack of clear demarcation between personal and professional communications, and how the exploding use of electronic media networks along with unified communications (video, voice, and data) make retention of every record related to "business as such" impractical, unsustainable, and costly.[23]

As part of this effort, regulators should consider the advantages of a more flexible regulatory regime rather than requiring broker-dealers to supervise and maintain a record of *every* communication related to business as such, without weighing the costs and benefits of such requirements. Rather, the Institute and its members would like to work with FINRA and SEC staff to modernize requirements in a way that permits the use of today's and tomorrow's technologies in a cost-effective way consistent with investor protection.[24]

To develop a new framework that provides regulatory clarity and accommodates the use of communications media over the long term, FINRA should continuously engage with the industry more broadly, and leverage the industry's extensive experience with such media.

B. Need for a Reasonable Transition Period

While FINRA has not proposed a transition period in connection with the proposed requirements, we are pleased that it will consider members' needs to adopt new policies and procedures necessary to comply with the new rules. Therefore, consistent with, and for the same reasons articulated in our 2009 Letter, we recommend that FINRA provide a compliance date for the rule changes of ten business days after the second calendar quarter end following the adoption of the final rule changes.

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[23] *See, e.g.,* 2010 Guidance and 2011 Guidance (discussing recordkeeping requirements in the context of social media). The technology infrastructure required to comply across all operating systems and networks is costly as is the vast amount of storage capacity required.

[24] We recognize that member firms must comply with both FINRA rules and SEC rules regarding recordkeeping. We would seek to work with the SEC to effectuate changes to Securities Exchange Act Rule 17a-4 to develop a reasonable framework for recordkeeping related to electronic communications.

The Institute appreciates the opportunity to comment on this significant proposal. If you have any questions or need additional information, please contact me at (202) 218-3563.

Sincerely,

/s/

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