FINRA Rule 2210 – Communications with the Public

Teleconference

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Presenter:

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1. Presentation

2. Frequently Asked Questions about the FINRA Communication Rules

FINRA Communications Rules

Bradley Berman

October 20, 2016
Rule 2210 governs three categories of “communications” by FINRA member firms:

- Institutional communications;
- Retail communications; and
- Correspondence

- The rule sets forth requirements relating to approval, review and recordkeeping of communications; filing requirements and review procedures; and content standards
Do the Rule’s requirements distinguish between communications that relate to registered or exempt securities, structured products or instruments that may not be viewed as securities?

- In almost all cases, no
- The Rule focuses mainly on the nature of the addressee of the communication, rather than on the type of instrument described in the communication
- Communications made to an investor regarding a security or regarding a product that, in some circumstances, may not be viewed as a security, will be covered by the Rule
- Consequently, communications to investors regarding registered securities, exempt securities or non-securities are subject to the Rule’s requirements
FINRA is in the process of amending Rule 2210

- May 25, 2016: Initial proposed amendments to the filing requirements of Rule 2210
- June 15, 2016: Federal Register publication of proposed amendments
- July 19, 2016: FINRA extended the time period for the SEC to either approve, disapprove or institute proceedings to determine whether to approve or disapprove to September 13, 2016
- September 1, 2016: FINRA files a proposed partial amendment to the initial proposed changes, in which it reversed the proposed amendments to the pre-use filing requirements for new member firms
- September 13, 2016: Federal Register publication of SEC approval of FINRA’s revised amendments
  - Comment period closed on October 11, 2016
Retail communication: any written (including electronic) communication that is distributed or made available to more than 25 retail investors within any 30 calendar day period

Examples:
- Product brochures provided to retail investors;
- Any non-password protected website or communication by means of unrestricted social media;
- A communication distributed or made available by a firm consisting of a reprint of an article from an independent publication, or a report published by an independent research firm, to more than 25 retail investors within a 30 calendar day period;
- Telemarketing and other sales scripts used with more than 25 retail investors within a 30 calendar day period

As one might expect, retail communications are subject to the highest degree of regulation under the rule
• **Correspondence**: Any written (including electronic) communication that is distributed or made available to 25 or fewer retail investors within any 30 calendar day period

• **Institutional communication**: Any written (including electronic) communication that is distributed or made available only to institutional investors, but does not include a member’s internal communications
**Retail investor:** Any person other than an institutional investor, regardless of whether the person has an account with a member.

**Institutional investor:** Any:

(A): • Bank, savings and loan association, insurance company or registered investment company;

• Investment adviser registered either with the Securities and Exchange Commission (SEC) under Section 203 of the Investment Advisers Act of 1940 or with a state securities commission (or any agency or office performing like functions); or

• Other person (whether a natural person, corporation, partnership, trust or otherwise) with total assets of at least $50 million;

• Regardless of whether any of the persons above has an account with a member.
(B) governmental entity or subdivision thereof;

(C) employee benefit plan, or multiple employee benefit plans offered to employees of the same employer, that meet the requirements of Section 403(b) or Section 457 of the Internal Revenue Code and in the aggregate have at least 100 participants, but does not include any participant of those plans;

(D) qualified plan, as defined in Section 3(a)(12)(C) of the Securities Exchange Act of 1934 (Exchange Act), or multiple qualified plans offered to employees of the same employer, that in the aggregate have at least 100 participants, but does not include any participant of those plans;

(E) FINRA member or registered person of that member; and

(F) person acting solely on behalf of any such institutional investor
“No member may treat a communication as having been distributed to an institutional investor if the member has reason to believe that the communication or any excerpt thereof will be forwarded or made available to any retail investor”

- A firm does not have an obligation to inquire whether an institutional communication will be forwarded to retail investors each time that that communication is distributed;
- Firms should have policies and procedures in place reasonably designed to prevent institutional communications from being forwarded to retail investors, and make appropriate efforts to implement such policies and procedures
  - Those procedures may include the use of legends warning the recipient of an institutional communication that it is for institutional investor use only
- To the extent that a firm becomes aware that a recipient institutional investor is forwarding or making available institutional communications to retail investors, the firm must treat future communications to the institutional investors as retail communications until it reasonably concludes that the improper practice has ceased
The Rule’s approval, review and record keeping requirements vary depending on the type of communication. Retail communications are subject to the most stringent requirements. For example, members generally must have a registered principal approve all advertisements, sales literature and independently prepared reprints prior to use. This pre-use approval requirement does not apply to:

- institutional sales material;
- public appearances; or
- correspondence, unless it is sent to 25 or more existing retail customers within a 30 calendar day period and includes an investment recommendation or promotes a product or service of the firm.
Timing: Retail communications must be reviewed before the earlier of their first use or its filing with the FINRA Advertising Regulation Department.

Who must review: An appropriately qualified registered principal of the firm must approve each retail communication. A Series 16 Supervisory Analyst may, however, review certain retail communications.

Exceptions from principal pre-use approval: The principal pre-use approval requirements do not apply to the following categories of retail communications, provided that the member firm supervises and reviews the communications in the same manner as required under Rule 3010(b):

- Any retail communication that is excepted from the definition of “research report” under Rule 2241(a)(11)(A), unless the communication makes any financial or investment recommendation;
- Any retail communication that is posted on an online interactive electronic forum; and
- Any retail communication that does not make any financial or investment recommendation or otherwise promote a product or service of the member.

In addition, if (i) another member has filed the retail communication with the Department and has received a letter from the Department stating that it appears to be consistent with applicable standards; and (ii) the member using it in reliance upon the previous filing and approval has not materially altered it and will not use it in a manner that is inconsistent with the conditions of the Department’s letter, then the retail communication does not have to be pre-approved by a registered principal.
The member firm must have written procedures for review of institutional communications by a principal. Those procedures must be reasonably designed to ensure that institutional communications comply with applicable standards. If the procedures do not require review of all institutional communications, they must include provision for the education and training of associated persons regarding these communications.

• FINRA has the right to request evidence that these supervisory procedures have been implemented and carried out.

**Internal communications:** Firms still must supervise these communications, including a firm’s internal communications that train or educate registered representatives. In this regard, a firm’s supervisory policies and procedures concerning internal training and education materials must be reasonably designed to ensure that such materials are fair, balanced and accurate.
The recordkeeping requirements apply to retail and institutional communications. Members must retain retail or institutional communications for three years from the date of last use. The records must include:

- A copy of the communication and the dates of first and (if applicable) last use;
- The name of any registered principal who approved the communication and the date that approval was given;
- In the case of a retail communication or institutional communication that is not approved prior to first use by a registered principal, the name of the person who prepared or distributed the communication;
- Information concerning the source of any statistical table, chart, graph or other illustration used in the communication; and
- For retail communications that rely on the exception from pre-approval for retail communications previously filed with, and approved by, the Department, the name of the firm that filed the retail communication with the Department and a copy of the Department review letter

“Business as such”: Rule 2210 and Exchange Act Rule 17a-4(b)(4) require a firm to retain records that relate to its “business as such.” Neither FINRA nor the SEC have defined this term. As a result, firms retain records of virtually all communications.
The Rule’s filing requirements depend on the type of communication and whether the firm is a new member. The type of communication will affect whether there is a “pre-use” or “concurrent with use” filing requirement.
Only retail communications are subject to the Rule’s filing requirements. Correspondence and institutional communications are not subject to any filing requirement with FINRA.

**Pre-Use; New Member Firms:** A new FINRA member firm must file with the Department, at least 10 business days prior to its first use, any retail communication that is published or used in any electronic or other public media, including any generally accessible website, newspaper, magazine or other periodical, radio, television, telephone or audio recording, video display, signs or billboards, motion pictures, or telephone directories (other than routine listings).

- Department approval is not required once 10 business days have passed since the filing.

“**New member firms**”: The period begins on the date when FINRA’s Central Registration Depository shows that FINRA membership has become effective and ends one year later.

**Exceptions to this pre-use filing rule for new member firms for underwriter free writing prospectuses:** Any retail communication of a new member firm that is a free writing prospectus that has been filed with the SEC under Securities Act Rule 433(d)(1)(ii) may be filed within 10 business days of first use rather than 10 business days prior to first use.
All member firms must file the following retail communications with the Department at least 10 business days prior to first use or publication and not publish or circulate them until any changes specified by the Department have been made:

- Retail communications concerning registered investment companies (including mutual funds, exchange-traded funds, variable insurance products, closed-end funds and unit investment trusts) that include or incorporate performance rankings or performance comparisons of the investment company with other investment companies when the ranking or comparison category is not generally published or is the creation, either directly or indirectly, of the investment company, its underwriter or an affiliate (together with a copy of the data on which the ranking or comparison is based);

- Retail communications concerning security futures, with the exception of (i) retail communications concerning security futures that are submitted to another self-regulatory organization having comparable standards pertaining to such retail communications; and (ii) retail communications in which the only reference to security futures is contained in a listing of the services of a member; and

- [Retail communications concerning bond mutual funds that include or incorporate bond mutual fund volatility ratings]
  - Proposed to be removed by the Rule 2210 amendments
Filing Requirements – Concurrent With Use

The following must be filed with the Department within 10 business days of first use or publication (“concurrent with use”):

• Retail communications concerning registered investment companies other than those subject to the pre-use filing requirements;
  • The proposed amendment to Rule 2210(c)(3)(A) will only require the filing of retail communications that promote a specific registered investment company or family of registered investment companies. Generic investment company retail communications will no longer be subject to a filing requirement.
  • Generic example: a retail communication that describes different mutual fund types and features but does not discuss the benefits of a specific fund or family
  • The requirement that a copy of a fund performance or ranking used as backup material for a retail communication that includes a fund performance or ranking will be eliminated; this information is easily available online
• Retail communications concerning public direct participation programs;
• [Any template for written reports produced by, or retail communications concerning, an investment analysis tool];
  • Proposed to be removed by the Rule 2210 amendments
  • Investment analysis tools are interactive technological tools that produce simulations and statistical analyses that present the likelihood of various investment outcomes
  • FINRA believes that the content standards and a requirement that FINRA members provide access to the tools upon request are sufficient investor protection and that the filing requirement is no longer necessary
• Any retail communication concerning collateralized mortgage obligations registered under the Securities Act;
• Any retail communication concerning any security that is registered under the Securities Act and that is derived from or based on a single security, a basket of securities, an index, a commodity, a debt issuance or a foreign currency (“registered structured products”), except (i) retail communications already subject to the pre-use filing requirements or (ii) the retail communications described in the four bullet points above
  • Note that retail communications for structured products within an exemption from registration, such as Section 3(a)(2), or structured certificates of deposit, are not subject to this concurrent with use filing requirement
Department approval is not required for concurrent with use filings
These communications are excluded from the concurrent with use filing requirements:

- Retail communications that previously have been filed with the Department and that are to be used without material change;
- Retail communications that are based on templates that were previously filed with the Department the changes to which are limited to updates of more recent statistical or other non-narrative information;
  - The proposed amendment to Rule 2210(c)(7)(B) would expand the template exclusion to allow members to include updated non-predictive narrative descriptions of market events during the period covered by the communication and factual descriptions of portfolio changes, as well as updated information sourced from a registered investment company’s SEC filings
- Retail communications that do not make any financial or investment recommendation or otherwise promote a product or service of the member;
- Retail communications that do no more than identify a national securities exchange symbol of the member or identify a security for which the member is a registered market maker;
• Retail communications that do no more than identify the member or offer a specific security at a stated price;
• Prospectuses, preliminary prospectuses, fund profiles, offering circulars and similar documents that have been filed with the SEC or any state, or that are exempt from such registration, and free writing prospectuses that are exempt from filing with the SEC, except that an investment company prospectus published under Securities Act Rule 482 and a free writing prospectus that is required to be filed with the SEC under Securities Act Rule 433(d)(1)(ii) will not be considered a prospectus for purposes of this exclusion;
• The proposed amendments to Rule 2210(c)(7)(F) would expand the exemption to cover investment company shareholder reports and also clarify that “similar offering documents concerning securities offerings that are exempt from SEC and state registration requirements” are within the exemption
  • FINRA views, and has interpreted, this exemption to cover issuer-prepared offering documents concerning securities offerings that are exempt from registration
  • FINRA currently requires members to file the management’s discussion of fund performance portion (“MDFP”) of a registered investment company’s shareholder report if that report is distributed or made available to prospective investors
• By excluding from the filing requirements annual and semi-annual shareholder reports, the MDFP filing requirement will be eliminated
Retail communications prepared in accordance with Section 2(a)(10)(b) of the Securities Act (tombstones), or any rule thereunder, such as Rule 134, and announcements as a matter of record that a member has participated in a private placement, unless the retail communications are related to publicly offered direct participation programs or securities issued by registered investment companies;

Press releases that are made available only to members of the media;

Any reprint or excerpt of any article or report issued by a publisher, provided that:

• The publisher is not an affiliate of the member using the reprint or any underwriter or issuer of a security mentioned in the reprint that the member is promoting;

• Neither the member using the reprint nor any underwriter or issuer of a security mentioned in the reprint has commissioned the reprinted article or report; and

• The member using the reprint has not materially altered its contents except as necessary to make the reprint consistent with applicable regulatory standards or to correct factual errors;
- Correspondence;
- Institutional communications;
- Communications that refer to types of investments solely as part of a listing of products or services offered by the member;
- Retail communications that are posted on an online interactive electronic forum; and
- Press releases issued by closed-end investment companies that are listed on the New York Stock Exchange (NYSE) under Section 202.06 of the NYSE Listed Company Manual (or any successor provision).
There are general and specific content standards. The general content standards that apply to all communications are:

- **All** member communications must be based on principles of fair dealing and good faith, must be fair and balanced, and must provide a sound basis for evaluating the facts in regard to any particular security or type of security, industry, or service
  - No member may omit any material fact or qualification if the omission, in light of the context of the material presented, would cause the communications to be misleading
- No member may make any false, exaggerated, unwarranted, promissory or misleading statement or claim in any communication
  - No member may publish, circulate or distribute any communication that the member knows or has reason to know contains any untrue statement of a material fact or is otherwise false or misleading
- Information may be placed in a legend or footnote only in the event that such placement would not inhibit an investor’s understanding of the communication
- Members must ensure that statements are clear and not misleading within the context in which they are made, and that they provide balanced treatment of risks and potential benefits. Communications must be consistent with the risks of fluctuating prices and the uncertainty of dividends, rates of return and yield inherent to investments
- Members must consider the nature of the audience to which the communication will be directed and must provide details and explanations appropriate to the audience
Communications may not predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast; provided, however, that this paragraph does not prohibit:

- A hypothetical illustration of mathematical principles, provided that it does not predict or project the performance of an investment or investment strategy;
- An investment analysis tool, or a written report produced by an investment analysis tool, that meets the requirements of FINRA Rule 2214; and
- A price target contained in a research report on debt or equity securities, provided that the price target has a reasonable basis, the report discloses the valuation methods used to determine the price target, and the price target is accompanied by disclosure concerning the risks that may impede achievement of the price target.

Can comparisons be used in any communications?

- Yes, provided that any comparison between investments or services in retail communications must disclose all material differences between them, including (as applicable) investment objectives, costs and expenses, liquidity, safety, guarantees or insurance, fluctuation of principal or return, and tax features.
Excepted documents:
• Prospectuses, preliminary prospectuses, fund profiles and similar documents that have been filed with the SEC, and free writing prospectuses that are exempt from filing with the SEC, are not subject to the Rule’s content standards

Exception to the exception:
• Broadly disseminated underwriter free writing prospectuses are not within this exception
A recent FINRA case involving internal use only materials violating the FINRA content requirements:

- A FINRA member made available to its sales force internal use only documents regarding a complex trust security
- FINRA said that those documents did not contain adequate descriptions of the product
- Nor did the materials contain sufficient risk factors, particularly with respect to the possibility of a customer losing a significant percentage of principal
- Materials were not fair and balanced
- The FINRA member violated NASD Rule 2211(d) (the precursor to Rule 2210)

Under Rule 2210, internal communications are excluded from the definition of institutional communication. However, the supervisory policies and procedures of Rule 3110 concerning internal training materials must be reasonably designed to ensure that such materials are fair, balanced and accurate (FINRA Notice 12-29).
**Backtested, or hypothetical historical, information:** FINRA has provided guidance on backtested data included in institutional communications relating to exchange-traded products.\(^1\) FINRA’s approval of the use of backtested data in these materials is limited to a narrow set of circumstances. In its guidance, FINRA reiterated its historic position that the presentation of backtested data to retail investors does not comply with its disclosure standards. FINRA also warned that the backtested data should not be given excess weight in a recommendation to an investor.

In discussions with counsel, FINRA reiterated its position against the use of backtested data in retail communications relating to structured products (not just exchange-traded products). In institutional communications relating to structured products, FINRA indicated that its application of the content standards of Rule 2210(d) to backtested data would not be applicable in the same manner as to retail communications. Consequently, the use of backtested data may be appropriate in institutional communications relating to structured products, at the discretion of the broker-dealer.

Backtested data could be included in the filed free writing prospectus of an issuer that is affiliated with the member – FINRA has indicated that they would not extend their jurisdiction to an issuer free writing prospectus of this type.

Backtested information: Compare the SEC’s view:

• In the SEC’s April 2012 sweep letter regarding structured notes disclosure, the Office of Capital Market Trends asked issuers whether they have disclosed hypothetical historical information and how it was presented in a balanced manner.

• Most issuers responded that their presentation was balanced and that there was a clear delineation between historical and hypothetical historical information in the disclosure.
All retail communications and correspondence must:

• Prominently disclose the name of the member, or the name under which the member’s broker-dealer business primarily is conducted as disclosed on the member’s Form BD, and may also include a fictional name by which the member is commonly recognized or which is required by any state or jurisdiction;

• Reflect any relationship between the member and any non-member or individual who is also named; and

• If it includes other names, reflect which products or services are being offered by the member
**Websites:** Each member firm’s website must include a readily apparent reference and hyperlink to FINRA’s BrokerCheck page
- The reference and link must be included on the initial webpage that the member intends to be viewed by retail investors and any other webpage that includes a professional profile of one or more registered persons who conduct business with retail investors
- The rule applies to a separate retail website of a branch office or branch office personnel, which would be treated as separate websites of the member
- The hyperlink and reference would be required for all webpages where a branch office registered person’s profile information appears, including webpages on the member’s website and webpages on the branch office’s website
- The requirement does not apply to a member that does not provide products or services to retail investors and a directory or list of registered persons limited to names and contact information
- A hyperlink and reference included in a footer would not be “readily apparent”
Testimonials: If a testimonial in a communication concerns a technical aspect of investing, the person making the testimonial must have the knowledge and experience to form a valid opinion.

Retail communications or correspondence providing any testimonial concerning the investment advice or investment performance of a member or its products must prominently disclose the following:

- The fact that the testimonial may not be representative of the experience of other customers;
- The fact that the testimonial is no guarantee of future performance or success; and
- If more than $100 in value is paid for the testimonial, the fact that it is a paid testimonial.
All retail communications that include a recommendation of securities must have a reasonable basis for the recommendation.

In any communication, a member must provide, or offer to furnish upon request, available investment information supporting the recommendation. When a member recommends a corporate equity security, the member must provide the price at the time the recommendation is made.

**Required Information in a communication including a recommendation:** All retail communications that include a recommendation of securities must disclose the following *conflicts of interest*, to the extent applicable:

- That at the time the communication was published or distributed, the member was making a market in the security being recommended, or in the underlying security if the recommended security is an option or security future, or that the member or associated persons will sell to or buy from customers on a principal basis;
• That the member or any associated person that is directly and materially involved in the preparation of the content of the communication has a financial interest in any of the securities of the issuer whose securities are recommended, and the nature of the financial interest (including, without limitation, whether it consists of any option, right, warrant, future, long or short position), unless the extent of the financial interest is nominal; and

• That the member was manager or co-manager of a public offering of any securities of the issuer whose securities are recommended within the past 12 months
A speaking engagement that constitutes a “public appearance” is subject to the content requirements

Public appearance: “speaking activities that are unscripted and do not constitute retail communications, institutional communications or correspondence”

- Public appearances are subject to the general content standards for communications (i.e., that they be fair and balanced and not include false or misleading statements)
- Scripts, slides, handouts or other written (including electronic) materials used in connection with public appearances are considered communications for purposes of the Rule

**Content requirement:** For public appearances by associated persons, if an associated person recommends a security in a public appearance, the associated person must have a reasonable basis for the recommendation. The associated person also must disclose, as applicable, the following **conflicts of interest:**

- That the associated person has a financial interest in any of the securities of the issuer whose securities are recommended, and the nature of the financial interest, unless the extent of the financial interest is nominal; and
- Any other actual, material conflict of interest of the associated person or firm of which the associated person knows or has reason to know at the time of the public appearance
Are the content standards applicable to a FINRA member’s proprietary index?

- Yes. The publication by a FINRA member of its proprietary index while the member knew or had reason to know that the index contained materially inaccurate information was a violation of Rule 2210(d)(1)(B)
Tweets and social media posts: What does FINRA say?

- They are retail communications
- Any non-password protected website or communication by means of unrestricted social media would be a retail communication
- A password-protected website limited to institutional investors would be an institutional communication

Are the FINRA filing requirements applicable to social media posts?

- Any retail communication by a member firm on an online interactive electronic forum is excluded from the filing requirements
What is an online interactive electronic forum?

- FINRA considers chat rooms, online seminars, and any portion of a blog or a social networking site such as Facebook, Twitter or LinkedIn that is used to engage in real-time interactive communications to be online interactive electronic forums

- The mere updating of a non-interactive blog (or any other firm web page) does not cause it to become an interactive electronic forum, even if the updating occurs frequently

Do the principal pre-use approval requirements apply to retail communications posted on an online interactive electronic forum?

- No

- In contrast, a static posting on an online interactive electronic forum, such as profile, background or wall information, is deemed to be an advertisement under Rule 2210 and therefore requires prior approval
  - Interactive content can be copied or forwarded and posted in a static forum, thus rendering it an advertisement
• To the extent that the communications relates to the member firm’s “business as such,” the record keeping requirements of the Securities Exchange Act and Rule 2210 would apply
  • If a firm’s or any of its associated person’s social media posting that is not considered relating to the firm’s business as such is replied to with a posting that does relate to the firm’s business as such, then the firm must retain records of that reply
  • Firms should archive the content of links in any business communication; FINRA may come looking for the content of those links in the future and the link may then be inactive
• Unscripted participation in an online interactive electronic forum such as a chat room or an online seminar is a “public appearance” under FINRA Rule 2210, and does not require prior approval by a registered principal
  • These public appearances are subject to the general content standards discussed earlier and member firms should supervise these interactive communications in a manner designed to ensure that the general content standards are not violated
• Retail communications that are posted on an online interactive electronic forum are not subject to the filing requirements.

• Social media postings could be “recommendations” that implicate the suitability rules.
  • If a social media site makes a communication that constitutes a recommendation widely available, then the suitability requirement must be applied to every customer or potential investor who then becomes a customer.

Does a member firm have to consider Rule 2210 for posts by third parties on the firm’s website?

• Generally, a third-party post on a website established by a firm or any of its personnel would not be considered a communication by the firm or its personnel. However, under certain circumstances, third-party posts could become attributable to the firm and considered communications with the public subject to the requirements of Rule 2210.
  • If the firm or any of its personnel involved themselves in the preparation of the content of the third-party post, or paid for the post, then the third-party post would be considered to be a communication with the public by the firm or its personnel under an entanglement theory.
  • Or if, after the third-party content was posted, the firm or its personnel explicitly or implicitly endorsed or approved the post, then, under an adoption theory, the post would constitute a communication with the public by the firm.
**FREQUENTLY ASKED QUESTIONS**  
**ABOUT THE FINRA COMMUNICATION RULES**

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**Understanding Financial Industry Regulatory Authority, Inc. Rule 2210, Communications with the Public**

**What is Rule 2210, and what does it require?**

Rule 2210 governs three categories of “communications” by FINRA member firms:

- Institutional communications;
- Retail communications; and
- Correspondence.

The Rule sets forth requirements relating to approval, review and recordkeeping of communications; filing requirements and review procedures; and content standards. The Rule became effective on February 4, 2013.¹

As discussed below, the Rule’s general content standards apply to all communications, and are meant to ensure communications that are fair, balanced and not misleading. Retail communications are subject to the highest degree of regulation under the Rule.

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¹ FINRA recently conducted a retrospective rule review process of Rule 2210. See FINRA Regulatory Notice 14-14 at http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p479810.pdf.

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**Do the Rule’s requirements distinguish between communications that relate to registered or exempt securities, structured products or instruments that may not be viewed as securities?**

In almost all cases, no. The Rule focuses mainly on the nature of the addressee of the communication, rather than on the type of instrument described in the communication. A communication made to an investor regarding a security or regarding a product that, in some circumstances, may not be viewed as a security, will be covered by the Rule. Consequently, communications to investors regarding registered securities, exempt securities or non-securities are subject to the Rule’s requirements.

**What is “correspondence”?**

“Correspondence” means any written (including electronic) communication that is distributed or made available to 25 or fewer retail investors within any 30 calendar day period.  

*Source: Rule 2210(a)(2)*

**What is a “retail communication”?**

“Retail communication” means any written (including electronic) communication that is distributed or made available to more than 25 retail investors within any 30 calendar day period.  

*Source: Rule 2210(a)(5)*
What is an “institutional communication”?
An “institutional communication” means any written (including electronic) communication that is distributed or made available only to institutional investors, but does not include a member’s internal communications.

Source: Rule 2210(a)(3)

Is a sales script intended for use with retail customers a retail communication?
Yes. Telemarketing and other sales scripts used with more than 25 retail investors within a 30-day period are retail communications.

Who is a “retail investor”?
“Retail investor” means any person other than an institutional investor, regardless of whether the person has an account with a member.

Source: Rule 2210(a)(6)

Who is an “institutional investor”?
An “institutional investor” means any:

(A) • Bank, savings and loan association, insurance company or registered investment company;
• Investment adviser registered either with the Securities and Exchange Commission (the “SEC”) under Section 203 of the Investment Advisers Act of 1940 or with a state securities commission (or any agency or office performing like functions); or
• Other person (whether a natural person, corporation, partnership, trust or otherwise) with total assets of at least $50 million, regardless of whether the person has an account with a member;
(B) governmental entity or subdivision thereof;
(C) employee benefit plan, or multiple employee benefit plans offered to employees of the same employer, that meet the requirements of Section 403(b) or Section 457 of the Internal Revenue Code and in the aggregate have at least 100 participants, but does not include any participant of those plans;
(D) qualified plan, as defined in Section 3(a)(12)(C) of the Securities Exchange Act of 1934 (“Exchange Act”), or multiple qualified plans offered to employees of the same employer, that in the aggregate have at least 100 participants, but does not include any participant of those plans;
(E) FINRA member or registered person of that member; and
(F) person acting solely on behalf of any such institutional investor.

No member may treat a communication as having been distributed to an institutional investor if the member has reason to believe that the communication or any excerpt thereof will be forwarded or made available to any retail investor.

Source: Rule 2210(a)(4), 4512(c)

Does a firm have an obligation to inquire whether an institutional communication will be forwarded to retail investors each time that that communication is distributed?
No. Firms should have policies and procedures in place reasonably designed to prevent institutional communications from being forwarded to retail investors, and make appropriate efforts to implement those policies and procedures. Those procedures may include the use of legends warning the recipient of an
institutional communication that it is for institutional investor use only.

When a member is offering securities or other investments through another member, the inclusion of a legend would not be sufficient, in and of itself, if (for example) there is reason to believe that the other member is distributing the communication to retail investors. Absent such knowledge to the contrary, a member may reasonably rely on a legend restricting the usage of the communication to institutional investors in treating the communication as an institutional communication.


What if a firm becomes aware that an institutional communication is being forwarded by a recipient institutional investor to a retail investor?

To the extent that a firm becomes aware that a recipient institutional investor is forwarding or making available institutional communications to retail investors, the firm must treat future communications to the institutional investors as retail communications until it reasonably concludes that the improper practice has ceased.

Source: Notice 12-29

If a firm distributes or makes available a communication consisting of a reprint of an article from an independent publication, or a report published by an independent research firm, to more than 25 retail investors within a 30 calendar day period, is that communication a “retail communication”?

Yes.

If a firm uses social media or a website to communicate with investors, is that a retail communication?

Any non-password protected website or communication by means of unrestricted social media would be a retail communication. A password protected website limited to institutional investors would be an institutional communication.

Source: Notice 12-29

What is the difference between “correspondence” and “retail communications”?

The difference depends upon the number of retail investors to which the written materials are distributed or made available in a 30 calendar day period. If it is provided to 25 or fewer retail investors, the written materials are correspondence; if provided to more than 25 retail investors, the written materials are a retail communication.

Does the Rule impose any standards on the content of communications?

The communications rules include both general and specific content standards. Certain general standards apply to all communications, such as requirements that communications be fair and balanced, and provide a sound basis for evaluating the facts in regard to any particular security, industry or service, and prohibitions on omitting material facts whose absence would make the communication misleading. More particular content standards apply to specific issues or securities.
Approval, Review and Recordkeeping Requirements

The Rule’s approval, review and recordkeeping requirements vary depending on the type of communication. Retail communications are subject to the most stringent requirements. For example, members generally must have a registered principal approve all advertisements, sales literature and independently prepared reprints prior to use. This pre-use approval requirement does not apply to:

1. institutional sales material;
2. public appearances; or
3. correspondence, unless it is sent to 25 or more existing retail customers within a 30 calendar day period and includes an investment recommendation or promotes a product or service of the firm.

Retail Communications – Approval and Review

When must retail communications be approved by a registered principal?

Before the earlier of its first use or its filing with the FINRA Advertising Regulation Department (the “Department”).

Source: Rule 2210(b)(1)(A)

Who must approve a retail communication?

An appropriately qualified registered principal of the firm must approve each retail communication. However, a Series 16 Supervisory Analyst may, however, review the following retail communications:

- Research reports on debt and equity securities;
- Retail communications as described in FINRA Rule 2241(a)(11)(A) (list of research-related communications that do not fall within the definition of “research report” under FINRA Rule 2241); and
- Other research that does not meet the definition of “research report” under FINRA Rule 2241(a)(11), a provided that the Supervisory Analyst has technical expertise in the particular product area.

A Series 16 Supervisory Analyst may not approve a retail communication that requires a separate registration (such as retail communications concerning options, security futures or municipal securities) unless the supervisory analyst also holds the other registrations.

\footnote{FINRA Rule 2241(a)(11) defines a “Research Report” as any written (including electronic) communication that includes an analysis of equity securities of individual companies or industries (other than an open-end registered investment company that is not listed or traded on an exchange), and that provides information reasonably sufficient upon which to base an investment decision. Among other communications, this term does not include communications that are limited to the following: (i) discussions of broad-based indices; (ii) commentaries on economic, political or market conditions; (iii) technical analyses concerning the demand and supply for a sector, index or industry based on trading volume and price; (iv) statistical summaries of multiple companies’ financial data, including listings of current ratings; (v) recommendations regarding increasing or decreasing holdings in particular industries or sectors; or (vi) notices of ratings or price target changes, provided that the member simultaneously directs the readers of the notice to the most recent research report on the subject company that includes all current applicable disclosures required by this rule and that such research report does not contain materially misleading disclosure, including disclosures that are outdated or no longer applicable.}
Are there any exceptions to the principal pre-use approval requirements for retail communications?

Yes, for certain previously filed retail communications. If (i) another member has filed the retail communication with the Department and has received a letter from the Department stating that it appears to be consistent with applicable standards; and (ii) the member using it in reliance upon the previous filing and approval has not materially altered it and will not use it in a manner that is inconsistent with the conditions of the Department’s letter, then the retail communication does not have to be pre-approved by a principal.

What types of retail communications are excepted from the principal pre-use approval requirements?

The principal pre-use approval requirements do not apply to the following categories of retail communications, provided that the member firm supervises and reviews the communications in the same manner as required under FINRA Rule 3110(b)(4):

- Any retail communication that is excepted from the definition of “research report” under FINRA Rule 2241(a)(aa)(A), unless the communication makes any financial or investment recommendation;
- Any retail communication that is posted on an online interactive electronic forum; and
- Any retail communication that does not make any financial or investment recommendation or otherwise promote a product or service of the member.

What is an online interactive electronic forum?

FINRA considers chat rooms, online seminars, and any portion of a blog or a social networking site such as Facebook, Twitter or LinkedIn that is used to engage in real-time interactive communications to be online interactive electronic forums. The mere updating of a non-interactive blog (or any other firm web page) does not cause it to become an interactive electronic forum, even if the updating occurs frequently.

Are the static portions of an online interactive electronic forum subject to the principal pre-use approval requirement?

Yes. A static posting on an interactive electronic forum, such as profile, background or wall information, is deemed to be an advertisement under Rule 2210 and therefore requires prior approval. Interactive content can be copied or forwarded and posted in a static forum, thus rendering it an advertisement.

Is the portion of a member firm’s website that does not provide for real-time electronic communications within any of Rule 2210’s exceptions for an online interactive electronic forum?

No.
If a member files a retail communication with the Department, although the retail communication was within one of the exceptions provided by the Rule, is principal pre-use approval still required?

Yes. An appropriately qualified principal must approve any communication that is filed with the Department, even if a communication otherwise would come under an exception to the principal pre-use approval requirements of FINRA Rule 2210(b)(1)(A).

Source: Rule 2210(b)(1)(F)

Is there any other provision in the Rule for a member firm to avoid the principal pre-use approval requirement?

Yes. A member firm may petition FINRA for an exemption from the principal pre-use approval requirement for good cause shown. In granting an exemption, FINRA will consider whether the exemption is consistent with the purposes of the Rule, investor protection and the public interest. Exemptive relief granted under this provision will apply only to the firms that have applied for such relief.

Source: Rule 2210(b)(1)(E); Notice 12-29

Institutional Communications – Approval and Review

What approval and review requirements apply to institutional communications?

The member firm must have written procedures for review by a principal. Those procedures must be reasonably designed to ensure that institutional communications comply with applicable standards.

If the procedures do not require review of all institutional communications, they must include provision for the education and training of associated persons regarding these communications. FINRA has the right to request evidence that these supervisory procedures have been implemented and carried out.

Source: Rule 2210(b)(3)

Internal communications are excepted from the definition of institutional communications; are there any requirements relating to internal communications under the Rule?

Yes. Firms still must supervise these communications, including a firm’s internal communications that train or educate registered representatives. In this regard, a firm’s supervisory policies and procedures concerning internal training and education materials must be reasonably designed to ensure that such materials are fair, balanced and accurate.

Source: Notice 12-29

Retail and Institutional Communications – Recordkeeping Requirements

What recordkeeping requirements apply to retail and institutional communications?

Members must retain retail or institutional communications for three years from the date of last use. The records must include:

- A copy of the communication and the dates of first and (if applicable) last use;
- The name of any registered principal who approved the communication and the date that approval was given;
In the case of a retail communication or institutional communication that is not approved prior to first use by a registered principal, the name of the person who prepared or distributed the communication;

Information concerning the source of any statistical table, chart, graph or other illustration used in the communication; and

For retail communications that rely on the exception from pre-approval for retail communications previously filed with, and approved by, the Department, the name of the firm that filed the retail communication with the Department and a copy of the Department review letter.

Source: Rule 2210(b)(4)(A)

How do the recordkeeping requirements apply to a member's communications on an online interactive electronic forum, such as a blog or chat room?

The recordkeeping requirements only require retention of the records of all communications made or received by a firm or its associated persons on an online interactive electronic forum and that relate to its “business as such,” even though third-party posts are not generally treated as the member firm’s or its associated persons’ communications under Rule 2210 (unless they are covered by the “entanglement” and “adoption” theories discussed below). If a firm’s or any of its associated person’s social media posting that is not considered relating to the firm’s business as such (i.e., personal) is replied to with a posting that does relate to the firm’s business as such, then the firm must retain records of that reply.

Neither the SEC nor FINRA has specifically defined the term “business as such,” although FINRA has said that “[w]hether a particular communication is related to the business of the firm depends upon the facts and circumstances.”

In contrast, a communication by a member firm on its or any other website that is not an online interactive electronic forum would be subject to the recordkeeping requirements, whether or not the communication relates to the firm’s business as such.

Source: Notice 11-39; Securities and Exchange Act Rule 17a-4(b)

Could a third-party post on a member firm’s social media site be considered a communication by the firm or any of its registered representatives?

Generally, a third-party post on a social media site established by a firm or any of its personnel would not be considered a communication by the firm or its personnel, to which the supervision, recordkeeping, filing or content requirements would not apply. However, under certain circumstances, third-party posts could become attributable to the firm and considered communications with the public subject to the requirements of Rule 2210.

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3 See the discussion above under “Are there any exceptions to the principal pre-use approval requirements for retail communications?”

For example, if the firm or any of its personnel involved themselves in the preparation of the content of the third-party post, or paid for the post, then the third-party post would be considered to be a communication with the public by the firm or its personnel under an entanglement theory.

Or if, for example, after the third-party content was posted, the firm or its personnel explicitly or implicitly endorsed or approved the post, then, under an adoption theory, the post would constitute a communication with the public.

Source: Notice 10-06

Correspondence – Recordkeeping, Supervisory and Review

What recordkeeping requirements apply to correspondence?

The FINRA rules, the Exchange Act and the applicable Exchange Act rules relating to books and records apply to correspondence. Members must preserve for a period of at least six years any correspondence for which there is no specified period under the FINRA rules or applicable Exchange Act rules. Correspondence must be preserved in a format and media that complies with Rule 17a-4 under the Exchange Act. The names of the persons who prepared outgoing correspondence and who reviewed the correspondence must be ascertainable from the retained records and these records must be readily available to FINRA, upon request.

Source: Rule 2210(b)(4)(B); NASD Rule 4511; FINRA Rule 3110.09

What are the supervisory and review requirements for correspondence?

All correspondence is subject to the supervision and review requirements of FINRA Rule 3110(b)(4), which provides, in part, that each member must establish procedures for the review and endorsement by a registered principal in writing, on an internal record, of all transactions and for the review by a registered principal of incoming and outgoing correspondence of its registered representatives. These procedures should be in writing and be designed to reasonably supervise each registered representative. The procedures should be designed to, among other things, properly identify and handle customer complaints and to ensure that customer funds and securities are handled in accordance with firm procedures.

Source: Rule 2210(b)(2)

Filing Requirements and Review Procedures

The Rule’s filing requirements depend on the type of communication and whether the firm is a new member. The type of communication will affect whether there is a “pre-use” or “concurrent with use” filing requirement.
Retail Communications – Filing Requirements – Pre-Use

What types of communications are subject to the Rule’s filing requirements?

Only retail communications are subject to the filing requirements. Correspondence and institutional communications are not subject to any filing requirement with FINRA.

Do any retail communications have to be filed with FINRA prior to first use?

Yes. A new FINRA member firm must file with the Department, at least 10 business days prior to its first use, any retail communication that is published or used in any electronic or other public media, including any generally accessible website, newspaper, magazine or other periodical, radio, television, telephone or audio recording, video display, signs or billboards, motion pictures, or telephone directories (other than routine listings).

Source: Rule 2210(c)(1)

On May 18, 2015, FINRA proposed amendments to Rule 2210(c)(1)(A) pursuant to which the requirement above would be changed to require a filing within 10 business days of first use and apply only to new member firms’ websites and material changes to their websites.


When does this pre-use filing requirement for new member firms begin and end?

The period begins on the date when FINRA’s Central Registration Depository shows that FINRA membership has become effective and ends one year later.

Does a new member firm have to wait for approval by the Department prior to using retail communications filed with the Department?

No; Department approval is not required once 10 business days have passed since the filing.

Are there any exceptions to this pre-use filing rule for new member firms?

Yes. Any retail communication of a new member firm that is a free writing prospectus that has been filed with the SEC under Securities Act of 1933 (“Securities Act”) Rule 433(d)(1)(ii) may be filed within 10 business days of first use rather than 10 business days prior to first use. Securities Act Rule 433(d)(1)(ii) applies to broker-prepared free writing prospectuses that are used or referred to, and widely disseminated by, an underwriter or dealer.

Source: Rule 2210(c)(1)

Is there any other provision in the Rule for a new member firm to avoid the pre-use filing requirement?

Yes. A new member firm may petition FINRA for an exemption from the pre-use filing requirement for good cause shown.

Source: Rule 2210(c)(9)(A)
Does FINRA have authority to require a new member firm to file communications other than retail communications prior to their use?

Yes. If the Department determines that a member has departed from the standards of the Rule, it may require that the member file with the Department all communications (rather than just retail communications), or the portion of the member’s communications that is related to any specific types or classes of securities or services, at least 10 business days prior to first use.

Source: Rule 2210(c)(9)(B)

Are there any other pre-use filing requirements?

Yes. Member firms must file the following retail communications with the Department at least 10 business days prior to first use or publication and not publish or circulate them until any changes specified by the Department have been made:

- Retail communications concerning registered investment companies (including mutual funds, exchange-traded funds, variable insurance products, closed-end funds and unit investment trusts) that include or incorporate performance rankings or performance comparisons of the investment company with other investment companies when the ranking or comparison category is not generally published or is the creation, either directly or indirectly, of the investment company, its underwriter or an affiliate (together with a copy of the data on which the ranking or comparison is based);
- Retail communications concerning security futures, with the exception of (i) retail communications concerning security futures that are submitted to another self-regulatory organization having comparable standards pertaining to those retail communications; and (ii) retail communications in which the only reference to security futures is contained in a listing of the services of a member; and
- Retail communications concerning bond mutual funds that include or incorporate bond mutual fund volatility ratings.5, 6

Source: Rule 2210(c)(2)(A)-(C)

Do all retail communications not subject to an exception from the filing requirement have to be filed prior to use?

No. The following must be filed with the Department within 10 business days of first use or publication (“concurrent with use”):

- Retail communications concerning7 registered investment companies other than

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5 FINRA Rule 2213 defines a “bond mutual fund volatility rating” as a description issued by an independent third party relating to the sensitivity of the net asset value of a portfolio of an open-end management investment company that invests in debt securities to changes in market conditions and the general economy, and is based on an evaluation of objective factors, including the credit quality of the fund’s individual portfolio holdings, the market price volatility of the portfolio, the fund’s performance, and specific risks, such as interest rate risk, prepayment risk, and currency risk.
6 This filing requirement relating to bond mutual funds incorporating volatility ratings is proposed to be removed under Notice 15-16.
7 The proposed amendments to Rule 2210(c)(3)(A) would require only the filing of retail communications concerning security futures.
those subject to the pre-use filing requirements;

* Retail communications concerning public direct participation programs;\(^8\)\(^9\)
* Any template for written reports produced by, or retail communications concerning, an investment analysis tool;\(^10\)

communications that “promote or recommend a specific registered investment company or family of registered investment companies.” \(\text{Notice 15-16}\)

\(8\) FINRA Rule 2310 defines a “direct participation program” as “a program which provides for flow-through tax consequences regardless of the structure of the legal entity or vehicle for distribution including, but not limited to, oil and gas programs, real estate programs, agricultural programs, cattle programs, condominium securities, Subchapter S corporate offerings and all other programs of a similar nature, regardless of the industry represented by the program, or any combination thereof.” A program may be composed of one or more legal entities or programs but when used herein and in any rules or regulations adopted pursuant hereto the term shall mean each of the separate entities or programs making up the overall program and/or the overall program itself. Excluded from this definition are real estate investment trusts, tax qualified pension and profit sharing plans pursuant to Sections 401 and 403(a) of the Internal Revenue Code and individual retirement plans under Section 408 of that Code, tax sheltered annuities pursuant to the provisions of Section 403(b) of the Internal Revenue Code, and any company including separate accounts, registered pursuant to the Investment Company Act.”

\(9\) FINRA recently provided guidance relating to “Regulation A+” solicitation materials and Rule 2210. If a member firm uses Regulation A+ solicitation materials concerning a direct participation program security with more than 25 retail investors, then the materials would be subject to the concurrent with use filing requirement and subject to principal approval. \(\text{Source: FINRA Regulatory Notice 15-32, found at: http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-15-32.pdf.}\)

\(10\) FINRA Rule 2214(b) defines an “investment analysis tool” 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

* Any retail communication concerning collateralized mortgage obligations registered under the Securities Act;
* Any retail communication concerning any security that is registered under the Securities Act and that is derived from or based on a single security, a basket of securities, an index, a commodity, a debt issuance or a foreign currency (that is, “registered structured products”), except (i) retail communications already subject to the pre-use filing requirements or (ii) the retail communications described in the four bullet points above.

\(\text{Source: Rule 2210(c)(3)}\)

Are any of these concurrent with use filings subject to Department approval?

No. Department approval is not required. However, the Department has historically made comments on these documents when it believed that they were not prepared in accordance with FINRA’s standards.

Does the concurrent with use filing requirement for structured products apply to retail communications for structured product offerings exempt from filing under the Securities Act or offerings of structured certificates of deposit?

No. The concurrent with use filing requirement only applies to retail communications for registered structured products. Communications relating to unregistered products, such as bank notes and investment strategies or styles are undertaken, thereby serving as an additional resource to investors in the evaluation of the potential risks and returns of investment choices. Under Notice 15-16, this filing requirement would be removed.
certificates of deposit, are not subject to the filing requirements.

Does the filing (whether pre-use or concurrent with use) of a draft storyboard of a television or video retail communication satisfy that filing requirement?

No. The final “filmed” version must be filed with the Department within 10 business days of first use or broadcast.

*Source: Rule 2210(c)(4)*

Are there any retail or other communications by a member firm that are not subject to the filing requirements?

Yes; the following communications do not have to be filed with the Department:

- Retail communications that previously have been filed with the Department and that are to be used without material change;
- Retail communications that are based on templates that were previously filed with the Department the changes to which are limited to updates of more recent statistical or other non-narrative information;\(^{11}\)
- Retail communications that do not make any financial or investment recommendation or otherwise promote a product or service of the member;
- Retail communications that do no more than identify a national securities exchange symbol of the member or identify a security for which the member is a registered market maker;
- Retail communications that do no more than identify the member or offer a specific security at a stated price;
- Prospectuses, preliminary prospectuses, fund profiles, offering circulars and similar documents that have been filed with the SEC or any state, or that are exempt from such registration,\(^{12}\) and free writing prospectuses that are exempt from filing with the SEC, except that an investment company prospectus published under Securities Act Rule 482 and a free writing prospectus that is required to be filed with the SEC under Securities Act Rule 433(d)(1)(ii) will not be considered a prospectus for purposes of this exclusion;\(^{13}\)
- Retail communications prepared in accordance with Section 2(a)(10)(b) of the Securities Act (tombstones), or any rule thereunder, such as Rule 134, and announcements as a matter of record that a member has participated in a private placement, unless the retail communications are related to publicly offered direct participation programs or securities issued by registered investment companies;
- Press releases that are made available only to members of the media;

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\(^{11}\) The proposed amendments to Rule 2210(c)(7)(B) would expand this exclusion for previously filed templates to include non-predictive narrative descriptions of market events during the period covered by the communication and factual descriptions of portfolio changes. *Notice 15-16*

\(^{12}\) The proposed amendments to Rule 2210(c)(7)(F) would expand the filing exclusion to cover annual or semi-annual shareholder reports. *Notice 15-16*

\(^{13}\) Preliminary or summary “term sheets,” which do not contain final pricing information and are free writing prospectuses that are exempt from filing with the SEC under Rule 433(d)(5)(i), are not subject to the filing requirements of Rule 2210(c)(1) – (4).
Any reprint or excerpt of any article or report issued by a publisher (a “reprint”), provided that:

- The publisher is not an affiliate of the member using the reprint or any underwriter or issuer of a security mentioned in the reprint that the member is promoting;
- Neither the member using the reprint nor any underwriter or issuer of a security mentioned in the reprint has commissioned the reprinted article or report; and
- The member using the reprint has not materially altered its contents except as necessary to make the reprint consistent with applicable regulatory standards or to correct factual errors;
- Correspondence;
- Institutional communications;
- Communications that refer to types of investments solely as part of a listing of products or services offered by the member;
- Retail communications that are posted on an online interactive electronic forum;
- Press releases issued by closed-end investment companies that are listed on the New York Stock Exchange (the “NYSE”) under Section 202.06 of the NYSE Listed Company Manual (or any successor provision); and
- Research reports (as defined in FINRA Rule 2241) that concern only securities that are listed on a national securities exchange, other than research reports required to be filed with the SEC pursuant to Section 24(b) of the Investment Company Act.

Note that press releases, reprints, correspondence and institutional communications, although exempt from the Department’s filing requirements, are deemed filed with FINRA for purposes of Section 24(b) of the Investment Company Act of 1940 and Rule 24b-3 thereunder.

Source: Rule 2210(c)(7)

Are there any circumstances under which FINRA would require a filing of a retail communication posted on an online interactive electronic forum?

Yes. FINRA has advised that if the purpose of the forum is, for example, to sell securities or promote a particular mutual fund, then the filing requirements would apply.14

Can a member firm petition FINRA for an exemption from the concurrent with use filing requirements?

Yes. Upon request and in accordance with the FINRA 9600 procedural rules, FINRA may conditionally or unconditionally grant an exemption from the concurrent with use filing rules for good cause shown after taking into consideration all relevant factors, to the extent such exemption is consistent with the purposes of the Rule, the protection of investors and the public interest.

Source: Rule 2210(c)(9)(B)

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14 See Notice 10-06, Q4 (“The treatment of a blog under Rule 2210 depends on the manner and purposes for which the blog has been constructed.”).
Are speaking engagements subject to pre-use approval or any filing requirements?

No. However, firms are required to establish appropriate written policies and procedures to supervise public appearances by associated persons.

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**Content Standards**

The Rule imposes general content standards applicable to all communications and more specific standards that vary, depending on the nature of the communication.

**What are the general content standards applicable to all communications?**

The Rule’s general content standards are:

- All member communications must be based on principles of fair dealing and good faith, must be fair and balanced, and must provide a sound basis for evaluating the facts in regard to any particular security or type of security, industry, or service. No member may omit any material fact or qualification if the omission, in light of the context of the material presented, would cause the communications to be misleading.
- No member may make any false, exaggerated, unwarranted, promissory or misleading statement or claim in any communication. No member may publish, circulate or distribute any communication that the member knows or has reason to know contains any untrue statement of a material fact or is otherwise false or misleading.
- Information may be placed in a legend or footnote only if that placement would not inhibit an investor’s understanding of the communication.
- Members must ensure that statements are clear and not misleading within the context in which they are made, and that they provide balanced treatment of risks and potential benefits. Communications must be consistent with the risks of fluctuating prices and the uncertainty of dividends, rates of return and yield inherent to investments.
- Members must consider the nature of the audience to which the communication will be directed and must provide details and explanations appropriate to the audience.
- Communications may not predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast; provided, however, that this provision does not prohibit:
  - A hypothetical illustration of mathematical principles, provided that it does not predict or project the performance of an investment or investment strategy;
  - An investment analysis tool, or a written report produced by an investment analysis tool, that meets the requirements of FINRA Rule 2214; and
  - A price target contained in a research report on debt or equity securities, provided that the price target has a reasonable basis, the report discloses the valuation methods used to determine the price target, and the price target is
accompanied by disclosure concerning the risks that may impede achievement of the price target.

*Source: Rule 2210(d)(1)*

**May a member firm use comparisons in any communications?**

Yes, provided that any comparison between investments or services in retail communications must disclose all material differences between them, including (as applicable) investment objectives, costs and expenses, liquidity, safety, guarantees or insurance, fluctuation of principal or return, and tax features.

*Source: Rule 2210(d)(2)*

**May a member firm use backtested, or hypothetical historical, information in communications?**

FINRA has provided guidance on backtested data included in institutional communications relating to exchange-traded products. FINRA’s approval of the use of backtested data in these materials is limited to a narrow set of circumstances. In its guidance, FINRA reiterated its historic position that the presentation of backtested data to retail investors does not comply with its disclosure standards. FINRA also warned that the backtested data should not be given excess weight in a recommendation to an investor.

In discussions with counsel, FINRA reiterated its position against the use of backtested data in retail communications relating to structured products (not just exchange-traded products). In institutional communications relating to structured products, FINRA indicated that its application of the content standards of Rule 2210(d) to backtested data would not be applicable in the same manner as to retail communications. Consequently, the use of backtested data may be appropriate in institutional communications relating to structured products, at the discretion of the broker-dealer.

**Does the Rule require any particular information in communications?**

Yes, all retail communications and correspondence must:

- Prominently disclose the name of the member, or the name under which the member’s broker-dealer business primarily is conducted as disclosed on the member’s Form BD, and may also include a fictional name by which the member is commonly recognized or which is required by any state or jurisdiction;
- Reflect any relationship between the member and any non-member or individual who is also named; and
- If it includes other names, reflect which products or services are being offered by the member.

These requirements do not apply to so-called “blind” advertisements used to recruit personnel.

*Source: Rule 2210(d)(3)*

**Are the content standards applicable to advertisements by investment companies?**

Yes. Retail communications and correspondence that present the performance of a non-money market

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mutual fund must disclose the fund’s maximum sales charge and operating expense ratio as set forth in the fund’s current prospectus fee table.

*Source: Rule 2210(d)(5)*

**Are the content standards applicable to a FINRA member’s proprietary index?**

Yes. The publication by a FINRA member of its proprietary index while the member knew or had reason to know that the index contained materially inaccurate information was a violation of Rule 2210(d)(1)(B).

*Source: FINRA Letter of Acceptance, Waiver and Consent No. 2014042781801*

**Are there content requirements for discussions of tax implications?**

Yes, there are general and very specific content standards for tax considerations in communications.

In retail communications and correspondence, references to tax-free or tax-exempt income must indicate which income taxes apply, or which do not, unless income is free from all applicable taxes. If income from an investment company investing in municipal bonds is subject to state or local income taxes, this fact must be stated, or the illustration must otherwise make it clear that income is free only from federal income tax.

Communications may not characterize income or investment returns as tax-free or exempt from income tax when tax liability is merely postponed or deferred, such as when taxes are payable upon redemption.

Any comparative illustration of the mathematical principles of tax-deferred versus taxable compounding must meet specific requirements set forth in the Rule.

*Source: Rule 2210(d)(4)*

**What requirements apply to testimonials?**

If any testimonial in a communication concerns a technical aspect of investing, the person making the testimonial must have the knowledge and experience to form a valid opinion.

Retail communications or correspondence providing any testimonial concerning the investment advice or investment performance of a member or its products must prominently disclose the following:

- The fact that the testimonial may not be representative of the experience of other customers;
- The fact that the testimonial is no guarantee of future performance or success; and
- If more than $100 in value is paid for the testimonial, the fact that it is a paid testimonial.

*Source: Rule 2210(d)(6)*
member must provide the price at the time the recommendation is made.

Source: Rule 2210(d)(7)(A), (B)

**What information must be included in a communication including a recommendation?**

All retail communications that include a recommendation of securities must disclose the following *conflicts of interest*, to the extent applicable:

- That at the time the communication was published or distributed, the member was making a market in the security being recommended, or in the underlying security if the recommended security is an option or security future, or that the member or associated persons will sell to or buy from customers on a principal basis;

- That the member or any associated person that is directly and materially involved in the preparation of the content of the communication has a financial interest in any of the securities of the issuer whose securities are recommended, and the nature of the financial interest (including, without limitation, whether it consists of any option, right, warrant, future, long or short position), unless the extent of the financial interest is nominal; and

- That the member was manager or co-manager of a public offering of any securities of the issuer whose securities are recommended within the past 12 months.

Source: Rule 2210(d)(7)(A)(i)-(iii)

**Can a retail communication refer to past, specific recommendations?**

No. A retail communication or correspondence may not refer, directly or indirectly, to past specific recommendations of the member that were or would have been profitable to any person.

A retail communication or correspondence is, however, allowed to set out or offer to furnish a list of all recommendations as to the same type, kind, grade or classification of securities made by the firm within the immediately preceding period of not less than one year. The list must provide certain information regarding each recommended security and include a prescribed cautionary legend warning investors not to assume that future recommendations will be profitable.

Source: Rule 2210(d)(7)(C)

**Do these content standards apply to prospectuses filed with the SEC?**

Prospectuses, preliminary prospectuses, fund profiles and similar documents that have been filed with the SEC and free writing prospectuses that are exempt from filing with the SEC are not subject to the content standards of FINRA Rule 2210(d); however, these standards do apply to investment company “omitting prospectuses” published under Securities Act Rule 482 and dealer-prepared, widely disseminated free writing prospectuses that are required to be filed with the SEC under Securities Act Rule 433(d)(1)(ii).

Source: Rule 2210(d)(8)

**Can a firm become responsible for the content of a third party’s website?**

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16 See footnote 13.
If a member firm co-brands any part of a third-party website, such as by placing the firm’s logo prominently on the site, then, under an adoption theory, it is responsible for the content of the entire site.

Source: Notice 11-39

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**Speaking Engagements/Public Appearances – Content Standards**

**Are speaking engagements subject to the content requirements?**

Yes, if the speaking engagement constitutes a “public appearance.” Rule 2210(f) defines a public appearance as “speaking activities that are unscripted and do not constitute retail communications, institutional communications or correspondence.” Public appearances are viewed by FINRA as part of the broader term “communications with the public.” Consequently, they are subject to the general content standards for communications (i.e., that they be fair and balanced and not include false or misleading statements). Scripts, slides, handouts or other written (including electronic) materials used in connection with public appearances are considered communications for purposes of the Rule and, as a result, can be retail communications.

Source: Notice 12-29; Rule 2210(f)(1)

**Is there anything specific that the Rule requires to be included in public appearances?**

Yes. For public appearances by associated persons, if an associated person recommends a security in a public appearance, the associated person must have a reasonable basis for the recommendation. The associated person also must disclose, as applicable, the following conflicts of interest:

- That the associated person has a financial interest in any of the securities of the issuer whose securities are recommended, and the nature of the financial interest, unless the extent of the financial interest is nominal; and
- Any other actual, material conflict of interest of the associated person or firm of which the associated person knows or has reason to know at the time of the public appearance.

Source: Rule 2210(f)(2)

**Are there any exceptions to these public appearance disclosure requirements by associated persons?**

Yes. These disclosure requirements do not apply to a public appearance by a research analyst for purposes of FINRA Rule 2241 that includes all of the applicable disclosures required by that rule. The disclosure requirements also do not apply to a recommendation of investment company securities or variable insurance products, provided that the associated person must have a reasonable basis for the recommendation.

Source: Rule 2210(g)

**Is participation in an online interactive electronic forum a public appearance?**

FINRA Rule 2241(a)(8) defines a “research analyst” as an associated person “who is primarily responsible for, and any associated person who reports directly or indirectly to such a research analyst in connection with, preparation of the substance of a research report, whether or not any such person has the job title of ‘research analyst.’”
Unscripted participation in an online interactive electronic forum such as a chat room or an online seminar is a “public appearance.”

*Please see Annex A for a summary chart of Rule 2210.*

______________________________

By Bradley Berman, Of Counsel,
Morrison & Foerster LLP

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2016
# Annex A

## FINRA COMMUNICATIONS RULES (SUMMARY)

<table>
<thead>
<tr>
<th>Type of Communication</th>
<th>Principal Pre-Use Approval</th>
<th>FINRA Filing</th>
<th>Record-Keeping</th>
</tr>
</thead>
<tbody>
<tr>
<td>Institutional Communication¹</td>
<td>Written procedures must address education, training regarding communications</td>
<td>Not required to be filed</td>
<td>Three years from date of last use. Keep on file: name of preparer, copy of communication, source of statistical information or illustration, date of first and last use, and if principal did review, then name and date of approval</td>
</tr>
<tr>
<td>Retail communication²</td>
<td>Requires approval before earlier of: use or filing with FINRA. Principal registration of approver will depend on type of material</td>
<td>For new members, 10 business days prior to first use: any retail communication published or used broadly. FWPs filed with SEC may be filed within 10 days of first use³</td>
<td>Three years from date of last use. File must include: (1) copy of communication, (2) date of first use, (3) date of last use, (4) name of principal who approved, (5) date approval received, (6) if pre-approval not required because another firm filed it, name of firm and their FINRA review letter, (7) source of any</td>
</tr>
<tr>
<td><strong>Exceptions:</strong> Pre-approval is not required for:</td>
<td></td>
<td>Within 10 business days of first use or publication: template for written</td>
<td></td>
</tr>
</tbody>
</table>

¹ Institutional communication:  
- written/electronic communications distributed or made available only to institutional investors  
- does not include internal communications  
- if member has “reason to believe” communication will be forwarded to retail investors, communication may be a “retail communication”

² Retail communication:  
- any written/electronic communication distributed or made available to more than 25 retail investors within a 30-day period  
- generally includes advertisements, sales literature, reprints  
- sales scripts intended for use with retail customers

³ To be removed by proposed amendments.
<table>
<thead>
<tr>
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</tr>
</thead>
<tbody>
<tr>
<td>Previously Filed Materials:</td>
<td>(1) another firm filed it with FINRA and has received a review letter from FINRA, and (2) firm using it has not made material changes and will not use in a manner inconsistent with the FINRA letter;</td>
<td>reports re an investment analysis tool, a communication concerning an SEC-registered structured product, a TV or video segment</td>
<td>statistical information or illustration</td>
</tr>
<tr>
<td>Communications excluded from research report definition and that do not include any investment recommendation;</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Materials posted in an online forum; and</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Any other communication that does not include an investment recommendation</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Exceptions to Filing Requirement:

1. communications previously filed, to be used without material change
2. communications based on template previously filed (that will include updated statistical or changes to non-narrative info)
3. materials that do not include a recommendation or promote a product
4. communications that only identify an exchange symbol

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4 Rule 2210(c)(3)(E) includes retail communications concerning any SEC-registered security derived from or based on a single security, a basket of securities, an index, a commodity, a debt issuance or a currency.
# FINRA COMMUNICATIONS RULES (SUMMARY)

<table>
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<tr>
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</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>or a security for which the member is a market maker or offer a specific security at a price (5) a prospectus or preliminary prospectus filed with SEC, or exempt from registration, EXCEPT that an FWP filed with the SEC under Rule 433(d)(1)(ii) is not considered a prospectus⁶</td>
<td>communications prepared in accordance with Securities Act Sec. 2(a)(10)(b), such as Rule 134 notices (6) press releases available only to media (7) reprints of published articles provided (a) member is not affiliated with publisher, (b) member or issuer or</td>
</tr>
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</tbody>
</table>

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⁵ The proposed amendments would add annual and semi-annual shareholder reports.

⁶ FWPs filed by an underwriter under Rule 433(d)(1)(ii) in a manner that will result in broad unrestricted distribution must be filed with FINRA, such as brochures posted on a public website, publicly available website pages about structured products.
<table>
<thead>
<tr>
<th>Type of Communication</th>
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<th>Record-Keeping</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>underwriter of any security mentioned has not commissioned, (c) member hasn’t altered contents</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>(9) correspondence</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>(10) institutional communications</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>(11) material posted on online forum</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>(12) research reports that concern only listed securities</td>
<td></td>
</tr>
<tr>
<td>Correspondence&lt;sup&gt;7&lt;/sup&gt;</td>
<td>Firm shall establish reasonable supervisory review process as required by Rule 3110.</td>
<td>Not required to be filed</td>
<td>Record retention requirements set out in Rule 3110.</td>
</tr>
</tbody>
</table>

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<sup>7</sup> Correspondence: any written/electronic communication distributed or made available to 25 or fewer retail investors within a 30-day period.
SUMMARY

SUBJECT TO FILING:

- FWPs that are red herrings (filed under Rule 433(d)(1)(ii) if distributed broadly, on an unrestricted basis (“underwriter FWPs”))
- If used broadly or on an unrestricted site:
  - a brochure
  - a product description
  - website product discussions

NOT SUBJECT TO FILING:

- Preliminary Pricing Supplements (424(b) filings)
- Final Pricing Supplements (424(b) filings)
- Offering documents for certificates of deposit, bank notes, or 144A issuances
- FWPs that are final term sheets, filed with the SEC
- FWPs that are exempt from the SEC’s filing requirements, such as preliminary or summary “term sheets” that do not contain final pricing information and are free writing prospectuses under Rule 433(d)(5)(i)
FINRA Proposes Initial Round of Amendments to Communications Rules

**Introduction**

In May 2016, FINRA filed with the SEC proposed revisions to its communications rules that include a few substantive revisions to existing rules, ease some burdensome filing requirements, and leave the door open for future changes. The rules to be revised include:

- FINRA Rule 2210 (Communications with the Public);
- FINRA Rule 2214 (Requirements for the Use of Investment Analysis Tools); and
- the content and disclosure requirements in FINRA Rule 2213 (Requirements for the Use of Bond Mutual Fund Volatility Ratings).

FINRA's proposals and related discussion can be found at the following link:

These proposals have been in the works for some time. FINRA commenced a review of its communications rules in April 2014, and FINRA initially proposed these revisions at a meeting of its Board of Governors in April 2015.

We note that these proposed amendments do not represent FINRA's final word about the communications rules. Rather, they are intended only as an initial set of changes, and are arguably somewhat narrow in scope and potential impact. Some are only technical clarifications, which do not involve any intended substantive change. However, FINRA expects that more revisions may come in the future to reflect its review and changes in the financial markets. For example, commentators have requested that FINRA update the rules concerning a variety of matters, including social media, mobile devices and electronic communications, performance advertising, the amount of disclosure in print advertising and options communications, among others. FINRA indicated that it is continuing to consider additional rule changes, and will address these topics as part of future proposals, as needed.

**New Member Communications – A Shift to Post-Use Filing**

FINRA Rule 2210(c)(1)(A) currently requires new FINRA members to file with FINRA retail communications that are used in any electronic or other public media at least 10 business days prior to use. Under the proposed...
amendments, the new firm filing requirement would only apply to broadly disseminated retail communications, such as generally accessible websites, print media communications, and television and radio commercials.

The rule revision is designed to prevent a delay in these firms’ ability to communicate with customers and prospective customers in a timely manner. FINRA believes it can continue to protect investors from potential harm without imposing this time delay on new members by reviewing most types of new members’ communications on a post-use basis. FINRA has found a post-use filing requirement to be an effective investor protection approach for retail communications with similar risk profiles as FINRA typically sees from new members.

**Offering Documents Concerning Unregistered Securities – A Clarification**

Rule 2210(c)(7)(F) currently excludes from filing “prospectuses, preliminary prospectuses, fund profiles, offering circulars and similar documents that have been filed with the SEC or any state, or that is exempt from such registration.” The filing exclusion has been interpreted by FINRA to exclude issuer-prepared offering documents concerning securities offerings that are exempt from registration, such as offerings of unregistered bank notes, Rule 144A offerings, and Regulation D offerings. Accordingly, FINRA is proposing to amend Rule 2210(c)(7)(F) to make this intent more clear, and to avoid any confusion concerning the phrase “or that is exempt from such registration.” As revised, Rule 2210(c)(7)(F) would exclude from filing, among other things, “similar offering documents concerning securities offerings that are exempt from SEC or state registration requirements.” FINRA believes that this amendment does not represent a substantive change to the current filing exclusion for unregistered securities’ offering documents. (The rule would remain unchanged as to documents such as preliminary term sheets, which do not require filing under Rule 433, and which are exempt from the FINRA filing requirements.)

**Investment Analysis Tools – Elimination of Certain Filing Requirements**

“Investment analysis tools” are interactive technological tools that produce 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. Under FINRA Rules 2210(c)(3)(C) and 2214(a), FINRA members that intend to offer an investment analysis tool must file templates for written reports produced by, or retail communications concerning, the tool, within 10 business days of first use. Rule 2214 also requires members to provide FINRA with access to the tool itself, and provide customers with specific disclosures when members communicate about the tool, use the tool or provide written reports generated by the tool.

FINRA members have largely complied with these requirements applicable to templates for written reports produced by investment analysis tools and retail communications concerning these tools. FINRA does not believe that the filing requirements for these templates and retail communications are necessary given this history, and in light of the investor protection afforded by other FINRA content standards and the requirement that members provide access to the tools and their output upon request of FINRA’s staff. Accordingly, FINRA proposes to eliminate the filing requirements for investment analysis tool report templates and retail communications about these tools. Instead, FINRA proposes to require its members to provide FINRA staff with access to investment analysis tools upon request.
Filing Exclusion for Templates – Extension to Narrative Information

FINRA members are currently not required to file retail communications that are based on templates that were previously filed with FINRA, but that are changed only to update recent statistical or other non-narrative information. However, members are required to re-file previously filed retail communications if the member has updated any narrative information contained in the prior filing. Often, these re-filed retail communications are templates for fact sheets concerning particular funds or products and provide quarterly information concerning a product’s performance, portfolio holdings and investment objectives. In the world of structured products, they may be used, for example, to show the recent historical performance of a proprietary index.

FINRA noted that, through its review of updated fund fact sheets and other similar templates, including its review of “thousands of template updates,” it found that certain narrative information has not presented significant risk to investors, and that these narrative updates are typically consistent with applicable standards. In particular, narrative updates that are not predictive in nature and only describe market events that occurred during the relevant period, or that only describe changes in a fund’s portfolio, have typically not presented significant investor risks. The information also may be derived from the relevant SEC filings for these funds. In these cases, FINRA believes that the costs associated with filing these types of narrative updates exceed the investor benefits arising from a FINRA staff review of these updates.

Accordingly, FINRA proposes to expand the template filing exclusion to also allow members to include updated non-predictive narrative descriptions of market events during the relevant period, and factual descriptions of portfolio changes, without having to refile the template, as well as updated information that is sourced from a registered investment company’s regulatory documents filed with the SEC.

Investment Company Proposals

*Investment Company Shareholder Reports.* FINRA currently requires members to file the management’s discussion of fund performance (“MDFP”) portion of a registered investment company shareholder report if the report is distributed or made available to prospective investors. FINRA requires members to file the MDFP because they may distribute or make shareholder reports available to prospective investors to provide more information about the offered funds, for example, in connection with the market process. Accordingly, FINRA has considered the MDFP to be subject to the filing requirement for retail communications.

FINRA proposes to exclude from the FINRA filing requirements the MDFP by adding an exclusion for annual or semi-annual reports that have been filed with the SEC in compliance with applicable requirements. FINRA believes that it would assist members’ understanding of Rule 2210 to clarify that annual and semi-annual reports that have been filed with the SEC are not subject to filing. The rule already excludes prospectuses, fund profiles, offering circulars and similar documents that have been filed with the SEC. FINRA believes it would be consistent to add shareholder reports that have been filed with the SEC.

*Backup Material for Investment Company Performance Rankings and Comparisons.* A FINRA member that files a retail communication for a registered investment company that contains a fund performance ranking or performance comparison must include a copy of the ranking or comparison used in the retail communication. When FINRA adopted this requirement, prior to the widespread use of the Internet, FINRA staff did not have ready access to the sources of rankings or comparisons. However, this information today is usually easily available online. FINRA therefore proposes to eliminate the requirement to file ranking and comparison backup material and instead to require members to maintain backup materials as part of their records.
Generic Investment Company Communications. FINRA Rule 2210(c)(3)(A) requires members to file within 10 business days of first use retail communications “concerning” registered investment companies. FINRA proposes to revise this filing requirement to cover only retail communications that promote a specific registered investment company or a family of registered investment companies. As a result, FINRA members would no longer be required to file generic investment company retail communications, such as a retail communication that describes different mutual fund types and features, but does not discuss the benefits of a specific fund or fund family.

Bond Mutual Fund Volatility Ratings. FINRA Rule 2213 permits FINRA members to use communications that include ratings provided by independent third parties that address the sensitivity of the net asset value of an open-end management investment company’s bond portfolio to changes in market conditions and the general economy, subject to a number of requirements. For example, these communications must be accompanied or preceded by the bond fund’s prospectus and contain specific disclosures. Members currently must file retail communications that include bond mutual fund volatility ratings at least 10 business days prior to first use, and withhold them from publication or circulation until any changes specified by FINRA have been made.

FINRA believes that some of these requirements have discouraged members from including bond fund volatility ratings in their communications due to the significant compliance burdens associated with doing so, and the level of disclosures required to accompany these ratings. Since Rule 2213 first became effective, members have rarely filed communications that contain bond fund volatility ratings. FINRA also noted that in general, in the few cases in which members filed them with FINRA, they have met applicable standards.

FINRA believes it is appropriate to revise the rule to reduce some of these burdens, while continuing to include requirements that will protect investors. Accordingly, FINRA proposes to modify some of Rule 2213’s requirements. Consistent with the filing requirements for other retail communications about specific registered investment companies, the proposal would no longer require a retail communication that includes a bond fund volatility rating to be accompanied or preceded by a prospectus for the fund, and would permit members to file these communications within 10 business days of first use, rather than prior to use. FINRA believes that the requirement that any retail communication including a bond fund volatility rating be accompanied or preceded by a fund prospectus increases the burdens associated with these communications without adding commensurate investor protection. Except in rare circumstances, all mutual fund prospectuses are available online, and an investor can easily access the prospectus, if needed.

Similarly, FINRA believes that requiring members to file these retail communications at least 10 business days prior to use and to withhold them from publication or circulation until any changes specified by FINRA have been made does not provide significant greater investor protection. This pre-use filing requirement inhibits a member’s ability to circulate retail communications containing volatility ratings in a timely manner. Members would still be required to file these communications within 10 business days of first use, so that if they contain misleading content, FINRA’s staff can take appropriate measures to correct any problems, such as recommending changes to the communication, or directing the member to cease using the communication with the public.

The proposal would also streamline the content and disclosure requirements. The amendments would eliminate the requirements:

- that all disclosures be contained in a separate disclosure statement;
- to disclose all current bond mutual fund volatility ratings that have been issued with respect to the fund;
to explain the reason or any change in the current rating from the most recent prior rating;

to describe the criteria and methodologies used to determine the rating;

to include a statement that not all bond funds have volatility ratings; and

to include a statement that the portfolio may have changed since the date of the rating.

**Potential Effective Date**

If the SEC approves the proposed rule changes, FINRA will announce the implementation date of the proposed rule changes in a regulatory notice to be published within 60 days. The effective date will be no later than 180 days following publication of the regulatory notice.

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