December 7, 2011

By Electronic Mail (rule-comments@sec.gov)

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

Re: SR-FINRA-2011-035

Dear Ms. Murphy:

The Compliance and Regulatory Policy Committee of the Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to comment on the recent amendment to proposed consolidated Financial Industry Regulatory Authority ("FINRA") rules governing communications with the public.[2] Specifically, FINRA has amended its proposal relating to adoption of new FINRA Rules 2210 (Communications with the Public), 2212 (Use of Investment Companies Rankings in Retail Communications), 2213 (Requirements for the Use of Bond Mutual Fund Volatility Ratings), 2214 (Requirements for the Use of Investment Analysis Tools), 2215 (Communications with the Public Regarding Security Futures), and 2216 (Communications with the Public About Collateralized Mortgage Obligations (CMOs)) for the new FINRA consolidated rulebook, based in part on existing NASD Rules 2210 and 2211 and

[1] SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association ("GFMA"). More information about SIFMA is available at http://www.sifma.org.

[2] Notice of Filing of Partial Amendment No. 1 and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Adopt FINRA Rules 2210 (Communications with the Public) and 2212 (Use of Investment Companies Rankings in Retail Communications), 2213 (Requirements for the Use of Bond Mutual Fund Volatility Ratings), 2214 (Requirements for the Use of Investment Analysis Tools), 2215 (Communications with the Public Regarding Security Futures), and 2216 (Communications with the Public About Collateralized Mortgage Obligations (CMOs)) in the Consolidated FINRA Rulebook; Release No. 34-65663 (November 1, 2011), 76 FR 68800 (November 7, 2011).

NASD Interpretive Materials 2210-1 and 2210-3 through 2210-8.

I. Introduction

SIFMA supports FINRA's continued efforts to establish a consolidated rulebook, to eliminate duplicative rules and interpretations and to enhance and modernize self-regulation. Current communications with the public rules have posed compliance challenges for members for many years. SIFMA supports FINRA's efforts to streamline the current communications with the public rules. In particular, SIFMA commends FINRA's efforts to promote greater consistency among the communications rules by focusing on the recipient of the communication rather than the form of the communication.

FINRA's initial rule proposal was filed with the SEC on July 14, 2011. SIFMA and other interested parties submitted comments relating to FINRA's formal rule proposal. In response to the nine comment letters submitted, as well as comments from the staff of the Securities and Exchange Commission ("SEC"), FINRA published Partial Amendment No. 1, which makes several important revisions to the proposed rules, including the following:

- FINRA eliminated the filing requirement for retail communications concerning "government securities" (as defined in § 3(a)(42) of the Securities Exchange Act of 1934, as amended) in proposed FINRA Rule 2210(c)(3)(C).

- FINRA modified the disclosure requirements in proposed FINRA Rule 2210(d)(7)(A)(ii) for "retail communications" that include a recommendation of securities. The revised proposal imposes disclosure requirements on associated persons who are "directly and materially involved in the preparation of the content of the communication."

- FINRA modified the disclosure requirements for "public appearances" that include a recommendation of securities by adding language to proposed FINRA Rule 2210(f)(1). The newly-proposed language requires the associated person who makes the public appearance to disclose a financial interest in the securities of the issuer whose securities are recommended, the nature of the financial interest (unless the extent of the financial interest is nominal), and any actual, material conflict of interest of which the associated person knows or has reason to know.

- FINRA eliminated the disclosure requirements of proposed FINRA Rule 2210(d)(7)(A), and the past recommendation requirements of proposed FINRA Rule 2210(d)(7)(C), for recommendations of registered investment companies and variable insurance products, provided that such recommendations have a reasonable basis.

While a substantial amount of progress has been made, SIFMA remains concerned about certain key provisions in proposed FINRA Rule 2210 and the supplementary material. SIFMA

remains particularly concerned about the proposed treatment of online postings, which remain subject to the filing requirements in proposed FINRA Rule 2210(c)(7). SIFMA is also concerned about the treatment in proposed Supplementary Material .01 of internal communications "intended to educate or train registered persons" as "institutional communications" under proposed FINRA Rule 2210(a)(3), which would subject such communications to regulation under both proposed FINRA Rule 2210 and FINRA Rule 3010(d).

As always, SIFMA welcomes the opportunity to discuss with FINRA or the SEC any of our comments to the proposed rule changes. Our specific comments are as follows.

II. Proposed FINRA Rule 2210(c)(7) and (f)

SIFMA continues to believe that communications that are "posted on an online interactive electronic forum" are best treated as a type of "public appearance" that does not constitute a "retail communication." This approach is consistent with FINRA's approach to online postings over the years. Indeed, revising proposed FINRA Rule 2210(f) to specify that postings in an online interactive forum are a type of "public appearance" (and not a "retail communication") would restore FINRA's longstanding treatment of online communications, first articulated in 1999, codified in 2003 in NASD Rule 2210(a)(5), and recently reiterated in Regulatory Notices 10-06, 10-55 and 11-39. Regulatory Notice 11-39 could not be more clear: "FINRA considers unscripted participation in an interactive electronic forum to come within the definition of 'public appearance' under NASD Rule 2210." This is an eminently sensible approach. Online postings – like television and radio appearances – are more closely analogous to unscripted public appearances and should be supervised pursuant to the flexible requirements of proposed FINRA Rule 2210(f). Member firms already have well-established procedures to supervise the content of public appearances.

Although FINRA has excluded retail communications "posted on an online interactive electronic forum" from the pre-approval requirements of proposed FINRA Rule 2210(b)(1)(A), such communications remain subject to the pre- and post-use filing requirements in proposed FINRA Rule 2210(c). At a minimum, the pre- and post-use filing requirements should be limited to content that is static and not interactive (as defined in Regulatory Notices 10-06 and 11-39). "Static content" is content that is "posted in a static forum, such as a blog or a static area of a web page."[3] Principal approval is required for static content, and principals can determine whether such postings need to be filed with FINRA when reviews are conducted. SIFMA believes this is a reasonable alternative.

The burden of subjecting all online postings – interactive as well as static – to pre- and post-use filing requirements would far outweigh any potential benefits. Those burdens would fall both on FINRA and member firms. If every member firm is required to monitor and review all of the online postings of all of its registered representatives, and every member firm is required to file those that trigger a filing requirement, the impact upon FINRA is potentially overwhelming. Indeed, the burden of reviewing such postings will only get worse as social media rises in popularity. And yet, the benefits of such review are likely to be very limited. By

[3] *See* Regulatory Notice 11-39, at 5.

its very nature, social media lends itself to brief, relatively informal communications that generally pose little risk to the investor. Based on FINRA's guidance in Notices 10-06 and 11-39, firms are already beginning to implement controls appropriate to the types of social media usage that they allow. Accordingly, whether treated as a form of "public appearance" or not, FINRA should exclude retail communications "posted on an online interactive electronic forum" from the filing requirements of proposed FINRA Rule 2210(c).

Nor is subjecting online postings to pre- and post-use filing requirements consistent with the principles that FINRA has developed over many years for the review of electronic communications. In Regulatory Notice 10-06, FINRA endorsed a risk-based approach to the supervision of electronic communications, making clear that its overall goal was to interpret its rules "in a flexible manner to allow firms to communicate with clients and investors using this new technology."[4] The current proposal, however, subjects social media to an inflexible requirement that is better suited to communications using traditional media.

FINRA, in its Response to Comments, suggests that firms should "adopt policies and procedures that prohibit associated persons from posting [the] types of communications" that might trigger a 2210(c) filing.[5] SIFMA respectfully submits that such policies would be unworkable given the breadth of the proposed post-use filing requirements. Members would be required to prohibit registered representatives, for example, from communicating about mutual funds, variable products, unit investment trusts, and all kinds of derivative products. Such severe limitations could have the unintended consequence of encouraging representatives to use social media outside of firm systems and, therefore, beyond the reach of any effective supervision. But firms that do not impose such prohibitions would be obligated – as noted above – to review 100% of the online content of their associated persons, lest a filing obligation be missed. Such an approach would have a significant chilling effect on social media, the main benefit of which is to promote spontaneous, real-time communications. Neither a blanket prohibition on the 2210(c) topics, nor 100% review would promote FINRA's goal of facilitating the ability of firms to communicate with clients and investors using new social media technologies.

III. Proposed Supplementary Material .01

Proposed Supplementary Material .01 provides that internal communications "intended to educate or train registered persons about the products or services offered by a member" are subject to review as "institutional communications" under FINRA Rule 2210(a)(3). Proposed FINRA Rule 2210 is not intended to apply to internal communications.[6] The very definition of

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[4] *See also* Regulatory Notice 07-59.

[5] Letter from Joseph P. Savage, dated October 31, 2011 ("Response to Comments") at p. 11.

[6] In its response to comments, FINRA points out that the definition of "institutional sales material" in NASD Rule 2211(a)(2) includes communications made available to members and associated persons to argue that such communications have always been subject to NASD Rule 2211. The industry has always understood that definition, however, to refer to communications made available to *other* members or their associated persons. Indeed, three of the four settled disciplinary actions that the Staff identifies to support its position that internal educational and training materials fall under NASD Rule 2211 involve

"institutional communication" in proposed FINRA Rule 2210(a)(3) makes clear that such communications must be "distributed or made available" to institutional investors.

Certain internal training and educational materials themselves may already be subject to similar requirements under NASD Rule 3010(d), which requires members, among other things, to have written procedures for their review that are appropriate to the member's business, size, structure, and customers. Depending upon their business mix, size, structure and customers, some firms have required internal training and educational materials that relate to the broker-dealer's products or services to be reviewed and approved by a registered principal prior to use. In addition, a few firms subject selected materials to an independent review by members of the firm's Compliance Department. Firms that have adopted such procedures have included them in their firm's written supervisory procedures. These processes and procedures are generally subject to testing and verification by control units or internal audit. Therefore, subjecting such communications to review under the communications with the public rules does not provide investors with additional protections.

SIFMA agrees with FINRA that certain educational and training materials should be subject to supervisory review. Indeed, as noted above, some firms have adopted specific written supervisory procedures relating to the appropriate review and approval of such materials given the member's business mix, size, structure, and customers. SIFMA does not, however, agree that electronic communications used to distribute such materials *within the member firm that created the materials* should also be subject to review as a communication with the public. Provided that the "cover" electronic communication is not substantive, no investor protection goal is served by separately requiring review of such communications provided that the actual educational or training material is appropriately supervised. SIFMA believes that this constitutes a significant change in the standard for review of internal correspondence that should be reviewed by the SEC.[7] Further, this change will impose significant costs on broker-dealers. Identifying such correspondence will be difficult and time-consuming and will significantly increase the amount of electronic correspondence that is required to be reviewed. Again, provided that the actual educational or training material is appropriately supervised, these additional costs are not justified by any perceived investor protection benefit.

IV. Proposed FINRA Rule 2210(c)(3)

Proposed FINRA Rule 2210(c)(3) requires that "all retail communications" regarding certain registered investment companies, including closed-end funds, be filed with FINRA

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communications that were distributed both inside and *outside of the member firm* (it is not clear whether the materials identified in US Bancorp Investments were distributed outside of the firm). Further, we note that regulatory inquiries result in settlements for a number of reasons not necessarily related to the merits of the matter. As a result, settlements are of limited precedential value.

[7] SIFMA recognizes that FINRA has made the point, in its Response to Comments and elsewhere, that it believes that educational and training material has been subject to the content standards and recordkeeping requirements in FINRA Rule 2211. Here, however, FINRA seeks to incorporate this standard into its rulebook. We believe that this is a substantive change to FINRA's rules that should be reviewed as a new rule rather than as a "consolidation" of existing rules.

within 10 business days of first use or publication. FINRA has eliminated this requirement for retail communications concerning government securities, but has not explained why the post-use filing requirement remains appropriate for closed-end funds. Like those concerning government securities, retail communications concerning closed-end funds are required to be reviewed by a registered principal prior to distribution and pose lower risks than other types of securities (such as, for example, structured products, which are discussed at length in the Response to Comments). SIFMA believes that pre-use principal review is sufficient and, accordingly, that the filing of such communications is not necessary for investor protection. As noted in its Response to Comments, FINRA retains the ability to review communications relating to closed-end funds through other methods, including spot checks and targeted examinations. Further, the proposed rule will impose significant administrative burdens, the cost of which will far exceed any perceived investor protection benefit. Accordingly, SIFMA believes that the filing requirement for closed-end funds should be eliminated from proposed FINRA Rule 2210(c)(3).

V. Proposed FINRA Rule 2210(c)(7)(F)

SIFMA continues to believe that proposed FINRA Rule 2210(c)(7)(F) should be revised to exclude "free writing prospectuses" that have been filed with the SEC pursuant to Rule 433(d)(1)(ii) of the Securities Act of 1933 (the "Securities Act") from the filing requirements of proposed FINRA Rule 2210(c). Indeed, FINRA acknowledges in its Response to Comments that the filing of free writing prospectuses with FINRA would be an "additional review." Free writing prospectuses should not be subject to an additional review for the same reasons that preliminary and formal prospectuses are not subject to an additional review. They are fully-vetted by the SEC, the regulator charged with enforcing the Securities Act. Nor is delay justified in this context. Timely access to free writing prospectuses is vital to the statutory scheme.

There is no question that timely access to free writing prospectuses is critical to the statutory mandate. In the Securities Offering Reform Release, the SEC made clear that the free writing prospectus rules were designed to "address the need for timeliness of information for investors" and to avoid "delays in the offering process that [the SEC] believe[s] would be inconsistent with the needs of issuers for timely access to the securities markets and capital."[8] Requiring members to file free writing prospectuses with FINRA delays the communication of important information to investors and may actually slow the offering process. Many securities products are offered initially pursuant to a free-writing prospectus, and some (exchange-traded funds and unit investment trusts, among them) will trigger a pre-filing requirement under proposed FINRA Rule 2210(d)(2). Requiring members to pre-file such materials with FINRA would prejudice issuers, underwriters and investors by causing significant and unforeseen delays in the offering process.

SIFMA again urges FINRA to include "free writing prospectuses that have been filed with the SEC pursuant to Rule 433(d)(1)(ii) of the Securities Act" in the exclusion to the filing requirements in proposed FINRA 2210(c)(7)(F). Such materials should not be required to be

[8] *See* Release No. 33-8591 (July 19, 2005), 70 F.R. 44722 (August 3, 2005).

double-filed with the SEC and then FINRA, and should be excluded from the filing requirements in proposed FINRA Rule 2210(c)(1) through (4).

VI. Proposed FINRA Rule 2210(a)(4)

SIFMA fully supports FINRA's stated intent to "harmonize, where appropriate, the definitions related to institutional investors under its rules."[9] Indeed, in its initial comment letter, SIFMA stressed that the multiple definitions of "institutional investor" and "institutional account" in the FINRA rulebook "create serious compliance difficulties for members," and should be harmonized.[10] FINRA's proposed solution, however, does not accomplish this objective. It would, in fact, create two separate definitions of an institutional account. FINRA Rule 4512(c) defines "institutional account" to include banks, savings and loan associations, insurance companies, registered investment companies, registered investment advisers, and other entities with total assets of at least $50 million.[11] Proposed FINRA Rule 2210(a)(4) expands upon the definition of "institutional account" in FINRA Rule 4512(c), adding government entities or subdivisions thereof, certain types of employee benefit plans and qualified plans, members or registered persons of members, and persons acting on behalf of institutional investors.[12] SIFMA prefers the expanded definition in proposed FINRA rule 2210(a)(4), but strongly urges FINRA to choose one standard or the other. Members should not be required to build systems to comply with inconsistent definitions of "institutional investor" and "institutional account." FINRA should have a uniform standard within its consolidated rulebook.

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[9] Response to Comments, at 4.

[10] *See* SIFMA Comment Letter, August 25, 2011, at 3.

[11] *See* FINRA Rule 4512(c)(1) through (3). In addition, Supplementary Material .05 to FINRA Rule 4512 cites FINRA Rule 2090 (the "know your customer" obligation). Thus, having two apparently different definitions of "institutional investor" also appears to impact the "know your customer" rule as well.

[12] *See* proposed FINRA Rule 2210(a)(4)(B) through (F).

SIFMA appreciates the opportunity to provide comments on the proposed FINRA rules and supplementary materials governing communications with the public, and looks forward to continuing the dialogue. If you have any questions or require further information, please contact Jim McHale, at (202) 962-7386 (jmchale@sifma.org), or outside counsel David Sieradzki at (202) 828-5826 (david.sieradzki@bgllp.com) or Bob Frenchman at (212) 508-6184 (robert.frenchman@bgllp.com).

Very truly yours,

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