

December 7, 2011

By Electronic Mail ([rule-comments@sec.gov](mailto:rule-comments@sec.gov))

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

Re: File No. SR-FINRA-2011-035; Proposed Rule Change to Adopt FINRA Rules Regarding Communications with the Public in the Consolidated FINRA Rulebook

Dear Ms. Murphy:

Wolverine Execution Services, LLC (“WEX” or the “Firm”)<sup>1</sup> appreciates the opportunity to comment on the proposed Financial Industry Regulatory Authority (“FINRA”) rules governing communications with the public.<sup>2</sup> WEX supports FINRA’s continued efforts to establish a consolidated rulebook and related interpretations in order to prevent manipulative activity and promote a fair and orderly marketplace for all participants. Specifically, WEX seeks to comment on the definition of the term “institutional investor” in proposed FINRA Rule 2210.<sup>3</sup> WEX joins several commenters<sup>4</sup> in encouraging FINRA to lower the asset threshold in the definition of “institutional investor” below the current requirement of \$50 million. WEX believes that the current threshold is unnecessary to protect sophisticated investors in light of the lower thresholds imposed by other federal securities regulations. As a result, this standard creates an undue compliance burden on member firms and diverts protections away from the very retail customers that truly benefit from the safeguards afforded by the proposed Rule.

Current NASD Rule 2211<sup>5</sup>, defines the term “institutional investor” to include banks, savings and loan associations, insurance companies, registered investment companies, investment advisers registered with the Securities and Exchange Commission (the “Commission”) or a state securities commission, certain retirement plans, governmental entities, and individual investors and other entities with at least \$50 million in assets.

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<sup>1</sup> Wolverine Execution Services, LLC is a registered broker and FINRA member providing order routing and execution services to institutional clients.

<sup>2</sup> See Release No. 34-64984; File No. SR-FINRA-2011-035 Notice of Filing of Proposed Rule Change To Adopt 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)) in the Consolidated FINRA Rulebook, 76 Fed. Reg 46870 (August 3, 2011).

<sup>3</sup> See proposed FINRA Rule 2210(a)(4).

<sup>4</sup> See John Polanin and Claire Santaniello, Co-Chairs, Compliance and Regulatory Policy Committee 2011, Securities Industry and Financial Markets Association, dated August 24, 2011; Alexander C. Gavis, FMR LLC Legal Department, Fidelity Investments, dated August 24, 2011.

<sup>5</sup> See NASD Rule 2211(a)(3).



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Under proposed FINRA Rule 2210<sup>6</sup>, the term “institutional investor” will include: (i) any person described in FINRA Rule 4512(c) (regardless of whether the person has an account with a member), (ii) a governmental entity or subdivision thereof, (iii) certain employee benefit plans, (iv) a qualified plan with at least 100 participants, (v) a member or registered person of such a member, and (vi) a person acting solely on behalf of any such institutional investor. Approved FINRA Rule 4512<sup>7</sup> (effective December 5, 2011) defines the term “institutional account” as the account of a bank, savings and loan association, insurance company, registered investment company, an investment adviser registered with the Commission or a state securities commission or any other person (i.e., a natural person, corporation, partnership, trust or otherwise) with total assets of at least \$50 million. In effect, the proposed FINRA Rule 2210 retains the same general categories and \$50 million threshold as current NASD Rule 2211 to qualify as an institutional investor.

As noted by other commenters, the federal securities laws currently utilize several definitions for accredited or institutional investors, with varying monetary thresholds required for an unregistered firm (e.g., corporation, partnership, limited liability company, etc.) to qualify. These definitions include the qualified investor<sup>8</sup> under the Exchange Act (\$25 million<sup>9</sup>), the qualified purchaser<sup>10</sup> under the Investment Company Act (\$25 million<sup>11</sup>), and the accredited investor<sup>12</sup> under Regulation D (\$5 million<sup>13</sup>). In each case, the asset threshold for an unregistered firm is below the \$50 million threshold in current NASD Rule 2211 and proposed FINRA Rule 2210. The significant disparity in the thresholds set forth by the various SEC and FINRA rules creates a compliance burden for member firms in appropriately classifying and actively monitoring various types of customers, especially where the required protections are overly restrictive and unnecessary considering the sophistication of the market participant.

In the Firm’s experience, there are numerous sophisticated market participants that act as professional investors yet currently do not meet the asset threshold of NASD Rule 2211 and proposed FINRA Rule 2210. As a result, FINRA member firms must treat any such participant as a retail customer. For example, a registered broker-dealer and FINRA member firm would be required to treat an unregistered corporation, partnership or limited

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<sup>6</sup> See proposed FINRA Rule 2210(a)(4).

<sup>7</sup> See approved FINRA Rule 4512(c).

<sup>8</sup> See Securities Exchange Act of 1934 (the “Exchange Act”), 17 C.F.R. §240.3(a)(54).

<sup>9</sup> See the Exchange Act, 17 C.F.R. §240.3(a)(54)(A)(xi). “Any corporation, company, or partnership that owns and invests on a discretionary basis, not less than \$25,000,000 in investments”

<sup>10</sup> See Investment Company Act of 1940 (the “Investment Company Act”), 17 C.F.R. §270.2(a)(51).

<sup>11</sup> See the Investment Company Act, 17 C.F.R. §270.2(a)(51)(A)(iv). “Any person, acting for its own account or the accounts of other qualified purchasers, who in the aggregate owns and invests on a discretionary basis, not less than \$25,000,000 in investments”

<sup>12</sup> See Securities Act of 1933, Rule 501(a) (“Regulation D”), 17 C.F.R. §230.501(a).

<sup>13</sup> See Regulation D, 17 C.F.R. §230.501(a)(3). “Any organization described in section 501(c)(3) of the Internal Revenue Code, corporation, Massachusetts or similar business trust, or partnership, not formed for the specific purpose of acquiring the securities offered, with total assets in excess of \$5,000,000”

liability company with \$25 million in assets, thereby qualifying as a qualified purchaser, qualified investor, or accredited investor, in the same manner as a retail customer under proposed FINRA Rule 2210. Furthermore, the Firm believes that this requirement is disadvantageous to market participants below the \$50 million threshold as member firms like WEX must allocate time and resources to implement unnecessary supervisory procedures for sophisticated professional firms when such resources could be more efficiently allocated to protect true retail customers. Moreover, it discourages smaller professional firms that are growing their business but may be limited in the FINRA member firms that may offer services that could prove critical to both parties involved. The current limit of \$50 million creates a less competitive environment.

Accordingly, the Firm joins other commenters in advocating that FINRA reconcile this disparity by harmonizing the institutional investor asset threshold in proposed Rule 2210 with other recognized criteria contained in the federal securities laws cited herein. The Firm believes that the asset threshold for an unregistered firm to qualify as an institutional investor should be \$5 million, but in no event greater than \$25 million, which is an acceptable standard for distinguishing sophisticated professional investors from true retail customers under other federal securities laws. The Firm believes that such a reduction would create a uniform standard among the various securities regulators, thus, reducing the unnecessary compliance burden on member firms while promoting a more efficient allocation of regulatory resources to strengthen the existing protections for true retail customers. While the formation of FINRA through the consolidation of the NASD and regulatory functions of the NYSE were designed to harmonize industry standards, so to should be the work of FINRA to continually harmonize its rules with those of other regulatory obligations and thresholds to create a more efficient regulatory model that reduces waste and minimizes disparity.

WEX thanks FINRA for the consideration of its comments and welcomes the opportunity to discuss this matter further.

Respectfully submitted,

A handwritten signature in black ink that reads 'Jeremiah McGair'.

Jeremiah McGair  
Attorney  
Wolverine Execution Services, LLC