

VIA ELECTRONIC MAIL

August 24, 2011

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

RE: SR-FINRA-2011-035 – Proposed Rule Change to Adopt FINRA Rules Regarding Communications with the Public

Dear Ms. Murphy:

On September 21, 2009, the Financial Industry Regulatory Authority, Inc. (FINRA) published Regulatory Notice 09-55 (RN 09-55).¹ RN 09-55, titled Communications with the Public, incorporated much of NASD Rules 2210 and 2211, as well as the interpretive materials to Rule 2210 and selected portions of Incorporated NYSE Rule 472, into Proposed FINRA Rule 2210. RN 09-55 attempted to simplify the advertising rules by consolidating the number of communications categories from six (6)² down to three (3) broad categories.³ On November 20, 2009, the Financial Services Institute (FSI)⁴ submitted a comment letter in response to RN 09-55.⁵ On July 14, 2011, FINRA filed with the Securities and Exchange Commission (SEC) its second iteration of the proposed rule changes to NASD and NYSE rules regarding communications with the public as part of the FINRA Rulebook Consolidation process (Proposed Rules).⁶ On August 3, 2011, the SEC published the Proposed Rules in the Federal Register for comment.⁷

FSI welcomes the opportunity to comment on the Proposed Rules. We generally support FINRA's Proposed Rules and applaud FINRA for addressing several of the concerns we raised in our November 2009 comment letter. However, several significant concerns remain regarding the most recent iteration of the Proposed Rules. We believe that the Proposed Rules should more specifically address issues related to social media, that additional clarification is needed with

¹ Regulatory Notice 09-55, FINRA Proposed New Rules Governing Communications with the Public, available at <http://www.finra.org/Industry/Regulation/Notices/2009/P120004>

² Advertisement, Sales Literature, Correspondence, Institutional Sales Material, Independently Prepared Reprint, and Public Appearance.

³ Institutional Communication, Retail Communication, and Correspondence.

⁴ The Financial Services Institute is an advocacy organization for the financial services industry – the only one of its kind. FSI is the voice of independent broker-dealers and independent financial advisors in Washington, D.C. Established in January 2004, FSI's mission is to create a healthier regulatory environment for their members through aggressive and effective advocacy, education and public awareness. FSI represents more than 124 independent broker-dealers and more than 27,000 independent financial advisors, reaching more than 15 million households. FSI is headquartered in Atlanta, GA with an office in Washington, D.C.

⁵ Letter from the Financial Services Institute to Marcia E. Asquith (November 20, 2009), available at <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/noticecomments/p120432.pdf>

⁶ Proposed Rule Change to Adopt FINRA Rules 2210, 2212, 2213, 2214, 2215, and 2216 in the Consolidated FINRA Rulebook, available at <http://www.finra.org/web/groups/industry/@ip/@reg/@rulfil/documents/rulefilings/p123893.pdf>

⁷ Proposed Rule Change to Adopt FINRA Rules 2210, 2212, 2213, 2214, 2215, and 2216 in the Consolidated FINRA Rulebook, 76 Fed. Reg. 46870, available at <http://www.finra.org/web/groups/industry/@ip/@reg/@rulfil/documents/rulefilings/p124086.pdf>

respect to disclosures called for in the Proposed Rules, and that further guidance is needed regarding the phrase “reason to believe,” as used in section (a)(4)(F) of Proposed Rule 2210. These concerns are outlined in greater detail below.

Background on FSI Members

The independent broker-dealer (IBD) community has been an important and active part of the lives of American investors for more than 30 years. The IBD business model focuses on comprehensive financial planning services and unbiased investment advice. IBD firms also share a number of other similar business characteristics. They generally clear their securities business on a fully disclosed basis; primarily engage in the sale of packaged products, such as mutual funds and variable insurance products; take a comprehensive approach to their clients’ financial goals and objectives; and provide investment advisory services through either affiliated registered investment adviser firms or such firms owned by their registered representatives. Due to their unique business model, IBDs and their affiliated financial advisors are especially well positioned to provide middle-class Americans with the financial advice, products, and services necessary to achieve their financial goals and objectives.

In the U.S., approximately 201,000 independent financial advisors – or approximately 64% percent of all practicing registered representatives – operate in the IBD channel.⁸ These financial advisors are self-employed independent contractors, rather than employees of the IBD firms. These financial advisors provide comprehensive and affordable financial services that help millions of individuals, families, small businesses, associations, organizations, and retirement plans with financial education, planning, implementation, and investment monitoring. Clients of independent financial advisors are typically “main street America” – it is, in fact, almost part of the “charter” of the independent channel. The core market of advisors affiliated with IBDs is clients who have tens and hundreds of thousands as opposed to millions of dollars to invest. Independent financial advisors are entrepreneurial business owners who typically have strong ties, visibility, and individual name recognition within their communities and client base. Most of their new clients come through referrals from existing clients or other centers of influence.⁹ Independent financial advisors get to know their clients personally and provide them investment advice in face-to-face meetings. Due to their close ties to the communities in which they operate their small businesses, we believe these financial advisors have a strong incentive to make the achievement of their clients’ investment objectives their primary goal.

FSI is the advocacy organization for IBDs and independent financial advisors. Member firms formed FSI to improve their compliance efforts and promote the IBD business model. FSI is committed to preserving the valuable role that IBDs and independent advisors play in helping Americans plan for and achieve their financial goals. FSI’s primary goal is to insure our members operate in a regulatory environment that is fair and balanced. FSI’s advocacy efforts on behalf of our members include industry surveys, research, and outreach to legislators, regulators, and policymakers. FSI also provides our members with an appropriate forum to share best practices in an effort to improve their compliance, operations, and marketing efforts.

Comments on the Proposed Rule

As noted above, FSI generally supports FINRA’s Proposed Rule and applauds FINRA for addressing several of the concerns we raised in our November 2009 comment letter. However, several significant concerns remain regarding the most recent iteration of the Proposed Rules. These concerns are described below.

⁸ Cerulli Associates at <http://www.cerulli.com/>

⁹ These “centers of influence” may include lawyers, accountants, human resources managers, or other trusted advisors.

- **Social Media** - In our November 2009 comment letter in response to RN 09-55, we urged FINRA to provide guidance in the Proposed Rules on the emerging area of social networking.¹⁰ We indicated that we believe that FINRA should capitalize on the opportunity presented by the Proposed Rules to incorporate definitive guidance related to communications with the public made via social networking websites.

In response to this request for additional guidance, FINRA provided the following:

“After Regulatory Notice 09-55 was published for comment, but before this filing with the SEC, FINRA published Regulatory Notice 10-06, which provides guidance on blogs and social networking websites. Among other things, that Notice addressed the supervision of social media sites and specified that members may adopt supervisory procedures similar to those outlined for electronic correspondence in Regulatory Notice 07-59. FINRA is now codifying this guidance as part of proposed FINRA Rule 2210. Proposed paragraph (b)(1)(D)(ii) specifies that the requirements of paragraph (b)(1)(A), which require a principal to approve retail communications prior to use, will not apply to retail communications that are posted on an online interactive electronic forum, provided that the member supervises and reviews such communications in the same manner as required for supervising and reviewing correspondence pursuant to NASD Rule 3010(d).”¹¹

While we appreciate FINRA’s response to our initial request for clarification on social media, and the inclusion of an exemption for principal approval of retail communications posted to online interactive electronic forums, we believe that FINRA should take full advantage of this rule making opportunity. As discussed above, FINRA has issued several Regulatory Notices on the subject of social media and we believe that this is the perfect opportunity to incorporate that guidance into the FINRA Rulebook.¹² Accordingly, we again urge FINRA to include the existing additional guidance related to social media in the Proposed Rules.

- **Expanded Disclosure Requirements Regarding Recommendations** – In RN 09-55, Proposed Rule 2210(d)(7) would have required a registered representative making a recommendation in retail communications, correspondence or a public appearance to disclose, (if applicable) that the member or any associated person with the ability to influence the substance of the communication, has a financial interest in any of the securities of the issuer whose securities are being recommended and the nature of the financial interest. In our comment letter in response to RN 09-55, we asked FINRA for clarification related to this provision of the proposal concerning how far the “financial interest” test ran through the supervisory chain.¹³

¹⁰ Letter from the Financial Services Institute to Marcia E. Asquith (November 20, 2009), available at <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/noticerecommendations/p120432.pdf>

¹¹ Proposed Rule Change to Adopt FINRA Rules 2210, 2212, 2213, 2214, 2215, and 2216 in the Consolidated FINRA Rulebook, 76 Fed. Reg. at 46881 (August 3, 2011).

¹² See RN 11-39, RN10-06, FINRA’s Guide to the Internet for Registered Representatives.

¹³ Letter from the Financial Services Institute to Marcia E. Asquith (November 20, 2009), available at <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/noticerecommendations/p120432.pdf>

In response to this, and other requests for clarification, FINRA made several revisions to Rule 2210(d)(7) of the Proposed Rules. Most notably, FINRA excluded "correspondence" from section (d)(7)(A) of the Proposed Rules, and modified the requirement to disclose the financial interests of any associated person with the ability to influence the substance of the communication. Instead, the disclosure requirement will only apply to any associated person with the ability to influence the "content" of the communication. FINRA provided that "[w]hile this modification is minor, FINRA believes that it will help clarify which associated persons must disclose their financial interests."¹⁴ FINRA went on to state that it "continues to believe that persons who influence the content of a communication that includes a recommendation have a material conflict of interest that should be disclosed if the person also has a financial interest in the recommended security."¹⁵ However, FINRA did not provide additional clarification or rationale as to the definition of "content" as provided in the Proposed Rules. FINRA also indicates that "the disclosure requirement excludes financial interests that are 'nominal'."¹⁶ This revision makes the rule consistent with the current disclosure requirements for advertisements and sales literature that include securities recommendations under NASD IM 2210-1(6)(A)(ii).

FSI supports enhancing disclosures to facilitate customer understanding. We believe it is important that the disclosures be carefully designed to ensure their effectiveness. It is our belief that the effectiveness of client disclosure is rarely enhanced by complicated and redundant disclosures.¹⁷ Accordingly, we urge FINRA to reevaluate the need for this additional disclosure language which we believe will prove meaningless to the majority of retail customers. Moreover, we remind FINRA that its Concept Release offered in RN 10-54 would require disclosure of the conflicts of interest contemplated in the Proposed Rule.

However, should FINRA conclude that additional disclosures are still necessary, we request further guidance. While we believe that FINRA was attempting to answer our original inquiry with respect to how far the "financial interest" test ran through the supervisory chain by making the change to the Proposed Rules discussed above, we believe there is still a great deal of ambiguity as it relates to this disclosure obligation. We believe this ambiguity can be resolved by clearly defining and explaining what the "ability to influence the content of the communication" means. More specially, FINRA should define the key term "ability to influence," and provide more analysis on how this change resolves our inquiry.

Finally, we continue to believe that the financial interests of the firm's registered representatives would be extremely difficult for independent broker-dealers to track on a real-time basis. Accordingly, we request further clarification from FINRA on how far the registered representative's disclosure obligation runs and urge FINRA to define the term "ability to influence" as provided in Proposed Rule 2210(d)(7).

¹⁴ Proposed Rule Change to Adopt FINRA Rules 2210, 2212, 2213, 2214, 2215, and 2216 in the Consolidated FINRA Rulebook, 76 Fed. Reg. at 46886 (August 3, 2011).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Please see FSI's Comment Letter related to Regulatory Notice 10-54, and our discussion about effective disclosure. FSI's comment letter can be accessed here:

<http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/noticerecommendations/p122722.pdf>

- **Definition of the Term Institutional Investor** - The term "Institutional Investor" is defined in the Proposed Rule as follows:

““Institutional investor” means any:

- (A) person described in Rule 4512(c), 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 such plans;
- (D) qualified plan, as defined in Section 3(a)(12)(C) of the 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 such plans;
- (E) member or registered person of such a 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.” (Emphasis added)¹⁸

The inclusion of the phrase "has reason to believe," in the Proposed Rule suggests that FINRA may apply the retail communication provisions of the Proposed Rule to broker use/internal use materials. Rather than have member firms speculating and guessing if a communication may be forwarded or made available to any retail investor, we urge FINRA to expressly set parameters around this expectation. We believe that a "reason to believe" standard is subject to a variety of interpretations. Accordingly, we urge FINRA to remove this subjective standard and replace it with a clearly articulated standard.

¹⁸ Proposed Rule 2210(a)(4)

Conclusion

In summary, we believe that the Proposed Rule is a meaningful effort to streamline and clarify the existing requirements related to communications with the public. Accordingly, we continue to support the Proposed Rule's adoption. We do, however, request resolution from FINRA regarding the concerns raised in this letter.

We are committed to constructive engagement in the regulatory process and, therefore, welcome the opportunity to work with you to enhance investor protection and broker-dealer compliance efforts.

Thank you for your consideration of our comments. Should you have any questions, please contact me at 770 980-8488.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. T. Bellaire". The signature is fluid and cursive, with a large initial "D" and "T" followed by "Bellaire".

David T. Bellaire, Esq.
General Counsel and Director of Government Affairs