



August 25, 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")<sup>1</sup> appreciates the opportunity to comment on the proposed consolidated Financial Industry Regulatory Authority ("FINRA") rules governing communications with the public.<sup>2</sup> Specifically, FINRA is proposing to adopt 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 NASD Interpretive Materials 2210-1 and 2210-3 through 2210-8.

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<sup>1</sup>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>.

<sup>2</sup>Notice of Filing of 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. 34-64984 (July 28, 2011), 76 FR 149 (August 3, 2011).

## 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 initially published this rule proposal in Regulatory Notice 09-55, and FINRA has addressed many of the comments submitted by SIFMA and others on the initial proposal. The initial proposal has been improved in several important respects, including the following:

- FINRA restored the 30-calendar day distribution qualifier — which had appeared in NASD Rule 2211(a)(1) — to the definitions of "correspondence" and "retail communications" in proposed FINRA Rule 2210(a)(2) and (5). Without this qualifier, members would have been required to track "correspondence" over an indefinite period of time to ensure that it is not distributed or made available to more than 25 retail investors.
- FINRA exempted all "retail communications" from the pre-approval requirements in proposed FINRA Rule 2210(b)(1) that fall within the exceptions to the definition of "research report" in NASD Rule 2711(a)(9)(A), including "market letters," that are posted on an online interactive electronic forum, and that do not make any financial or investment recommendation or otherwise promote a product or service of the member.
- FINRA proposed limits to the requirement that new members file all retail communications with FINRA at least ten business days prior to use. Proposed FINRA Rule 2210(c)(1) requires new members to pre-file only those retail communications that are published in the electronic or public media. This excludes password-protected web pages and other materials that are not generally accessible to the public.
- FINRA struck the reference to "options" in proposed FINRA Rule 2210(c)(2). Options communications are already covered by FINRA Rule 2220, and should not be addressed again in proposed FINRA Rule 2210.

While substantial progress has been made, SIFMA remains concerned about various provisions in proposed FINRA Rule 2210 and its supplementary material. SIFMA remains particularly concerned about the broad scope of "retail communications" in proposed FINRA Rule 2210 (a)(5), the failure to exempt online postings from the filing requirement in proposed FINRA Rule 2210(c)(7), as well as the dramatic expansion of the disclosure requirements that

apply to recommendations of securities in proposed FINRA Rule 2210(d)(7)(A).

SIFMA is also concerned about the multiple types of institutional investor in the federal securities laws and of the multiple definitions of "institutional investor" and "institutional account" in the FINRA rulebook. The term "institutional investor" is defined in proposed FINRA Rule 2210(a)(4). FINRA Rule 4512(c) already 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.<sup>3</sup> 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.<sup>4</sup> NYSE Rule 408.11<sup>5</sup> adds yet another definition of "institutional account." Finally, certain provisions of the federal securities laws add other relevant definitions to the mix. Customers may also qualify as a "qualified institutional buyer" (or "QIB"),<sup>6</sup> "qualified investor,"<sup>7</sup> "qualified purchaser,"<sup>8</sup> or "accredited investor,"<sup>9</sup> all of which have different meanings.

These disparate standards create serious compliance difficulties for members. Customers may fall within one, some, or all of these institutional account categories, sometimes only on a temporary basis. Members must have systems to determine the categories within which each customer falls, and must update their systems each time the status of a customer is changed. To ease this compliance burden and limit confusion, SIFMA urges FINRA to harmonize the multiple definitions of the terms "institutional investor" and "institutional account" in the FINRA rulebook.

As always, SIFMA welcomes the opportunity to discuss with FINRA or the Securities and Exchange Commission ("SEC") any of our comments to the proposed rule changes. Our specific comments are as follows.

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<sup>3</sup>See FINRA Rule 4512(c)(1) through (3).

<sup>4</sup>See proposed FINRA Rule 2210(a)(4)(B) through (F).

<sup>5</sup>See FINRA Regulatory Notice 08-64 (October 2008).

<sup>6</sup>See Rule 144A(7)(a) under the Securities Act of 1933, as amended (the "Securities Act").

<sup>7</sup>See Securities Exchange Act of 1934, as amended (the "Exchange Act"), § 3(a)(54).

<sup>8</sup>See Investment Company Act of 1940, as amended, §§ 3(c)(7) and 2(a)(51).

<sup>9</sup>See Securities Act, § 2(a)(15).

II. Proposed FINRA Rule 2210(a)

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

SIFMA reiterates its earlier suggestion, made in response to Regulatory Notice 10-55, that the definition of "institutional investor" should be expanded. Although we recognize that the proposed definition generally tracks NASD Rule 2211(a)(3), the proposed rule significantly changes the consequences that flow from satisfying that definition. Under the current provision, a member must treat non-institutional customers as "retail customers" in the context of correspondence, and must apply the standards of "sales literature" (rather than "institutional sales material") with respect to non-institutional recipients. Under the proposed provision, by contrast, any entity that does not meet the definition of "institutional investor" is automatically deemed a "retail investor," and communications with that entity become "retail communications" subject to a broad array of pre-approval and pre- and post-use filing requirements.

As SIFMA urged in its initial comment letter, FINRA should consider broadening the definition of "institutional investor" to include entities such as unregistered hedge funds, money managers, and family offices, regardless of the amount of assets under management. In light of the significant requirements attaching to "retail communications," it is not appropriate to lump such entities, which are sophisticated players in the market, together with retail investors. The approach SIFMA advocates is similar to FINRA's categorical inclusion of registered investment advisers as "institutional investors," regardless of assets under management.

In the alternative, SIFMA urges FINRA to broaden the scope of proposed FINRA Rule 2210(a)(4) by lowering the asset threshold for "institutional investors" to \$10 million. Entities with total assets of at least \$10 million are sufficiently sophisticated, sufficiently distinct from retail customers, and sufficiently capable of evaluating sales and other materials appropriate for institutional accounts. Indeed, the proposed asset threshold—total assets of at least \$50 million—excludes a sizable number of private investment funds run by professional investment managers. SIFMA believes that these and other smaller-sized institutions are institutional accounts that do not need the protections afforded to retail investors.

B. Proposed FINRA Rule 2210(a)(2), (4) and (5)

Proposed FINRA Rule 2210(a)(4) provides that a member cannot 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." SIFMA believes that this standard is inappropriate and, from a compliance perspective, unworkable. Members cannot control what end-users do with communications that they receive from a member, nor can they reasonably be expected to predict or monitor what an end-user may do with institutional communications that are not intended by the sender to be provided to others. SIFMA urges FINRA to adopt a standard that recognizes that members cannot control what recipients do with communications they receive from a member, but can

establish policies and procedures that are reasonably designed to prevent unauthorized distributions of institutional communications to retail investors.

SIFMA urges the following amendments to proposed FINRA Rule 2210(a)(4):

No member may treat a communication as having been distributed to an institutional investor unless [if] the member has established policies and procedures that are reasonably designed to limit the distribution of [reason to believe that] the communication or any excerpt thereof [will be forwarded or made available to any retail investor] to institutional investors.

Proposed FINRA Rule 2210(a)(2) and (5) present a similar problem. Proposed FINRA Rule 2210(a)(2) provides that "correspondence" is any written or electronic communication that is distributed or made available to 25 or fewer retail investors within any 30 calendar-day period. Similarly, Proposed FINRA Rule 2210(a)(5) provides that a communication becomes a "retail communication" when it is distributed or made available to more than 25 retail investors within a 30-day calendar period. Here again, members are not in a position to control what end-users do with communications that they receive from a member. Members can, however, adopt policies and procedures that are reasonably designed to prevent the unauthorized distribution by recipients of communications that are intended to be "correspondence" as opposed to "retail communications." This may include, for example, policies and procedures that require such communications to contain legends that expressly prohibit the forwarding of such communications to unauthorized persons. The use of legends is a well established practice that members have long used to flag unauthorized distributions.

SIFMA urges the following amendments to proposed FINRA Rules 2210(a)(2) and (5):

"Correspondence" means any written (including electronic) communication that is distributed or made available directly by a member or an associated person of the member to 25 or fewer retail investors within any 30 calendar-day period.

"Retail communication" means any written (including electronic) communication that is distributed or made available directly by a member or an associated person of the member to more than 25 retail investors within any 30 calendar-day period.

Correspondence and institutional communications should not become "retail communications" merely because, unbeknownst to the member, a recipient who is outside of the member's control has forwarded the communication to an unauthorized recipient (or recipients).

### III. Proposed FINRA Rule 2210(c)(7)

SIFMA commends FINRA for excluding, in proposed FINRA Rule 2210(b)(1)(D)(ii), retail communications that are "posted on an online interactive electronic forum" from the principal approval requirements of proposed FINRA Rule 2210(b)(1)(A). FINRA has correctly recognized that postings on social media and similar fora are more appropriately reviewed under

the more flexible, risk-based standards of NASD Rule 3010(d). Unfortunately, the flexibility gained by this carve-out is seriously undermined by the fact that online postings have not been excluded from the pre- or post-use filing requirements in proposed FINRA Rule 2210(c). Without such an exclusion, members would be required to review every online posting from every associated person to determine whether the filing requirements of proposed FINRA Rule 2210(c)(2) or (3) have been triggered. Any discussion of mutual funds or exchange-traded funds on a social network, for example, could potentially trigger a filing requirement under proposed FINRA Rule 2210(c)(3).

Subjecting online postings to pre- and post-use filing requirements is also inconsistent with the principles that FINRA has developed, in consultation with the industry, for the review of electronic communications. In Regulatory Notices 07-59 and 10-06, FINRA has endorsed a risk-based approach to supervising electronic communications, an approach that recognizes the desirability and volume of such communications. Our members' customers spend increasing amounts of time on the internet, and they expect to interact with their service providers online. A rule that effectively requires the review of 100% of a member's postings in an online interactive forum would create a high—and perhaps insurmountable—obstacle to its ability to communicate with customers in their desired fora.

At a minimum, we believe that proposed FINRA Rule 2210(c)(7) should be revised to exclude online postings, which have been excluded from proposed FINRA Rule 2210(b)(1)(D)(ii). In our view, however, the better solution is to revise proposed Rule 2210(f) to specify that online postings—at least those of an interactive nature—are a type of "public appearance" that do not constitute "retail communications." Such a revision would restore the long-standing FINRA definition of "public appearance," currently reflected in NASD Rule 2210(a)(5), and reiterated in Regulatory Notices 10-06 and 10-55. Indeed, FINRA has reiterated this view again in Regulatory Notice 11-39, FINRA's latest guidance on social networking websites. Regulatory Notice 11-39 makes clear that "FINRA considers unscripted participation in an interactive electronic forum to come within the definition of 'public appearance' under NASD Rule 2210." We agree. The open and spontaneous nature of interactive postings make them much more analogous to unscripted public appearances, as FINRA has long recognized. SIFMA urges FINRA to maintain the classification of online postings as "public appearances."

#### IV. Proposed FINRA Rule 2210(d)(7)

##### A. Proposed FINRA Rule 2210(d)(7)(A)

Proposed FINRA Rule 2210(d)(7)(A) expands current disclosure requirements for recommendations of securities by applying them to all "retail communications" and "public appearances" that contain a recommendation of securities. This is a dramatic expansion from the disclosure requirements of NASD IM-2210-1, which applied only to the more limited universe of "advertisements" and "sales literature." The more limited universe of "advertisements" and "sales literature" includes only materials that are made generally available to customers or the investing public. Proposed FINRA Rule 2210(d)(7)(A) expands the universe significantly. It

applies to, among other things, any correspondence that is distributed to more than 25 retail investors, any research that does not satisfy the definition of "research report" in NASD Rule 2711, and all public appearances by associated persons.

SIFMA believes that—consistent with NASD IM-2210-1—proposed FINRA Rule 2210(d)(7)(A) should apply only to "public appearances" and to "retail communications that are published or used in the electronic or other public media." The disclosures in proposed FINRA Rule 2210(d)(7)(A) were meant to apply to recommendations of securities that are made in the context of broad-based communications with the investing public, where the recipient may not have a direct relationship with the sender. "Retail communications" that are not published in the media, or made generally available to customers, should not be covered by the proposed rule. SIFMA urges FINRA to adopt the following language—which borrows from the standard in proposed FINRA Rule 2210(c)(1)—in proposed FINRA Rule 2210(d)(7)(A):

Retail communications that are published or used in any electronic or other public media and public appearances as described in paragraph (f) that include a recommendation of securities must have a reasonable basis for the recommendation and must disclose, if applicable, the following:

Adopting proposed FINRA Rule 2210(d)(7)(A) without qualifying the term "retail communications" would require members to append extensive disclosures on a potentially enormous quantity of additional materials. SIFMA believes that the benefits of requiring members to make such disclosures on these additional materials are far outweighed by the additional costs.

B. Proposed FINRA Rule 2210(d)(7)(A)(ii)

Proposed FINRA Rule 2210(d)(7)(A)(ii) expands current disclosure requirements by applying them to "the member or any associated person with the ability to influence the content of the communication." This, too, is a dramatic expansion from the disclosure requirements of NASD IM-2210-1, which applies such requirements only to "the member and/or its officers or partners."

This expanded disclosure regime is, we submit, unnecessary. SIFMA understands that when a recommendation is made by the member itself, such a recommendation may carry additional weight, thus justifying an added layer of disclosure. With respect to recommendations made by associated persons, however, investors are protected by a panoply of safeguards, including the suitability rule, communications standards that mandate a fair and balanced presentation, and anti-manipulation rules that prevent conflicts from interfering with recommendations. A recommendation that complies with all of these rules—i.e., that is fair, balanced, and suitable for the investor—should not have to be accompanied by extensive disclosures.

In practice, proposed FINRA Rule 2210(d)(7)(A)(ii) would impose significant burdens by requiring members to implement extensive compliance systems to track the securities holdings of all of their associated persons, and to make such information available on a real-time basis to registered representatives who make recommendations. Because of the large number of associated persons who may have the ability to influence the content of a recommendation, the consequences of such a requirement would be severe. It is not at all unusual for a registered representative to have multiple supervisors (often in multiple locations and departments), all of whom have the ability to influence the content of a recommendation. Proposed FINRA Rule 2210(d)(7)(A)(ii) would require that the member, at a minimum, implement systems and processes designed to: (1) identify associated persons that have the ability to influence the recommendations of registered representatives; (2) monitor the securities holdings of such associated persons; (3) determine whether an associated person who has the ability to influence the recommendations of a registered representative holds securities that are the subject of the proposed recommendation of a registered representative; (4) determine the nature and extent of the securities holdings; and (5) make such information available to the registered representative on a real-time basis so that the registered representative is in a position to satisfy the disclosure requirements with respect to the proposed recommendation. Respectfully, this is an extremely difficult task for most members.

SIFMA believes that proposed FINRA Rule 2210(d)(7)(A)(ii) should apply only to the member and/or its officers or partners (as did NASD IM-2210-1). SIFMA urges FINRA to adopt the following proposed language:

(ii) that the member and/or its officers or partners [or any associated person with the ability to influence 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

SIFMA's proposed language would put reasonable limitations on the persons whose securities holdings would be required to be disclosed by registered representatives who make securities recommendations. Such limitations would enable members to provide meaningful disclosures to customers, without requiring members to implement costly monitoring systems and processes.

#### V. Proposed FINRA Rule 2210 and NASD Rule 2711

NASD Rule 2711 was adopted specifically to address the unique issues that arise in connection with research. As a general matter, SIFMA believes that "research reports" should be subject to the uniform standards set forth in NASD Rule 2711, not the potentially inconsistent standards of proposed FINRA Rule 2210. SIFMA acknowledges that the issue of "research" in terms of communications with the public is a difficult one. As a historical matter, "research," broadly defined, was deemed a form of "sales literature" and therefore regulated under NASD Rule 2210. Today, research is subject to a panoply of NASD/FINRA and SEC rules crafted to

address issues relating to the preparation, review and distribution of such reports.<sup>10</sup> Indeed, NASD Rule 2711 has its own review and approval requirements,<sup>11</sup> its own public appearance requirements,<sup>12</sup> its own disclosure requirements,<sup>13</sup> and its own recommendation requirements.<sup>14</sup> Each such requirement was designed specifically for "research reports" and "research analysts" (and nothing else), and should trump the general provisions set forth in FINRA's communications with the public proposal.

SIFMA believes that FINRA should acknowledge that a separate regulatory regime for "research" has developed, and that FINRA should sever the link between proposed FINRA Rule 2210 and "research." We take this position for the following reasons:

- It is evident that attempting to deal with "research" in proposed FINRA Rule 2210 leads immediately—see proposed FINRA Rule 2210 (b)(1)(B) and (b)(1)(D)(i) as the first such examples in reading the proposal—to exclusions and provisos that complicate proposed FINRA Rule 2210 without any regulatory benefit.
- SIFMA is concerned that the exclusions and provisos in proposed FINRA Rule 2210 will have unintended consequences and leave ambiguities as to whether "research" is or is not captured by certain provisions of proposed FINRA Rule 2210, which provisions may or may not be consistent with NASD Rule 2711 and its successors.
- FINRA has the opportunity, in revisiting its "research" rules in connection with incorporating NASD Rule 2711 into its consolidated rulebook, to address all such matters relating to "research."<sup>15</sup>
- As a matter of regulatory policy, it would be highly preferable to allow firms to refer to a specifically-tailored and self-contained rule governing "research," rather than having to deal both with that rule and a generalized communication rule in determining what requirements apply to "research."

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<sup>10</sup>Such provisions include, among others, Regulation AC, and NASD Rules 1050, 2711 and 5280.

<sup>11</sup>See NASD Rule 2711(b) and (c).

<sup>12</sup>See NASD Rule 2711(f).

<sup>13</sup>See NASD Rule 2711 (h).

<sup>14</sup>See NASD Rule 2711(h)(4) through (7).

<sup>15</sup>Separately, in March 2011, FINRA issued a regulatory notice seeking comment on a concept proposal relating to the preparation and distribution of debt research reports. See Regulatory Notice 11-11 (March 11, 2011). SIFMA commented on this proposal as well. See Letter from James T. McHale, Managing Director and Associate General Counsel, SIFMA, April 29, 2011.

SIFMA acknowledges that this topic presents certain difficulties. Given that NASD Rule 2711 proceeds on the basis of defining a "research report" as an equity research report and carefully excludes certain other "research"—for example, fixed income, economics, and commodities—from its provisions, there exists the problem of how to deal with those other types of "research." Further, there is the reality that, while some members have "research departments" and "supervisory analysts," other members do not. Finally, while the idea of requiring a "fair and balanced" standard for communications might seem reasonable on its face, content standards have slight differences in the context of research. NYSE Rule 472(j)(1), which provides that research "must have a basis which can be substantiated as reasonable," is a more appropriate standard.

It is clear to SIFMA that it is preferable to address all matters having to do with "research" products of all types (including, for example, reports specifically exempted from the definition of research) labeled as such in one set of "research" rules—which might cross-reference the "general" communications standards, if appropriate—than the approach currently embodied in Proposed FINRA Rule 2210—i.e., that research is presumptively governed by the general rule unless an exemption or modified provision can be found.

One possible approach, for example, would be for FINRA to build upon the concept acknowledged in both NASD Rule 2711 and NASD Rule 5280 of a "research department," taking the basic position that insofar as a communication is branded as a product of a research department and is treated as such by the member (i.e., the research department has supervised its preparation, review and distribution), then the publication is exempt from the provisions of proposed FINRA Rule 2210.

#### VI. 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 both "institutional communications" under FINRA Rule 2210(a)(3), and internal correspondence under NASD Rule 3010(d). SIFMA respectfully disagrees with this approach. Proposed FINRA Rule 2210 was not intended to apply to communications that do not extend outside of the member. Indeed, the definitions of "correspondence," "institutional communication," and "retail communication" all require that the communication is "distributed or made available" to someone outside the member (whether an institutional or retail investor).<sup>16</sup>

Applying the standards of proposed FINRA Rule 2210 to internal education and training materials subjects these internal communications to overlapping and potentially inconsistent standards of review. Accordingly, SIFMA urges FINRA to make proposed Supplementary Material .01 consistent with the scope of the proposed Rule by amending it to provide that internal communications are covered by NASD Rule 3010(d), not proposed FINRA Rule 2210(a)(3).

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<sup>16</sup>See proposed FINRA Rule 2210(a)(2), (3), (4) and (5).

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

Proposed FINRA Rule 2210(c)(7)(F) declines to exclude "free writing prospectuses" that have been filed with the SEC pursuant to Rule 433(d)(1)(ii) of the Securities Act from the filing requirements of proposed FINRA Rule 2210(c). SIFMA is at a loss to understand why FINRA believes free writing prospectuses that are filed with the SEC should also be filed with FINRA. Such prospectuses should not be subject to a double-filing requirement for the same reasons that preliminary and formal prospectuses are not subject to a double-filing requirement. FINRA has not explained why free writing prospectuses, unlike preliminary and formal prospectuses, should be subject to duplicative filing obligations.

Nor is the filing of free writing prospectuses with FINRA consistent with 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."<sup>17</sup> Requiring members to file free writing prospectuses with FINRA delays the communication of important information to investors and may well slow the offering process. Indeed, many securities products are offered initially pursuant to a free-writing prospectus, and some (exchange-traded funds and unit investment trusts, among them) could trigger a pre-filing requirement under proposed FINRA Rule 2210(d)(2). Requiring members to pre-file such materials with FINRA would prejudice issuers and investors by causing significant and unforeseen delays in the offering process.

SIFMA 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 Rule 2210(c)(7)(F). Such materials should be excluded from the filing requirements of proposed FINRA Rule 2210(c)(1) through (4).

VIII. Proposed FINRA Rule 2210(c)(7)(B)

Proposed FINRA Rule 2210(c)(7)(B) provides an exception to the filing requirements in proposed FINRA Rule 2210(c)(1) through (4) for retail communications that are based on templates that were previously filed with FINRA and that are "limited to updates of statistical or other non-narrative information." While we commend FINRA's decision to exempt these kinds of updates from the filing requirements, there is, in fact, little difference between updates of narrative and non-narrative information when they derive from an independent, third-party source. Indeed, such information is typically received in the same dynamic feed. Whether the information is narrative or non-narrative, the member exercises no control or discretion over the update. Members should be able to update their templates in either event.

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<sup>17</sup>See Release No. 33-8591 (July 19, 2005), 70 FR 44722 (August 3, 2005).

SIFMA urges FINRA to broaden the scope of proposed FINRA Rule 2210(c)(7)(B) by including updates of narrative information when such updates come from an independent, third-party source. SIFMA proposes the following new exception for members that use templates with information that is derived from an independent, third-party source:

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 narrative or non-narrative information, provided such information is derived from an independent, third-party source.

SIFMA urges FINRA to retain the original exception as well. Members that use templates that do not contain information that comes from independent, third-party sources should not be required to re-file retail communications that are based on templates that were updated with more recent statistical or other non-narrative information.

IX. Proposed FINRA Rule 2210(c)(7)(H)

Proposed FINRA Rule 2210(c)(7)(H) provides an exception to the filing requirements for "press releases" that are made available to the media. SIFMA believes that this exception should be broadened to include any "press materials" that are provided to the media, not just "press releases." It is not at all unusual for members to provide materials to the press that cannot accurately be described as "press releases," such as, for example, market studies, internal research about relevant issues, product descriptions, and white papers. SIFMA urges FINRA to resolve this issue by using the term "press materials" in proposed FINRA Rule 2210(c)(7)(H), in lieu of the term "press releases."

X. 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 within 10 business days of first use or publication. The stated rationale for adding this requirement is that "FINRA believes that investors deserve the same protections concerning retail communications about closed-end funds that are distributed after the IPO period as those that are distributed during the IPO period." SIFMA is unclear how "investor protection" is enhanced after the distribution of the "retail communication" if in fact a registered principal has already pre-approved the "retail communication" in the first place (as would be required under proposed FINRA Rule 2210(b)(1)(A)). Creating the additional administrative burden of filing with FINRA "all retail communications" relating to closed-end funds after the IPO of such fund does not appear to advance investor protection in a manner greater than having a FINRA-registered principal review such communication prior to distribution. SIFMA urges FINRA to eliminate this requirement in proposed FINRA Rule 2210(c)(3).

Similarly, SIFMA requests that FINRA eliminate this same requirement for government securities as set forth in proposed FINRA Rule 2210(c)(3)(C). This is a change from current

NASD Rule 2210(c)(2)(C), which requires that "advertisements" relating to government securities be filed within 10 business days of first use. As stated above, requiring that retail communications relating to government securities be filed with FINRA after distribution does not appear to add any additional protection to investors particularly since such communications have already been subject to review and approval by a registered principal. In a fast-moving market as the industry and the investing public experienced in mid-August, timely communications about government securities is critical. Forcing firms to file retail communications about government securities within 10 business days of first use does not seem warranted from the standpoint of investor protection given the pre-approval by a registered principal. SIFMA urges FINRA to maintain the current requirement for government securities in NASD Rule 2210(c)(2)(C).

XI. Format of the Proposing Release

As a final matter, SIFMA notes that the proposed rules in the proposing release are difficult for readers to follow. SIFMA acknowledges the difficulties of the rulemaking process, and the complexity of proposed FINRA Rule 2210. Despite these difficulties (or perhaps because of them), SIFMA urges FINRA to simplify the presentation of the proposed rules. SIFMA believes that it would be helpful for FINRA to include a "clean version" of the proposed rules in future proposing releases. SIFMA believes that marked versions of the proposed rules with strike-through deletions—instead of bracketed deletions—would also be helpful. These are complex regulations that should be readily understandable by industry professionals, as well as the investing public. SIFMA hopes that the proposed rules in future proposing releases are presented to the public in a more user-friendly way.

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Ms. Elizabeth M. Murphy

August 25, 2011

Page 14 of 14

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,



John Polanin  
Co-Chair, Compliance and  
Regulatory Policy Committee 2011



Claire Santaniello  
Co-Chair, Compliance and  
Regulatory Policy Committee 2011

cc: Mr. Marc Menchel  
Ms. Patrice Gliniecki  
Ms. Patricia Albrecht