

### Filing Requirements for Certain Electronic Communications

The staff has received inquiries regarding whether certain interactive content posted in a real-time electronic forum (*i.e.*, chat rooms or other social media) (“interactive content”) should be filed under the filing requirements of Section 24(b) of the Investment Company Act of 1940 (“1940 Act”) or Rule 497 under the Securities Act of 1933 (“1933 Act”) if it is not required to be filed under Financial Industry Regulatory Authority (“FINRA”) Rule 2210.<sup>1</sup> The staff believes that certain interactive content need not be filed. Whether a communication need be filed depends on the content, context, and presentation of the particular communication or set of communications and requires an examination of the underlying substantive information transmitted to the social media user and consideration of any other facts and circumstances, such as whether the interactive communication is merely a response to a request or inquiry from the social media user or is forwarding previously-filed content. The following examples of interactive communications are intended to provide more guidance.

The staff would view the following as examples of interactive communications that generally need not be filed:

- ▲ An incidental mention of a specific investment company or family of funds not related to a discussion of the investment merits of the fund.
  - “Fund X Family of Funds invites you to their annual benefit for XYZ Charity.”
  - “More than 100 Fund X employees volunteered for our Annual Day of Caring!”
  - “Consumer Reports has written an article in which it mentions our Brand X Rewards Card. Are you a card member?”
  
- ▲ The incidental use of the word “performance” in connection with a discussion of an investment company or family of funds, without specific mention of some or all of the elements of a fund’s return (*e.g.*, 1, 5 and 10 year performance).<sup>2</sup>
  - “We update the performance of our funds every month and publish the results on <website url>.”
  - “Click on this link <website url> where we provide full details of our yearly performance since inception.”



- “When reviewing a mutual fund’s historical performance it’s important to consider the following:
  - Total return
  - Performance against benchmark index
  - Performance against peers
  - Past performance is not a guarantee of future returns.”
  
- ▲ A factual introductory statement forwarding or including a hyperlink to a fund prospectus or to information that is filed pursuant to Section 24(b) or Rule 497:<sup>3</sup>
  - “The new ABC ETF Strategy Report is now available through this link: <website url>.”
  - “We launched two new emerging market funds this week. More info about them is available here <website url>.”
  - “John Doe is the new portfolio manager for ABC fund. <website url>.”
  
- ▲ An introductory statement not related to a discussion of the investment merits of a fund that forwards or includes a hyperlink to general financial and investment information such as discussions of basic investment concepts or commentaries on economic, political or market conditions:
  - “The ‘low volatility anomaly’ is explained in our latest white paper: <website url>.”
  - “Our data shows the average 401(k) balance is the highest it’s been in more than 10 years! This is partly due to increasing employer and employee contributions. <website url>.”
  - “The election is over, what is next for our economy? See our report analyzing the elections. <website url>.”
  - “Here’s a Q&A with our Portfolio Manager, John Doe, regarding his views on the economy for 2013. <website url>.”
  - “Gold and silver have provided a relatively low correlation to stocks and bonds over the last few years. <website url>.”
  
- ▲ A response to an inquiry by a social media user that provides discrete factual information that is not related to a discussion of the investment merits of the fund. The response may direct the social media user to the fund prospectus or to access information filed with FINRA pursuant to Section 24(b) or Rule 497 or to contact the issuer through a different medium (e.g., phone, e-mail).

INQUIRY: “Why are your funds such a large investor in ABC Manufacturer’s stock?”

**Fund’s posted response:** “We respect your thoughts. As you know, ABC Manufacturer is found in many broad-market indices that our index funds are obligated to track so some of our index funds hold those shares as a result.”

INQUIRY: “Can you add a page to your website providing personalized information on year-end distribution dates, estimated distributions, and total estimated distributions?”

**Fund’s posted response:** “Here’s a link to our website that may provide the information you’re interested in: <website url>”

INQUIRY: “What is a better investment, buying real estate or buying a REIT?”

**Fund’s posted response:** “There are a lot of things to consider when choosing between the two options. The answer depends on your goals and risk tolerance and whether you want to invest in a REIT, a fund that invests in REITs, or real property. While we can’t talk about specific funds on [social media] please give us a call at 1-800-\*\*\*-\*\*\*\* and we’ll be happy to talk to you in more detail about this.”

INQUIRY: “With companies paying dividends in December to avoid concerns with 2013, are you anticipating paying larger than usual capital gains and dividends in December 2012?”

**Fund’s posted response:** “According to a lead analyst in our Investment Strategy Group, our published capital gains and dividends estimates are not that different this year than in recent years. Here’s a link to our estimates: <website url>.”

INQUIRY: “What was the NAV for ABC fund on Friday?”

**Fund’s posted response:** “\$xx.xx”

INQUIRY: “What are the fees and expenses for ABC Fund?”

**Fund’s posted response:** “Information on the fund’s fees and expenses is available at <website url>. Feel free to contact us at 1-800-\*\*\*-\*\*\*\* for more information about this fund.”

INQUIRY: “How can I exchange shares from one fund to another?”

**Fund’s posted response:** “Information about exchanging fund shares is available on our website at <website url>. Feel free to call us at 1-800\*\*\*-\*\*\*\* to assist you with this process.”

The staff would view the following as examples of interactive communications that generally should be filed pursuant to Section 24(b) or Rule 482, as appropriate:

- ▲ A discussion of fund performance that provides specific mention of some or all of the elements of a fund's return (e.g., 1, 5 and 10 year performance) or promotes a fund's returns.
  - "Our quarter-end returns have exceeded our expectations!"
  - "Please keep in mind the fund's high double-digit returns were primarily achieved during favorable market conditions."
  - "Fund performance rebounded strongly during the third quarter of 2012."
  - "The fund slightly underperformed its benchmark, the S&P 500 Index, during the quarter that ended September 30, 2012."
  
- ▲ A communication initiated by the issuer that discusses the investment merits of the fund.
  - "Looking for dividends? Think global and consider our new Global Equity Fund. <website url>."
  - "What's your favorite technology to invest in? Read our portfolio manager's views regarding Fund X as an investment opportunity in this space. <website url>."
  - "As you plan for retirement, consider our new lifecycle fund <website url>."
  - "Our ABC Fund was included in the list of best new funds recently published by Morningstar. <website url>"

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### Endnotes

- 1 In particular, Section 24(b) of the 1940 Act prohibits certain investment companies from transmitting any advertisement, pamphlet, circular, form letter, or other sales literature addressed to or intended for distribution to prospective investors ("24(b) ads") through U.S. jurisdictional means unless the 24(b) ads have been filed with the Commission or are filed within 10 days of the transmission. Further, Rule 497 under the 1933 Act requires registered investment company performance advertisements subject to Rule 482 ("482 ads") to be filed with the Commission. 24(b) ads and 482 ads are considered filed with the Commission if filed with FINRA.

In the past, FINRA deemed real-time, interactive content on social networking as a public appearance, exempt from FINRA Rule 2210's filing requirement (the current category is "retail communications"). See "Blogs and Bulletin Boards," Guide to the Web for Registered Representatives available at <http://www.finra.org/Industry/Issues/Advertising/p006118>; and "Ask the Analyst—Electronic Communications," NASD Regulation, Regulatory & Compliance Alert (Mar. 1999) available at <https://www.finra.org/Industry/Regulation/Guidance/RCA/p015326>. FINRA clarified to its members in 2010 that even if FINRA considers interactive content to be a public appearance exempt from Rule 2210's filing requirement, the SEC could still conclude that Rule

482 under the 1933 Act and the filing requirements of Section 24(b) of the Act apply to the communication. See Regulatory Notice 10-06, Social Media Web Sites: Guidance on Blogs and Social Networking Web Sites (January 2010) available at <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p120779.pdf>.

- 2 In these examples, the performance discussion in the attached hyperlink “<website url>” is filed with FINRA pursuant to Rule 497.
- 3 In other words, in these examples, the content of the hyperlink “<website url>” is filed with FINRA pursuant to Section 24(b) or Rule 497. An issuer cannot avoid the filing requirements of Section 24(b) or Rule 497 by posting an interactive communication that hyperlinks to or attaches material that should be, but has not been, filed (e.g., a fund fact sheet).

This IM Guidance Update summarizes the Commission staff’s views regarding various requirements of the Investment Company Act of 1940 and/or the Investment Advisers Act of 1940. Future changes in laws or regulations may supersede some of the discussion or issues raised herein. This IM Guidance Update is not a rule, regulation or statement of the Commission, and the Commission has neither approved nor disapproved of this IM Guidance Update.

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- ▲ protect investors
- ▲ promote informed investment decisions and
- ▲ facilitate appropriate innovation in investment products and services

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**If you any questions about this IM Guidance Update, please contact:**

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