

FINRA ISSUES ADDITIONAL GUIDANCE ON COMMUNICATIONS WITH THE PUBLIC

After several years of proposed changes to the rules governing broker-dealer communications with the public, the Financial Industry Regulatory Authority, Inc. (“FINRA”) announced in June 2012 that the final, modified rule will be effective as of February 4, 2013. FINRA received a number of questions since the announcement and recently released additional guidance on the Advertising Regulation page of its website. The guidance is an a Q&A format available [here](#). This Client Alert summarizes several of the issues addressed in the latest guidance. For further discussion of the prior proposals and the final rules, please refer to our prior Client Alert entitled SEC Approves New FINRA Rules on Communications with the Public (June 22, 2012) available [here](#).

Additional Guidance

Internal Communications. FINRA clarified that material prepared by a firm to train or educate registered representatives of other broker-dealers (whether affiliated or unaffiliated) would be considered “institutional communications” and, as a result, not eligible for the “internal communication” exclusion from FINRA Rule 2210(a)(3).

Transitional Filing Issues. If a firm has filed an advertisement or sales literature item with the FINRA Advertising Regulation Department under the existing NASD Rule 2210 filing requirements, and intends to continue using such material after the effective date of the new rules, FINRA indicated that it will not require the firm to re-file the material (unless the firm makes material changes to the previously-filed retail communication). FINRA also addressed certain other transitional filing issues.

New Member Firms. FINRA addressed certain filing requirements for new member firms, including compliance and cutoff dates.

Retail Structured Products. New FINRA Rule 2210(c)(3)(E) requires a firm to file retail communications concerning any security that is registered under the Securities Act of 1933 and that is derived from or based on a single security, a basket of securities, an index, a

commodity, a debt issuance or a foreign currency. While the intent appears to be that this provision covers certain registered structured products, questions have arisen as to what types of products this filing requirement actually covers. The recent guidance indicates that such registered structured products would include, among others, exchange-traded notes registered under the Securities Act of 1933, registered reverse convertibles, registered structured notes, registered principal protection notes, and any other registered security that includes embedded derivative-like features. FINRA then referred to Regulatory Notice 12-03 on heightened supervision of “complex” products for examples of other structured products (see our related [Client Alert](#).) FINRA also clarified that although the filing requirement applies to retail communications concerning registered structured products, it does not apply to issuer-prepared prospectuses, including issuer-prepared free-writing prospectuses, that are filed with the Securities and Exchange Commission.

Mutual Fund Portfolio Manager Discussions. FINRA clarified that the recommendation requirements of new FINRA Rule 2210 would not apply to a mutual fund portfolio manager’s discussion of the fund’s past performance (such as that which accompanies an annual or semi-annual report) and, as a result, would not be considered to be the firm’s recommendation of any individual securities in the discussion.

Public Appearances. A scripted presentation made by a registered representative (used with more than 25 retail investors within a 30 calendar-day period) would be considered a retail communication under new FINRA Rule 2210. FINRA clarified that the representative's firm would be responsible for approving the script prior to use. In addition, the new rule would require the firm to file the script (if subject to a filing requirement under the rule) and to establish appropriate written procedures to supervise the representative's public appearance.

FINRA also clarified that the requirement in FINRA Rule 2210(d)(3) to disclose a firm's name in retail communications and correspondence would apply to sales scripts, slide presentations and brochures used in connection with a public appearance (but not as part of non-scripted, extemporaneous remarks during a live appearance).

If you would like to discuss any of the issues discussed in this Client Alert, please contact any attorney in our Investment Management Group or visit us online at chapman.com.

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