

FREQUENTLY ASKED QUESTIONS ABOUT THE FINRA COMMUNICATION RULES

Understanding Financial Industry Regulatory
Authority, Inc. Rule 2210, Communications with the
Public

What is Rule 2210, and what does it require?

Rule 2210 governs three categories of “communications” by FINRA member firms:

- Institutional communications;
- Retail communications; and
- Correspondence.

The Rule sets forth requirements relating to approval, review and recordkeeping of communications; filing requirements and review procedures; and content standards. The Rule became effective on February 4, 2013.¹

As discussed below, the Rule’s general content standards apply to all communications, and are meant to ensure communications that are fair, balanced and not misleading. Retail communications are subject to the highest degree of regulation under the Rule.

¹ FINRA recently conducted a retrospective rule review process of Rule 2210. See FINRA Regulatory Notice 14-14 at <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p479810.pdf>.

Do the Rule’s requirements distinguish between communications that relate to registered or exempt securities, structured products or instruments that may not be viewed as securities?

In almost all cases, no. The Rule focuses mainly on the nature of the addressee of the communication, rather than on the type of instrument described in the communication. A communication made to an investor regarding a security or regarding a product that, in some circumstances, may not be viewed as a security, will be covered by the Rule. Consequently, communications to investors regarding registered securities, exempt securities or non-securities are subject to the Rule’s requirements.

What is “correspondence”?

“Correspondence” means any written (including electronic) communication that is distributed or made available to 25 or fewer retail investors within any 30 calendar day period.

Source: Rule 2210(a)(2)

What is a “retail communication”?

“Retail communication” means any written (including electronic) communication that is distributed or made available to more than 25 retail investors within any 30 calendar day period.

Source: Rule 2210(a)(5)

What is an “institutional communication”?

An “institutional communication” means any written (including electronic) communication that is distributed or made available only to institutional investors, but does not include a member’s internal communications.

Source: Rule 2210(a)(3)

Is a sales script intended for use with retail customers a retail communication?

Yes. Telemarketing and other sales scripts used with more than 25 retail investors within a 30-day period are retail communications.

Who is a “retail investor”?

“Retail investor” means any person other than an institutional investor, regardless of whether the person has an account with a member.

Source: Rule 2210(a)(6)

Who is an “institutional investor”?

An “institutional investor” means any:

- (A) ● Bank, savings and loan association, insurance company or registered investment company;
- Investment adviser registered either with the Securities and Exchange Commission (the “SEC”) under Section 203 of the Investment Advisers Act of 1940 or with a state securities commission (or any agency or office performing like functions); or
- Other person (whether a natural person, corporation, partnership, trust or otherwise) with total assets of at least \$50 million,

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 those plans;

(D) qualified plan, as defined in Section 3(a)(12)(C) of the Securities Exchange Act of 1934 (“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 those plans;

(E) FINRA member or registered person of that 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.

Source: Rule 2210(a)(4), 4512(c)

Does a firm have an obligation to inquire whether an institutional communication will be forwarded to retail investors each time that that communication is distributed?

No. Firms should have policies and procedures in place reasonably designed to prevent institutional communications from being forwarded to retail investors, and make appropriate efforts to implement those policies and procedures. Those procedures may include the use of legends warning the recipient of an

institutional communication that it is for institutional investor use only.

When a member is offering securities or other investments through another member, the inclusion of a legend would not be sufficient, in and of itself, if (for example) there is reason to believe that the other member is distributing the communication to retail investors. Absent such knowledge to the contrary, a member may reasonably rely on a legend restricting the usage of the communication to institutional investors in treating the communication as an institutional communication.

Source: FINRA Regulatory Notice 12-29 (“Notice 12-29”), found at http://finra.complinet.com/net_file_store/new_rulebooks/f/i/FINRANotice12_29.pdf; FINRA Rule 2210 Questions and Answers, Institutional Communications, Q1, found at: <http://www.finra.org/industry/finra-rule-2210-questions-and-answers>.

What if a firm becomes aware that an institutional communication is being forwarded by a recipient institutional investor to a retail investor?

To the extent that a firm becomes aware that a recipient institutional investor is forwarding or making available institutional communications to retail investors, the firm must treat future communications to the institutional investors as retail communications until it reasonably concludes that the improper practice has ceased.

Source: Notice 12-29

If a firm distributes or makes available a communication consisting of a reprint of an article from an independent publication, or a report published by an independent research firm, to more than 25 retail investors within a 30 calendar day

period, is that communication a “retail communication”?

Yes.

If a firm uses social media or a website to communicate with investors, is that a retail communication?

Any non-password protected website or communication by means of unrestricted social media would be a retail communication. A password protected website limited to institutional investors would be an institutional communication.

Source: Notice 12-29

What is the difference between “correspondence” and “retail communications”?

The difference depends upon the number of retail investors to which the written materials are distributed or made available in a 30 calendar day period. If it is provided to 25 or fewer retail investors, the written materials are correspondence; if provided to more than 25 retail investors, the written materials are a retail communication.

Does the Rule impose any standards on the content of communications?

The communications rules include both general and specific content standards. Certain general standards apply to all communications, such as requirements that communications be fair and balanced, and provide a sound basis for evaluating the facts in regard to any particular security, industry or service, and prohibitions on omitting material facts whose absence would make the communication misleading. More particular content standards apply to specific issues or securities.

Source: Notice 12-29

Approval, Review and Recordkeeping Requirements

The Rule's approval, review and recordkeeping requirements vary depending on the type of communication. Retail communications are subject to the most stringent requirements. For example, members generally must have a registered principal approve all advertisements, sales literature and independently prepared reprints prior to use. This pre-use approval requirement does not apply to: (1) institutional sales material; (2) public appearances; or (3) correspondence, unless it is sent to 25 or more existing retail customers within a 30 calendar day period and includes an investment recommendation or promotes a product or service of the firm.

Retail Communications – Approval and Review

When must retail communications be approved by a registered principal?

Before the earlier of its first use or its filing with the FINRA Advertising Regulation Department (the "Department").

Source: Rule 2210(b)(1)(A)

Who must approve a retail communication?

An appropriately qualified registered principal of the firm must approve each retail communication. However, a Series 16 Supervisory Analyst may, however, review the following retail communications:

- Research reports on debt and equity securities;

- Retail communications as described in FINRA Rule 2241(a)(11)(A) (list of research-related communications that do not fall within the definition of "research report" under FINRA Rule 2241); and
- Other research that does not meet the definition of "research report" under FINRA Rule 2241(a)(11),² provided that the Supervisory Analyst has technical expertise in the particular product area.

A Series 16 Supervisory Analyst may not approve a retail communication that requires a separate registration (such as retail communications concerning options, security futures or municipal securities) unless the supervisory analyst also holds the other registrations.

² FINRA Rule 2241(a)(11) defines a "Research Report" as any written (including electronic) communication that includes an analysis of equity securities of individual companies or industries (other than an open-end registered investment company that is not listed or traded on an exchange), and that provides information reasonably sufficient upon which to base an investment decision. Among other communications, this term does not include communications that are limited to the following: (i) discussions of broad-based indices; (ii) commentaries on economic, political or market conditions; (iii) technical analyses concerning the demand and supply for a sector, index or industry based on trading volume and price; (iv) statistical summaries of multiple companies' financial data, including listings of current ratings; (v) recommendations regarding increasing or decreasing holdings in particular industries or sectors; or (vi) notices of ratings or price target changes, provided that the member simultaneously directs the readers of the notice to the most recent research report on the subject company that includes all current applicable disclosures required by this rule and that such research report does not contain materially misleading disclosure, including disclosures that are outdated or no longer applicable.

Source: Rule 2210(b)(1)(A), (B)

Are there any exceptions to the principal pre-use approval requirements for retail communications?

Yes, for certain previously filed retail communications. If (i) another member has filed the retail communication with the Department and has received a letter from the Department stating that it appears to be consistent with applicable standards; and (ii) the member using it in reliance upon the previous filing and approval has not materially altered it and will not use it in a manner that is inconsistent with the conditions of the Department's letter, then the retail communication does not have to be pre-approved by a principal.

Source: Rule 2210(b)(1)(C)

What types of retail communications are excepted from the principal pre-use approval requirements?

The principal pre-use approval requirements do not apply to the following categories of retail communications, provided that the member firm supervises and reviews the communications in the same manner as required under FINRA Rule 3110(b)(4):

- Any retail communication that is excepted from the definition of "research report" under FINRA Rule 2241(a)(aa)(A), unless the communication makes any financial or investment recommendation;
- Any retail communication that is posted on an online interactive electronic forum; and
- Any retail communication that does not make any financial or investment recommendation or otherwise promote a product or service of the member.

Source: Rule 2210(b)(1)(D)

What is an online interactive electronic forum?

FINRA considers chat rooms, online seminars, and any portion of a blog or a social networking site such as Facebook, Twitter or LinkedIn that is used to engage in real-time interactive communications to be online interactive electronic forums. The mere updating of a non-interactive blog (or any other firm web page) does not cause it to become an interactive electronic forum, even if the updating occurs frequently.

Source: FINRA Regulatory Notice 10-06 ("Notice 10-06"), found at <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p120779.pdf>.

Are the static portions of an online interactive electronic forum subject to the principal pre-use approval requirement?

Yes. A static posting on an interactive electronic forum, such as profile, background or wall information, is deemed to be an advertisement under Rule 2210 and therefore requires prior approval. Interactive content can be copied or forwarded and posted in a static forum, thus rendering it an advertisement.

Is the portion of a member firm's website that does not provide for real-time electronic communications within any of Rule 2210's exceptions for an online interactive electronic forum?

No.

If a member files a retail communication with the Department, although the retail communication was within one of the exceptions provided by the Rule, is principal pre-use approval still required?

Yes. An appropriately qualified principal must approve **any** communication that is filed with the Department, even if a communication otherwise would come under an exception to the principal pre-use approval requirements of FINRA Rule 2210(b)(1)(A).

Source: Rule 2210(b)(1)(F)

Is there any other provision in the Rule for a member firm to avoid the principal pre-use approval requirement?

Yes. A member firm may petition FINRA for an exemption from the principal pre-use approval requirement for good cause shown. In granting an exemption, FINRA will consider whether the exemption is consistent with the purposes of the Rule, investor protection and the public interest. Exemptive relief granted under this provision will apply only to the firms that have applied for such relief.

Source: Rule 2210(b)(1)(E); Notice 12-29

Institutional Communications – Approval and Review

What approval and review requirements apply to institutional communications?

The member firm must have written procedures for review by a principal. Those procedures must be reasonably designed to ensure that institutional communications comply with applicable standards.

If the procedures do not require review of all institutional communications, they must include provision for the education and training of associated persons regarding these communications. FINRA has the right to request evidence that these supervisory procedures have been implemented and carried out.

Source: Rule 2210(b)(3)

Internal communications are excepted from the definition of institutional communications; are there any requirements relating to internal communications under the Rule?

Yes. Firms still must supervise these communications, including a firm's internal communications that train or educate registered representatives. In this regard, a firm's supervisory policies and procedures concerning internal training and education materials must be reasonably designed to ensure that such materials are fair, balanced and accurate.

Source: Notice 12-29

Retail and Institutional Communications – Recordkeeping Requirements

What recordkeeping requirements apply to retail and institutional communications?

Members must retain retail or institutional communications for three years from the date of last use. The records must include:

- A copy of the communication and the dates of first and (if applicable) last use;
- The name of any registered principal who approved the communication and the date that approval was given;

- In the case of a retail communication or institutional communication that is not approved prior to first use by a registered principal, the name of the person who prepared or distributed the communication;
- Information concerning the source of any statistical table, chart, graph or other illustration used in the communication; and
- For retail communications that rely on the exception from pre-approval for retail communications previously filed with, and approved by, the Department,³ the name of the firm that filed the retail communication with the Department and a copy of the Department review letter.

Source: Rule 2210(b)(4)(A)

How do the recordkeeping requirements apply to a member's communications on an online interactive electronic forum, such as a blog or chat room?

The recordkeeping requirements only require retention of the records of all communications made or received by a firm or its associated persons on an online interactive electronic forum and that relate to its "business as such," even though third-party posts are not generally treated as the member firm's or its associated persons' communications under Rule 2210 (unless they are covered by the "entanglement" and "adoption" theories discussed below). If a firm's or any of its associated person's social media posting that is not considered relating to the firm's business as

³ See the discussion above under "Are there any exceptions to the principal pre-use approval requirements for retail communications?"

such (*i.e.*, personal) is replied to with a posting that does relate to the firm's business as such, then the firm must retain records of that reply.

Neither the SEC nor FINRA has specifically defined the term "business as such," although FINRA has said that "[w]hether a particular communication is related to the business of the firm depends upon the facts and circumstances."⁴

In contrast, a communication by a member firm on its or any other website that is not an online interactive electronic forum would be subject to the recordkeeping requirements, whether or not the communication relates to the firm's business as such.

Source: Notice 11-39; Securities and Exchange Act Rule 17a-4(b)

Could a third-party post on a member firm's social media site be considered a communication by the firm or any of its registered representatives?

Generally, a third-party post on a social media site established by a firm or any of its personnel would not be considered a communication by the firm or its personnel, to which the supervision, recordkeeping, filing or content requirements would not apply. However, under certain circumstances, third-party posts could become attributable to the firm and considered communications with the public subject to the requirements of Rule 2210.

⁴ FINRA Regulatory Notice 11-39 ("Notice 11-39"), found at <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p124186.pdf>.

- For example, if the firm or any of its personnel involved themselves in the preparation of the content of the third-party post, or paid for the post, then the third-party post would be considered to be a communication with the public by the firm or its personnel under an entanglement theory.
- Or if, for example, after the third-party content was posted, the firm or its personnel explicitly or implicitly endorsed or approved the post, then, under an adoption theory, the post would constitute a communication with the public.

Source: Notice 10-06

Correspondence – Recordkeeping, Supervisory and Review

What recordkeeping requirements apply to correspondence?

The FINRA rules, the Exchange Act and the applicable Exchange Act rules relating to books and records apply to correspondence. Members must preserve for a period of at least six years any correspondence for which there is no specified period under the FINRA rules or applicable Exchange Act rules. Correspondence must be preserved in a format and media that complies with Rule 17a-4 under the Exchange Act. The names of the persons who prepared outgoing correspondence and who reviewed the correspondence must be ascertainable from the retained records and these records must be readily available to FINRA, upon request.

Source: Rule 2210(b)(4)(B); NASD Rule 4511; FINRA Rule 3110.09

What are the supervisory and review requirements for correspondence?

All correspondence is subject to the supervision and review requirements of FINRA Rule 3110(b)(4), which provides, in part, that each member must establish procedures for the review and endorsement by a registered principal in writing, on an internal record, of all transactions and for the review by a registered principal of incoming and outgoing correspondence of its registered representatives. These procedures should be in writing and be designed to reasonably supervise each registered representative. The procedures should be designed to, among other things, properly identify and handle customer complaints and to ensure that customer funds and securities are handled in accordance with firm procedures.

Source: Rule 2210(b)(2)

Filing Requirements and Review Procedures

The Rule’s filing requirements depend on the type of communication and whether the firm is a new member. The type of communication will affect whether there is a “pre-use” or “concurrent with use” filing requirement.

**Retail Communications – Filing Requirements –
Pre-Use**

What types of communications are subject to the Rule's filing requirements?

Only retail communications are subject to the filing requirements. Correspondence and institutional communications are not subject to any filing requirement with FINRA.

Do any retail communications have to be filed with FINRA prior to first use?

Yes. A new FINRA member firm must file with the Department, at least 10 business days prior to its first use, any retail communication that is published or used in any electronic or other public media, including any generally accessible website, newspaper, magazine or other periodical, radio, television, telephone or audio recording, video display, signs or billboards, motion pictures, or telephone directories (other than routine listings).

Source: Rule 2210(c)(1)

On May 18, 2015, FINRA proposed amendments to Rule 2210(c)(1)(A) pursuant to which the requirement above would be changed to require a filing within 10 business days of first use and apply only to new member firms' websites and material changes to their websites.

Source: FINRA Regulatory Notice 15-16 ("Notice 15-16"), found at http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory_Notice_15-16.pdf.

When does this pre-use filing requirement for new member firms begin and end?

The period begins on the date when FINRA's Central Registration Depository shows that FINRA membership has become effective and ends one year later.

Does a new member firm have to wait for approval by the Department prior to using retail communications filed with the Department?

No; Department approval is not required once 10 business days have passed since the filing.

Are there any exceptions to this pre-use filing rule for new member firms?

Yes. Any retail communication of a new member firm that is a free writing prospectus that has been filed with the SEC under Securities Act of 1933 ("Securities Act") Rule 433(d)(1)(ii) may be filed within 10 business days of first use rather than 10 business days prior to first use. Securities Act Rule 433(d)(1)(ii) applies to broker-prepared free writing prospectuses that are used or referred to, and widely disseminated by, an underwriter or dealer.

Source: Rule 2210(c)(1)

Is there any other provision in the Rule for a new member firm to avoid the pre-use filing requirement?

Yes. A new member firm may petition FINRA for an exemption from the pre-use filing requirement for good cause shown.

Source: Rule 2210(c)(9)(A)

Does FINRA have authority to require a new member firm to file communications other than retail communications prior to their use?

Yes. If the Department determines that a member has departed from the standards of the Rule, it may require that the member file with the Department all communications (rather than just retail communications), or the portion of the member's communications that is related to any specific types or classes of securities or services, at least 10 business days prior to first use.

Source: Rule 2210(c)(9)(B)

Are there any other pre-use filing requirements?

Yes. Member firms must file the following retail communications with the Department at least 10 business days prior to first use or publication and not publish or circulate them until any changes specified by the Department have been made:

- Retail communications concerning registered investment companies (including mutual funds, exchange-traded funds, variable insurance products, closed-end funds and unit investment trusts) that include or incorporate performance rankings or performance comparisons of the investment company with other investment companies when the ranking or comparison category is not generally published or is the creation, either directly or indirectly, of the investment company, its underwriter or an affiliate (together with a copy of the data on which the ranking or comparison is based);
- Retail communications concerning security futures, with the exception of (i) retail communications concerning security futures

that are submitted to another self-regulatory organization having comparable standards pertaining to those retail communications; and (ii) retail communications in which the only reference to security futures is contained in a listing of the services of a member; and

- Retail communications concerning bond mutual funds that include or incorporate bond mutual fund volatility ratings.^{5, 6}

Source: Rule 2210(c)(2)(A)-(C)

Retail Communications – Filing Requirements – Concurrent With Use

Do all retail communications not subject to an exception from the filing requirement have to be filed prior to use?

No. The following must be filed with the Department within 10 business days of first use or publication (“concurrent with use”):

- Retail communications concerning⁷ registered investment companies other than

⁵ FINRA Rule 2213 defines a “bond mutual fund volatility rating” as a description issued by an independent third party relating to the sensitivity of the net asset value of a portfolio of an open-end management investment company that invests in debt securities to changes in market conditions and the general economy, and is based on an evaluation of objective factors, including the credit quality of the fund’s individual portfolio holdings, the market price volatility of the portfolio, the fund’s performance, and specific risks, such as interest rate risk, prepayment risk, and currency risk.

⁶ This filing requirement relating to bond mutual funds incorporating volatility ratings is proposed to be removed under Notice 15-16.

⁷ The proposed amendments to Rule 2210(c)(3)(A) would require only the filing of retail

those subject to the pre-use filing requirements;

- Retail communications concerning public direct participation programs;^{8,9}
- Any template for written reports produced by, or retail communications concerning, an investment analysis tool;¹⁰

communications that “promote or recommend a specific registered investment company or family of registered investment companies.” *Notice 15-16*

⁸ FINRA Rule 2310 defines a “direct participation program” as “a program which provides for flow-through tax consequences regardless of the structure of the legal entity or vehicle for distribution including, but not limited to, oil and gas programs, real estate programs, agricultural programs, cattle programs, condominium securities, Subchapter S corporate offerings and all other programs of a similar nature, regardless of the industry represented by the program, or any combination thereof.” A program may be composed of one or more legal entities or programs but when used herein and in any rules or regulations adopted pursuant hereto the term shall mean each of the separate entities or programs making up the overall program and/or the overall program itself. Excluded from this definition are real estate investment trusts, tax qualified pension and profit sharing plans pursuant to Sections 401 and 403(a) of the Internal Revenue Code and individual retirement plans under Section 408 of that Code, tax sheltered annuities pursuant to the provisions of Section 403(b) of the Internal Revenue Code, and any company including separate accounts, registered pursuant to the Investment Company Act.”

⁹ FINRA recently provided guidance relating to “Regulation A+” solicitation materials and Rule 2210. If a member firm uses Regulation A+ solicitation materials concerning a direct participation program security with more than 25 retail investors, then the materials would be subject to the concurrent with use filing requirement and subject to principal approval. *Source:* FINRA Regulatory Notice 15-32, found at: http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-15-32.pdf.

¹⁰ FINRA Rule 2214(b) defines an “investment analysis tool” as an interactive technological tool that produces simulations and statistical analyses that present the likelihood of various investment outcomes if certain investments are made or certain

- Any retail communication concerning collateralized mortgage obligations registered under the Securities Act;
- Any retail communication concerning any security that is registered under the Securities Act 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 (that is, “registered structured products”), except (i) retail communications already subject to the pre-use filing requirements or (ii) the retail communications described in the four bullet points above.

Source: Rule 2210(c)(3)

Are any of these concurrent with use filings subject to Department approval?

No. Department approval is not required. However, the Department has historically made comments on these documents when it believed that they were not prepared in accordance with FINRA’s standards.

Does the concurrent with use filing requirement for structured products apply to retail communications for structured product offerings exempt from filing under the Securities Act or offerings of structured certificates of deposit?

No. The concurrent with use filing requirement only applies to retail communications for registered structured products. Communications relating to unregistered products, such as bank notes and

investment strategies or styles are undertaken, thereby serving as an additional resource to investors in the evaluation of the potential risks and returns of investment choices. Under Notice 15-16, this filing requirement would be removed.

certificates of deposit, are not subject to the filing requirements.

Does the filing (whether pre-use or concurrent with use) of a draft story board of a television or video retail communication satisfy that filing requirement?

No. The final “filmed” version must be filed with the Department within 10 business days of first use or broadcast.

Source: Rule 2210(c)(4)

Are there any retail or other communications by a member firm that are not subject to the filing requirements?

Yes; the following communications do not have to be filed with the Department:

- Retail communications that previously have been filed with the Department and that are to be used without material change;
- 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 non-narrative information;¹¹
- Retail communications that do not make any financial or investment recommendation or otherwise promote a product or service of the member;
- Retail communications that do no more than identify a national securities exchange symbol of the member or identify a security

¹¹ The proposed amendments to Rule 2210(c)(7)(B) would expand this exclusion for previously filed templates to include non-predictive narrative descriptions of market events during the period covered by the communication and factual descriptions of portfolio changes. *Notice 15-16*

for which the member is a registered market maker;

- Retail communications that do no more than identify the member or offer a specific security at a stated price;
- Prospectuses, preliminary prospectuses, fund profiles, offering circulars and similar documents that have been filed with the SEC or any state, or that are exempt from such registration,¹² and free writing prospectuses that are exempt from filing with the SEC, except that an investment company prospectus published under Securities Act Rule 482 and a free writing prospectus that is required to be filed with the SEC under Securities Act Rule 433(d)(1)(ii) will not be considered a prospectus for purposes of this exclusion;¹³
- Retail communications prepared in accordance with Section 2(a)(10)(b) of the Securities Act (tombstones), or any rule thereunder, such as Rule 134, and announcements as a matter of record that a member has participated in a private placement, unless the retail communications are related to publicly offered direct participation programs or securities issued by registered investment companies;
- Press releases that are made available only to members of the media;

¹² The proposed amendments to Rule 2210(c)(7)(F) would expand the filing exclusion to cover annual or semi-annual shareholder reports. *Notice 15-16*

¹³ Preliminary or summary “term sheets,” which do not contain final pricing information and are free writing prospectuses that are exempt from filing with the SEC under Rule 433(d)(5)(i), are not subject to the filing requirements of Rule 2210(c)(1) – (4).

- Any reprint or excerpt of any article or report issued by a publisher (a “reprint”), provided that:
 - The publisher is not an affiliate of the member using the reprint or any underwriter or issuer of a security mentioned in the reprint that the member is promoting;
 - Neither the member using the reprint nor any underwriter or issuer of a security mentioned in the reprint has commissioned the reprinted article or report; and
 - The member using the reprint has not materially altered its contents except as necessary to make the reprint consistent with applicable regulatory standards or to correct factual errors;
- Correspondence;
- Institutional communications;
- Communications that refer to types of investments solely as part of a listing of products or services offered by the member;
- Retail communications that are posted on an online interactive electronic forum;
- Press releases issued by closed-end investment companies that are listed on the New York Stock Exchange (the “NYSE”) under Section 202.06 of the NYSE Listed Company Manual (or any successor provision); and
- Research reports (as defined in FINRA Rule 2241) that concern only securities that are listed on a national securities exchange, other than research reports required to be

filed with the SEC pursuant to Section 24(b) of the Investment Company Act.

Note that press releases, reprints, correspondence and institutional communications, although exempt from the Department’s filing requirements, are deemed filed with FINRA for purposes of Section 24(b) of the Investment Company Act of 1940 and Rule 24b-3 thereunder.

Source: Rule 2210(c)(7)

Are there any circumstances under which FINRA would require a filing of a retail communication posted on an online interactive electronic forum?

Yes. FINRA has advised that if the purpose of the forum is, for example, to sell securities or promote a particular mutual fund, then the filing requirements would apply.¹⁴

Can a member firm petition FINRA for an exemption from the concurrent with use filing requirements?

Yes. Upon request and in accordance with the FINRA 9600 procedural rules, FINRA may conditionally or unconditionally grant an exemption from the concurrent with use filing rules for good cause shown after taking into consideration all relevant factors, to the extent such exemption is consistent with the purposes of the Rule, the protection of investors and the public interest.

Source: Rule 2210(c)(9)(B)

¹⁴ See Notice 10-06, Q4 (“The treatment of a blog under Rule 2210 depends on the manner and purposes for which the blog has been constructed.”).

Are speaking engagements subject to pre-use approval or any filing requirements?

No. However, firms are required to establish appropriate written policies and procedures to supervise public appearances by associated persons.

Content Standards

The Rule imposes general content standards applicable to all communications and more specific standards that vary, depending on the nature of the communication.

What are the general content standards applicable to all communications?

The Rule's general content standards are:

- All member communications must be based on principles of fair dealing and good faith, must be fair and balanced, and must provide a sound basis for evaluating the facts in regard to any particular security or type of security, industry, or service. No member may omit any material fact or qualification if the omission, in light of the context of the material presented, would cause the communications to be misleading.
- No member may make any false, exaggerated, unwarranted, promissory or misleading statement or claim in any communication. No member may publish, circulate or distribute any communication that the member knows or has reason to know contains any untrue statement of a material fact or is otherwise false or misleading.
- Information may be placed in a legend or footnote only if that placement would not

inhibit an investor's understanding of the communication.

- Members must ensure that statements are clear and not misleading within the context in which they are made, and that they provide balanced treatment of risks and potential benefits. Communications must be consistent with the risks of fluctuating prices and the uncertainty of dividends, rates of return and yield inherent to investments.
- Members must consider the nature of the audience to which the communication will be directed and must provide details and explanations appropriate to the audience.
- Communications may not predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast; provided, however, that this provision does not prohibit:
 - A hypothetical illustration of mathematical principles, provided that it does not predict or project the performance of an investment or investment strategy;
 - An investment analysis tool, or a written report produced by an investment analysis tool, that meets the requirements of FINRA Rule 2214; and
 - A price target contained in a research report on debt or equity securities, provided that the price target has a reasonable basis, the report discloses the valuation methods used to determine the price target, and the price target is

accompanied by disclosure concerning the risks that may impede achievement of the price target.

Source: Rule 2210(d)(1)

May a member firm use comparisons in any communications?

Yes, provided that any comparison between investments or services in retail communications must disclose all material differences between them, including (as applicable) investment objectives, costs and expenses, liquidity, safety, guarantees or insurance, fluctuation of principal or return, and tax features.

Source: Rule 2210(d)(2)

May a member firm use backtested, or hypothetical historical, information in communications?

FINRA has provided guidance on backtested data included in institutional communications relating to exchange-traded products.¹⁵ FINRA's approval of the use of backtested data in these materials is limited to a narrow set of circumstances. In its guidance, FINRA reiterated its historic position that the presentation of backtested data to retail investors does not comply with its disclosure standards. FINRA also warned that the backtested data should not be given excess weight in a recommendation to an investor.

In discussions with counsel, FINRA reiterated its position against the use of backtested data in retail communications relating to structured products (not

¹⁵ The FINRA guidance is available at <http://www.finra.org/Industry/Regulation/Guidance/InterpretiveLetters/P246651>.

just exchange-traded products). In institutional communications relating to structured products, FINRA indicated that its application of the content standards of Rule 2210(d) to backtested data would not be applicable in the same manner as to retail communications. Consequently, the use of backtested data may be appropriate in institutional communications relating to structured products, at the discretion of the broker-dealer.

Does the Rule require any particular information in communications?

Yes, all retail communications and correspondence must:

- Prominently disclose the name of the member, or the name under which the member's broker-dealer business primarily is conducted as disclosed on the member's Form BD, and may also include a fictional name by which the member is commonly recognized or which is required by any state or jurisdiction;
- Reflect any relationship between the member and any non-member or individual who is also named; and
- If it includes other names, reflect which products or services are being offered by the member.

These requirements do not apply to so-called "blind" advertisements used to recruit personnel.

Source: Rule 2210(d)(3)

Are the content standards applicable to advertisements by investment companies?

Yes. Retail communications and correspondence that present the performance of a non-money market

mutual fund must disclose the fund's maximum sales charge and operating expense ratio as set forth in the fund's current prospectus fee table.

Source: Rule 2210(d)(5)

Are the content standards applicable to a FINRA member's proprietary index?

Yes. The publication by a FINRA member of its proprietary index while the member knew or had reason to know that the index contained materially inaccurate information was a violation of Rule 2210(d)(1)(B).

Source: FINRA Letter of Acceptance, Waiver and Consent No. 2014042781801

Are there content requirements for discussions of tax implications?

Yes, there are general and very specific content standards for tax considerations in communications.

In retail communications and correspondence, references to tax-free or tax-exempt income must indicate which income taxes apply, or which do not, unless income is free from all applicable taxes. If income from an investment company investing in municipal bonds is subject to state or local income taxes, this fact must be stated, or the illustration must otherwise make it clear that income is free only from federal income tax.

Communications may not characterize income or investment returns as tax-free or exempt from income tax when tax liability is merely postponed or deferred, such as when taxes are payable upon redemption.

Any comparative illustration of the mathematical principles of tax-deferred versus taxable

compounding must meet specific requirements set forth in the Rule.

Source: Rule 2210(d)(4)

What requirements apply to testimonials?

If any testimonial in a communication concerns a technical aspect of investing, the person making the testimonial must have the knowledge and experience to form a valid opinion.

Retail communications or correspondence providing any testimonial concerning the investment advice or investment performance of a member or its products must prominently disclose the following:

- The fact that the testimonial may not be representative of the experience of other customers;
- The fact that the testimonial is no guarantee of future performance or success; and
- If more than \$100 in value is paid for the testimonial, the fact that it is a paid testimonial.

Source: Rule 2210(d)(6)

Recommendations – Content Standards

What are the limitations on including a recommendation in a communication?

All retail communications that include a recommendation of securities must have a reasonable basis for the recommendation.

In any communication, a member must provide, or offer to furnish upon request, available investment information supporting the recommendation. When a member recommends a corporate equity security, the

member must provide the price at the time the recommendation is made.

Source: Rule 2210(d)(7)(A), (B)

What information must be included in a communication including a recommendation?

All retail communications that include a recommendation of securities must disclose the following **conflicts of interest**, to the extent applicable:

- That at the time the communication was published or distributed, the member was making a market in the security being recommended, or in the underlying security if the recommended security is an option or security future, or that the member or associated persons will sell to or buy from customers on a principal basis;
- That the member or any associated person that is directly and materially involved in the preparation of 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
- That the member was manager or co-manager of a public offering of any securities of the issuer whose securities are recommended within the past 12 months.

Source: Rule 2210(d)(7)(A)(i)-(iii)

Can a retail communication refer to past, specific recommendations?

No. A retail communication or correspondence may not refer, directly or indirectly, to past specific recommendations of the member that were or would have been profitable to any person.

A retail communication or correspondence is, however, allowed to set out or offer to furnish a list of all recommendations as to the same type, kind, grade or classification of securities made by the firm within the immediately preceding period of not less than one year. The list must provide certain information regarding each recommended security and include a prescribed cautionary legend warning investors not to assume that future recommendations will be profitable.

Source: Rule 2210(d)(7)(C)

Do these content standards apply to prospectuses filed with the SEC?

Prospectuses, preliminary prospectuses, fund profiles and similar documents that have been filed with the SEC and free writing prospectuses that are exempt from filing with the SEC are not subject to the content standards of FINRA Rule 2210(d);¹⁶ however, these standards do apply to investment company “omitting prospectuses” published under Securities Act Rule 482 and dealer-prepared, widely disseminated free writing prospectuses that are required to be filed with the SEC under Securities Act Rule 433(d)(1)(ii).

Source: Rule 2210(d)(8)

Can a firm become responsible for the content of a third party's website?

¹⁶ See footnote 13.

If a member firm co-brands any part of a third-party website, such as by placing the firm's logo prominently on the site, then, under an adoption theory, it is responsible for the content of the entire site.

Source: Notice 11-39

Speaking Engagements/Public Appearances – Content Standards

Are speaking engagements subject to the content requirements?

Yes, if the speaking engagement constitutes a "public appearance." Rule 2210(f) defines a public appearance as "speaking activities that are unscripted and do not constitute retail communications, institutional communications or correspondence." Public appearances are viewed by FINRA as part of the broader term "communications with the public." Consequently, they are subject to the general content standards for communications (*i.e.*, that they be fair and balanced and not include false or misleading statements). Scripts, slides, handouts or other written (including electronic) materials used in connection with public appearances are considered communications for purposes of the Rule and, as a result, can be retail communications.

Source: Notice 12-29; Rule 2210(f)(1)

Is there anything specific that the Rule requires to be included in public appearances?

Yes. For public appearances by associated persons, if an associated person recommends a security in a public appearance, the associated person must have a reasonable basis for the recommendation. The

associated person also must disclose, as applicable, the following conflicts of interest:

- That the associated person has a financial interest in any of the securities of the issuer whose securities are recommended, and the nature of the financial interest, unless the extent of the financial interest is nominal; and
- Any other actual, material conflict of interest of the associated person or firm of which the associated person knows or has reason to know at the time of the public appearance.

Source: Rule 2210(f)(2)

Are there any exceptions to these public appearance disclosure requirements by associated persons?

Yes. These disclosure requirements do not apply to a public appearance by a research analyst for purposes of FINRA Rule 2241¹⁷ that includes all of the applicable disclosures required by that rule. The disclosure requirements also do not apply to a recommendation of investment company securities or variable insurance products, provided that the associated person must have a reasonable basis for the recommendation.

Source: Rule 2210(g)

Is participation in an online interactive electronic forum a public appearance?

¹⁷ FINRA Rule 2241(a)(8) defines a "research analyst" as an associated person "who is primarily responsible for, and any associated person who reports directly or indirectly to such a research analyst in connection with, preparation of the substance of a research report, whether or not any such person has the job title of 'research analyst.'"

Unscripted participation in an online interactive electronic forum such as a chat room or an online seminar is a “public appearance.”

Please see Annex A for a summary chart of Rule 2210.

By Bradley Berman, Of Counsel,
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FINRA COMMUNICATIONS RULES (SUMMARY)

<u>Type of Communication</u>	<u>Principal Pre-Use Approval</u>	<u>FINRA Filing</u>	<u>Record-Keeping</u>
Institutional Communication ¹	Written procedures must address education, training regarding communications	Not required to be filed	Three years from date of last use. Keep on file: name of preparer, copy of communication, source of statistical information or illustration, date of first and last use, and if principal did review, then name and date of approval
Retail communication ²	Requires approval before earlier of: use or filing with FINRA. Principal registration of approver will depend on type of material <u>Exceptions:</u> Pre-approval is not required for:	For new members, 10 business days prior to first use: any retail communication published or used broadly. FWPs filed with SEC may be filed within 10 days of first use ³ Within 10 business days of first use or publication: template for written	Three years from date of last use. File must include: (1) copy of communication, (2) date of first use, (3) date of last use, (4) name of principal who approved, (5) date approval received, (6) if pre-approval not required because another firm filed it, name of firm and their FINRA review letter, (7) source of any

¹ Institutional communication:

- written/electronic communications distributed or made available only to institutional investors
- does not include internal communications
- if member has “reason to believe” communication will be forwarded to retail investors, communication may be a “retail communication”

² Retail communication:

- any written/electronic communication distributed or made available to more than 25 retail investors within a 30-day period
- generally includes advertisements, sales literature, reprints
- sales scripts intended for use with retail customers

³ To be removed by proposed amendments.

FINRA COMMUNICATIONS RULES (SUMMARY)

<u>Type of Communication</u>	<u>Principal Pre-Use Approval</u>	<u>FINRA Filing</u>	<u>Record-Keeping</u>
	<p><i>Previously Filed Materials:</i> (1) another firm filed it with FINRA and has received a review letter from FINRA, and (2) firm using it has not made material changes and will not use in a manner inconsistent with the FINRA letter;</p> <p><i>Communications excluded from research report definition and that do not include any investment recommendation;</i></p> <p><i>Materials posted in an online forum; and</i></p> <p><i>Any other communication that does not include an investment recommendation</i></p>	<p>reports re an investment analysis tool, a communication concerning an SEC-registered structured product,⁴ a TV or video segment</p> <p>Exceptions to Filing Requirement:</p> <p>(1) communications previously filed, to be used without material change</p> <p>(2) communications based on template previously filed (that will include updated statistical or changes to non-narrative info)</p> <p>(3) materials that do not include a recommendation or promote a product</p> <p>(4) communications that only identify an exchange symbol</p>	<p>statistical information or illustration</p>

⁴ Rule 2210(c)(3)(E) includes retail communications concerning any SEC-registered security derived from or based on a single security, a basket of securities, an index, a commodity, a debt issuance or a currency.

FINRA COMMUNICATIONS RULES (SUMMARY)

<u>Type of Communication</u>	<u>Principal Pre-Use Approval</u>	<u>FINRA Filing</u>	<u>Record-Keeping</u>
		<p>or a security for which the member is a market maker</p> <p>or offer a specific security at a price</p> <p>(5) a prospectus or preliminary prospectus filed with SEC,⁵ or exempt from registration, EXCEPT that an FWP filed with the SEC under Rule 433(d)(1)(ii) is not considered a prospectus⁶</p> <p>(6) communications prepared in accordance with Securities Act Sec. 2(a)(10)(b), such as Rule 134 notices</p> <p>(7) press releases available only to media</p> <p>(8) reprints of published articles provided (a) member is not affiliated with publisher, (b) member or issuer or</p>	

⁵ The proposed amendments would add annual and semi-annual shareholder reports.

⁶ FWPs filed by an underwriter under Rule 433(d)(1)(ii) in a manner that will result in broad unrestricted distribution must be filed with FINRA, such as brochures posted on a public website, publicly available website pages about structured products.

FINRA COMMUNICATIONS RULES (SUMMARY)

<u>Type of Communication</u>	<u>Principal Pre-Use Approval</u>	<u>FINRA Filing</u>	<u>Record-Keeping</u>
		underwriter of any security mentioned has not commissioned, (c) member hasn't altered contents (9) correspondence (10) institutional communications (11) material posted on online forum (12) research reports that concern only listed securities	
Correspondence ⁷	Firm shall establish reasonable supervisory review process as required by Rule 3110.	Not required to be filed	Record retention requirements set out in Rule 3110.

⁷ Correspondence: any written/electronic communication distributed or made available to 25 or fewer retail investors within a 30-day period.

SUMMARY

SUBJECT TO FILING:

- FWPs that are red herrings (filed under Rule 433(d)(1)(ii) if distributed broadly, on an unrestricted basis (“underwriter FWPs”))
- If used broadly or on an unrestricted site:
 - a brochure
 - a product description
 - website product discussions

NOT SUBJECT TO FILING:

- Preliminary Pricing Supplements (424(b) filings)
- Final Pricing Supplements (424(b) filings)
- Offering documents for certificates of deposit, bank notes, or 144A issuances
- FWPs that are final term sheets, filed with the SEC
- FWPs that are exempt from the SEC’s filing requirements, such as preliminary or summary “term sheets” that do not contain final pricing information and are free writing prospectuses under Rule 433(d)(5)(i)