SRO Proposals not later than 180 days after the date of publication of notice of the filing of the proposed rule change. The Commission may extend the period for issuing an order approving or disapproving the SRO Proposals, however, by not more than 60 days if the Commission determines that a longer period is appropriate and publishes the reasons for such determination. The SRO Proposals were published for notice and comment in the **Federal Register** on October 4, 2011. April 1, 2012 is 180 days from that date, and May 31, 2012 is an additional 60 days from that date.

The Commission finds it appropriate to designate a longer period within which to issue an order approving or disapproving the SRO Proposals so that it has sufficient time to consider the SRO Proposals and the issues raised in the comment letters that have been submitted in connection with the SRO Proposals. Specifically, as the Commission noted in the Order Instituting Proceedings, the SRO Proposals raise issues including the potential interaction between the mechanisms for moderating volatility in individual securities and those for moderating volatility market-wide. In addition, the Commission is also considering commenters' concerns with the details of the SRO Proposals, including whether only the Level III circuit breaker should halt trading after 3:25 p.m. and whether the market-wide circuit breakers should be triggered if a significant number of volatility moderators for individual securities are triggered.[9]

Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[10] designates May 31, 2012, as the date by which the Commission shall either approve or disapprove the SRO Proposals.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–8060 Filed 4–3–12; 8:45 am]

BILLING CODE 8011–01–P

[9] *See* Order Instituting Proceedings, *supra* note 6 at 318, 319.

[10] 15 U.S.C. 78s(b)(2).

[11] 17 CFR 200.30–3(a)(57).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66681; File No. SR–FINRA–2011–035]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Amendment No. 3 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendments Nos. 1, 2 and 3, To Adopt 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)) in the Consolidated FINRA Rulebook

March 29, 2012.

I. Introduction

On July 14, 2011, the Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'' or ''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to adopt NASD Rules 2210 and 2211 and NASD Interpretive Materials 2210–1 and 2210–3 through 2210–8 as FINRA Rules 2210 and 2212 through 2216, and to delete paragraphs (a)(1), (i), (j) and (l) of Incorporated NYSE Rule 472, Incorporated NYSE Rule Supplementary Material 472.10(1), (3), (4) and (5) and 472.90, and Incorporated NYSE Rule Interpretations 472/01 and 472/03 through 472/11. The proposed rule change was published for comment in the **Federal Register** on August 3, 2011.[3] The Commission received nine comment letters in response to the Original Proposal.[4] On October 31, 2011, FINRA filed Amendment No. 1 to the proposed rule change and a letter responding to comments.[5] In order to solicit additional input from interested parties on the issues presented in FINRA's proposed rule change, on November 1, 2011, the Commission published notice of Amendment No. 1 and instituted proceedings pursuant to Section 19(b)(2)(B) of the Act, to determine whether to approve or disapprove FINRA's proposal as modified by Amendment No. 1.[6] The Commission received seven comment letters in response to the Notice and Proceedings Order.[7] On December 22, 2011, FINRA filed Amendment No. 2 to the proposed rule change and a letter responding to comments.[8] The

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Exchange Act Release No. 64984 (July 28, 2011), 76 FR 46870 (August 3, 2011) (''Original Proposal''). The comment period closed on August 24, 2011.

[4] *See* letter from Peter J. Mougey, Public Investors Arbitration Bar Association, dated August 23, 2011 (''PIABA August Letter''); letter from Oscar S. Hackett, BrightScope, Inc., dated August 23, 2011 (''BrightScope August Letter''); letter from Z. Jane Riley, The Leaders Group, Inc., dated August 24, 2011 (''TLGI August Letter''); letter from Dorothy M. Donohue, Investment Company Institute, dated August 24, 2011 (''ICI August Letter''); letter from Sandra J. Burke, Vanguard, dated August 24, 2011 (''Vanguard August Letter''); letter from Alexander C. Gavis, Fidelity Investments, dated August 24, 2011 (''Fidelity August Letter''); letter from David T. Bellaire, Esq., Financial Services Institute, Inc., dated August 24, 2011 (''FSI August Letter''); letter from John Polanin and Claire Santaniello, Securities Industry and Financial Markets Association, dated August 24, 2011 (''SIFMA August Letter''); and letter from Yoon-Young Lee, Wilmer Hale LLP, on behalf of Citigroup Global Markets, Inc., Credit Suisse Securities (USA) LLC, Goldman, Sachs & Co., JP Morgan Securities Inc., Merrill Lynch, Pierce, Fenner & Smith Incorporated, Morgan Stanley & Co., LLC, and UBS Securities LLC, dated August 26, 2011 (''Wilmer August Letter''). Comment letters are available at www.sec.gov.

[5] *See* letter from Joseph P. Savage, FINRA, dated October 31, 2011 (''October Response Letter''). The text of proposed Amendment No. 1 and FINRA's Response Letter are available on FINRA's Web site at *http://www.finra.org,* at the principal office of FINRA and at the Commission's Public Reference Room. FINRA's Response Letter is also available on the Commission's Web site at *http://www.sec.gov.*

[6] *See* Exchange Act Release No. 65663 (November 1, 2011), 76 FR 68800 (November 7, 2011) (Notice of Filing of Amendment No. 1 and Order Instituting Proceedings SR–FINRA–2011–035) (''Notice and Proceedings Order''). The comment period closed on December 7, 2011.

[7] *See* letter from Melissa Callison, Vice President, Compliance, Charles Schwab & Co., Inc., dated December 7, 2011 (''Schwab December Letter''); letter from Alexander C. Gavis, Vice President & Associate General Counsel, Fidelity Investments, dated December 7, 2011 (''Fidelity December Letter''); letter from David T. Bellaire, General Counsel and Director of Government Affairs, Financial Services Institute, dated December 7, 2011 (''FSI December Letter''); letter from Dorothy M. Donohue, Senior Associate Counsel, Investment Company Institute, dated December 7, 2011 (''ICI December Letter''); letter from John Polanin and Claire Santaniello, Co-Chairs, Compliance and Regulatory Policy Committee of the Securities Industry and Financial Markets Association, dated December 7, 2011 (''SIFMA December Letter''); letter from Sandra J. Burke, Principal, Vanguard, dated December 7, 2011 (''Vanguard December Letter''); and letter from Jeremiah McGair, Attorney, Wolverine Execution Services, LLC, dated December 7, 2011 (''Wolverine Letter''). Comment letters are available at *www.sec.gov.*

[8] Joseph P. Savage, FINRA, dated December 22, 2011 (''December Response Letter''). The text of proposed Amendment No. 2 and FINRA's Response Letter are available on FINRA's Web site *http://www.finra.org,* at the principal office of FINRA and at the Commission's Public Reference Room. FINRA's Response Letter is also available on the Commission's Web site at *http://www.sec.gov.*

Commission published notice of Amendment No. 2 on December 23, 2011,[9] and the Commission received two comment letters in response to Amendment No. 2.[10] On March 6, 2012, FINRA filed Amendment No. 3 to the proposed rule change and a letter responding to comments.[11] The Commission is publishing this Notice and Order to solicit comment on Amendment No. 3 and to approve the proposed rule changes, as modified by Amendments Nos. 1, 2, and 3, on an accelerated basis.

II. Description of Proposal

As described in the Original Proposal, FINRA is proposing to adopt NASD Rules 2210 and 2211 and NASD Interpretive Materials 2210–1 and 2210–3 through 2210–8 as FINRA Rules 2210 and 2212 through 2216, and to delete paragraphs (a)(1), (i), (j) and (l) of Incorporated NYSE Rule 472, Incorporated NYSE Rule Supplementary Material 472.10(1), (3), (4) and (5) and 472.90, and Incorporated NYSE Rule Interpretations 472/01 and 472/03 through 472/11 as part of the process of developing a new consolidated rulebook (''Consolidated FINRA Rulebook'').[12]

The proposed rule change would create a new FINRA Rule 2210 that would encompass, subject to certain changes, the provisions of current NASD Rules 2210 and 2211, NASD Interpretive Materials 2210–1 and 2210–4, and the provisions of Incorporated NYSE Rule 472 that do not pertain to research analysts and research reports. Each of the other Interpretive Materials that follow NASD Rule 2210 would receive its own FINRA rule number and would adopt the same communication categories used in proposed FINRA Rule 2210.[13]

Proposed FINRA Rule 2210 would reduce the number of defined categories of communication from six (in the current rule) to three and would set forth requirements governing pre-use principal approval of communications, recordkeeping, filing with FINRA's Advertising Regulation Department (the ''Department'') and content standards. The definitions of the three communication categories (''institutional communications,'' ''retail communication,'' and ''correspondence'') are important because the principal approval, filing and content standards apply differently to each category.

The remaining proposed rules establish guidelines and restrictions governing: the use of investment companies rankings in retail communications (proposed FINRA Rule 2212); the use of bond mutual fund volatility ratings (proposed FINRA Rule 2213); the use of investment analysis tools (proposed FINRA Rule 2214); communications with the public regarding security futures (proposed FINRA Rule 2215); and communications with the public about collateralized mortgage obligations (proposed FINRA Rule 2216).

FINRA has modified its Original Proposal in certain respects through Amendments Nos. 1 and 2, as described in the Notice and Proceedings Order [14] and Notice of Amendment No. 2,[15] respectively. FINRA has further modified its proposal through Amendment No. 3, as described immediately below.

III. Self-Regulatory Organization's Statement of the Terms of Substance of Proposed Amendment No. 3

FINRA is proposing to amend FINRA Rule 2210 to expand the scope of retail communications that a Supervisory Analyst may approve pursuant to NYSE Rule 344. In this regard, FINRA proposes to replace proposed FINRA Rule 2210(b)(1)(B) with the following:

(B) The requirements of paragraph (b)(1)(A) may be met by a Supervisory Analyst approved pursuant to NYSE Rule 344 with respect to: (i) research reports on debt and equity securities; (ii) retail communications as described in NASD Rule 2711(a)(9)(A); and (iii) other research that does not meet the definition of ''research report'' under NASD Rule 2711(a)(9), provided that the Supervisory Analyst has technical expertise in the particular product area. A Supervisory Analyst may not approve a retail communication that requires a separate registration unless the Supervisory Analyst also has such other registration.

IV. Discussion of Comment Letters

On August 3, 2011 the Commission published in the **Federal Register**, FINRA's proposed rule change governing communications with the public.[16] The comment period ended on August 24, 2011, and the Commission received the nine comment letters listed above.[17] Many of the commenters generally supported the proposal, but eight of the commenters raised specific concerns discussed in more detail below. FINRA filed Amendment No. 1 to address commenter concerns and responded to comments in a letter dated October 31, 2011.[18]

On November 7, 2011 the Commission published in the **Federal Register**, the Notice and Proceedings Order. The comment period ended on December 7, 2011, and the Commission received the seven comment letters listed above.[19] Again, many of the commenters generally supported the proposal, but each of the commenters raised specific concerns discussed in more detail below. FINRA filed Amendment No. 2 to address commenter concerns and responded to comments in a letter dated December 22, 2011.[20]

On December 29, 2011, the Commission published in the **Federal Register**, Amendment No. 2 to the Original Proposal, as modified by Amendment No. 1.[21] The comment period ended on January 17, 2012, and the Commission received the two comment letters listed above.[22] The commenters reiterated previously raised specific concerns discussed in more detail below. FINRA filed Amendment No. 3 to address commenter concerns,

[9] *See* Exchange Act Release No. 66049 (Dec. 23, 2011), 76 FR 82014 (Dec. 29, 2011) (''Notice of Amendment No. 2''). The comment period closed on January 18, 2012.

[10] *See* letter from Dorothy M. Donohue, Senior Associate Counsel, Investment Company Institute, dated January 18, 2012 (''ICI January Letter'') and letter from Yoon-Young Lee, Wilmer Hale LLP, on behalf of Citigroup Global Markets, Inc., Credit Suisse Securities (USA) LLC, Goldman, Sachs & Co., JP Morgan Securities Inc., Merrill Lynch, Pierce, Fenner & Smith Incorporated, Morgan Stanley & Co., LLC, and UBS Securities LLC, dated January 19, 2012 (''Wilmer January Letter''). Comment letters are available at *www.sec.gov.*

[11] *See* letter from Joseph P. Savage, FINRA, to Elizabeth M. Murphy, Secretary, SEC, dated March 6, 2012 (''March Response Letter''). The text of proposed Amendment No. 3 and FINRA's Response Letter are available on FINRA's Web site at *http://www.finra.org,* at the principal office of FINRA and at the Commission's Public Reference Room. FINRA's Response Letter is also available on the Commission's Web site at *http://www.sec.gov.*

[12] The current FINRA rulebook consists of (1) FINRA Rules; (2) NASD Rules; and (3) rules incorporated from NYSE (''Incorporated NYSE Rules'') (together, the NASD Rules and Incorporated NYSE Rules are referred to as the ''Transitional Rulebook''). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE (''Dual Members''). The FINRA Rules apply to all FINRA members, unless such rules have a more limited application by their terms. For more information about the rulebook consolidation process, *see Information Notice,* March 12, 2008 (Rulebook Consolidation Process).

[13] NASD Interpretive Material 2210–2 is the subject of a separate proposed rule change. *See* Securities Exchange Act Release No. 61107 (December 3, 2009), 74 FR 65180 (December 9, 2009) (Notice of Filing File No. SR–FINRA–2009–070) (proposing to replace NASD Interpretive Material 2210–2 with proposed FINRA Rule 2211 (Communications with the Public About Variable Insurance Products)).

[14] *See supra* footnote 6.

[15] *See supra* footnote 9.

[16] *See supra* footnote 3.

[17] *See supra* footnote 4.

[18] *See supra* footnote 5.

[19] *See supra* footnote 7.

[20] *See supra* footnote 8.

[21] *See supra* footnote 9.

[22] *See supra* footnote 10.

and responded to comments in a letter dated March 6, 2012.[23]

The section below includes a detailed description of: the comments received in response to the Original Proposal, the Notice and Proceedings Order and the Notice of Amendment No. 2; FINRA's October Response Letter, December Response Letter and March Response Letter; Amendments Nos. 1, 2 and 3; and the Commission's findings.

V. Discussion and Commission Findings

A. Categories of Communications

The proposed rule change defines three categories of communications: retail communications, correspondence, and institutional communications. [24]

1. Retail Communication and Correspondence

FINRA proposed to define ''retail communication'' as ''any written (including electronic) communication that is distributed or made available to more than 25 retail investors within any 30 calendar-day period'' and ''correspondence'' as ''any written (including electronic) communication that is distributed or made available to 25 or fewer retail investors within any 30 calendar-day period.''

Two commenters raised concerns regarding these definitions.[25] The comments focused on the scope of the definitions of retail communications and correspondence and the numerical limit on recipients of communications.

One commenter argued that the definition of correspondence is too limited, and that the definition of retail communication is too broad.[26] The commenter recommended that FINRA instead consider all communications to existing retail customers to be correspondence, as NASD Rule 2211(a)(1) currently does. Another commenter recommended that the definition of correspondence be qualified to state that the 25-person limit is determined by the number of persons to whom a member or associated person directly distributes a communication (and thus does not include persons to whom such recipients forward the communication).[27]

FINRA responded to the comments and disagreed that the term ''correspondence'' should include all communications to existing retail customers.[28] FINRA indicated that the definition is intended to allow greater supervisory flexibility for communications sent to a limited number of recipients. For example, FINRA proposed to make correspondence subject to the content standards of proposed FINRA Rule 2210, but would not require it to be filed with FINRA and would not subject it to the principal pre-use approval requirement. Instead, correspondence would be subject to the supervision, review and recordkeeping requirements under NASD Rules 3010 and 3110. FINRA also noted that it included in the proposal other exceptions that allow firms to supervise certain types of retail communications similarly to correspondence, such as retail communications posted on an online interactive electronic forum, and retail communications that do not make any financial or investment recommendation or otherwise promote a product or service of the member, irrespective of the number of recipients.

FINRA indicated, however, that retail communications to large numbers of retail investors (regardless of whether they are existing customers) that include financial or investment recommendations or otherwise promote the products or services of the member should receive the additional scrutiny required through the pre-use principal approval and filing requirements. Accordingly, FINRA did not expand the definition of correspondence as the commenter recommended.

FINRA agreed with commenters that a member generally should not be responsible for a third party that independently forwards a retail communication to additional recipients. However, FINRA clarified that whether a member is responsible for a communication that is forwarded by a third-party will depend on the facts and circumstances surrounding a particular communication.

The Commission believes that FINRA has addressed adequately comments regarding the definitions of retail communication and correspondence by, among other things, explaining its rationale for including communications to large numbers of recipients (including a firm's existing customers) in the definition of retail communication.

2. Institutional Communication

Under the proposal, ''institutional communication'' would include written (including electronic) communications that are distributed or made available only to institutional investors. ''Institutional investor'' would include, among other persons and entities, any employee benefit plan (under Section 403(b) or Section 457 of the Internal Revenue Code) or qualified plan (under Section 3(a)(12)(C) of the Exchange Act), or multiple such plans offered to employees of the same employer, that in the aggregate have at least 100 participants, but would not include any participant of such plans. The proposed definition also would include a category for any other person (whether a natural person, corporation, partnership, trust or otherwise) with total assets of at least $50 million. The proposal states that 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'' (the ''reason to believe'' standard).

In the Original Proposal, FINRA also included Supplementary Material 2010.01 to clarify that a member's internal written (including electronic) communications that are intended to educate or train registered persons about the products or services offered by a member are considered institutional communications. Accordingly, those internal communications would be subject to both the provisions of proposed FINRA Rule 2210 and NASD Rule 3010(d) (Review of Transactions and Correspondence).

Commenters raised a number of concerns regarding the definition of ''institutional communication'' (focusing on the scope of the category of institutional investor and the reason to believe standard) and the treatment of internal communications.[29]

a. Scope of the Definition of Institutional Investor: Retirement Plans

One commenter recommended that the definition of institutional investor be revised to cover any size retirement plan (including those with fewer than 100 participants) and that it cover any type of retirement plan, including those that do not meet the requirements of Sections 403(b) or 457 of the Internal Revenue Code and are not qualified plans as defined in the Exchange Act.[30] The commenter argued that the 100-participant minimum is arbitrary because there is no correlation between plan size and investor sophistication, and that the standard is difficult to

[23] *See supra* footnote 11.

[24] *See* proposed FINRA Rule 2210(a).

[25] *See* TLGI August Letter and SIFMA August Letter.

[26] *See* TLGI August Letter.

[27] *See* SIFMA August Letter.

[28] *See* October Response Letter.

[29] *See* Fidelity August Letter; SIFMA August Letter; FSI August Letter; Wolverine December Letter; Fidelity December Letter; SIFMA December Letter; and FSI December Letter.

[30] *See* Fidelity August Letter.

administer in practice because it requires firms to track the number of participants in clients' retirement plans. The commenter further argued that the retirement plans' coverage under the Employee Retirement Income Security Act of 1974 (''ERISA'') provides sufficient protection to small retirement plans without having to treat them as retail investors for purposes of FINRA communications rules. In a second letter, the commenter again recommended FINRA eliminate the requirement that such plans have at least 100 participants.[31] The commenter further argued that because all retirement plan sponsors have fiduciary responsibilities under ERISA, they are required to have an in-depth understanding of investment concepts and of the products chosen as retirement plan options or they are required to use the assistance of others who have such knowledge. Accordingly, the commenter argued that small retirement plans do not require the same investor protections as retail investors.

FINRA responded to the comments and declined to broaden the universe of retirement plans that are included or to eliminate the 100-participant threshold for employee benefit plans to be considered institutional investors. FINRA maintained that while some plans with 100 or more participants may have no more investment sophistication than smaller plans, that does not mean that all plans should be treated as institutional investors. FINRA believes that smaller plans require greater protection under the rules governing member communications than do larger plans because plans with at least 100 participants are more likely to have either the sophistication required to scrutinize member sales material without the benefit of the filing and more prescriptive content standards applicable to retail communications, or have the resources necessary to hire an outside party with this sophistication.[32]

FINRA also indicated that commenters did not identify any provision in ERISA or any Department of Labor rule under that Act that is intended to provide the same protections to investors with regard to communications with the public as those provided to retail investors under Rule 2210. FINRA further indicated that commenters also did not identify other plans that do not meet the requirements of Sections 403(b) or 457 of the Internal Revenue Code and are not qualified plans as defined in the Exchange Act that should be included as institutional investors.[33]

FINRA noted that when it first adopted the institutional investor definition in 2003, it had determined that retirement plans with fewer than 100 participants should receive the same investor protections as other retail investors. FINRA indicated that the Investment Company Institute had, at that time, recommended this 100-participant threshold as an appropriate cut-off point for retirement plans, citing the fact that ERISA distinguishes qualified plans with at least 100 participants from smaller plans.[34] At that time, FINRA agreed that this standard was a reasonable way to distinguish between large and small retirement plans.[35] FINRA does not believe commenters have provided any compelling reason to revise this standard.[36]

The Commission recognizes that the number of participants may not in all cases be a perfect proxy for investment sophistication, but believes that FINRA, in its statements summarized above, has responded adequately to comments regarding the definition of institutional investor with respect to retirement plans and that FINRA has provided adequate justifications for the adoption and continuing use of the 100-participant threshold.

b. Scope of the Definition of Institutional Investor: Minimum Asset Threshold and Inconsistency With Other Regulatory Thresholds

As noted above, the proposed definition of ''institutional investor'' would include a category for any other person (whether a natural person, corporation, partnership, trust or otherwise) with total assets of at least $50 million. Several commenters argued that the $50 million asset threshold is too high.[37] Two commenters recommended that the $50 million asset threshold be decreased to $5 million in order to make the definition of institutional investor more consistent with the Commission's Regulation D[38] which includes a $5 million asset threshold within the definition of ''accredited investor.''[39] Alternatively, one of the commenters recommended that FINRA adopt the ''qualified investor'' definition under the Exchange Act,[40] or the ''qualified purchaser'' definition under the Investment Company Act of 1940,[41] as a test of investor sophistication in lieu of its proposed definition.[42] These commenters argued that adopting one of these alternative tests would create greater harmony among various securities laws and regulations.

Another commenter similarly recommended that the definition be expanded to include unregistered hedge funds, money managers and family offices, regardless of the assets under management.[43] Alternatively, the commenter recommended that the asset threshold be reduced to $10 million. In a second letter, this commenter noted that while it prefers the expanded definition of institutional investor under proposed FINRA Rule 2210(a)(4) to the definition of ''institutional account'' under FINRA Rule 4512(c), it ''strongly urges FINRA to adopt one standard or the other.''[44] The commenter indicated that firms should not be required to build systems to comply with inconsistent definitions of ''institutional investor'' and ''institutional account,'' and thus FINRA should have a uniform standard within the Consolidated Rulebook.

FINRA declined to lower the minimum asset threshold from $50 million to $5 million or $25 million for investors that are not included in another institutional investor category because it believes that the definition of institutional investor with its $50 million threshold has long served as a reasonable way to distinguish retail and institutional customers.[45] FINRA pointed to the practical effect of designating a communication as retail rather than institutional: certain additional principal approval, filing and content standards apply. FINRA believes that these additional requirements help ensure that investor

[31] *See* Fidelity December Letter.

[32] *See* October Response Letter.

[33] *See* October Response Letter.

[34] *See* December Response Letter (citing to letter from Craig S. Tyle, General Counsel, Investment Company Institute, to Joan Conley, NASD Regulation, Inc., dated October 29, 1999, citing ERISA 103(a)(3)(A) (auditing requirements) and 104(a)(2)(A) (annual reporting), 29 U.S.C. 1023(a)(3)(A), 1024(a)(2)(A)).

[35] *See* December Response Letter (citing to Securities Exchange Act Release No. 45181, 66 FR 67586 (December 31, 2001) (Notice of Filing of Proposed Rule Change and Amendments No. 1 and 2 Thereto by the National Association of Securities Dealers, Inc. Concerning Amendments to Rules Governing Member Communications with the Public)).

[36] *See* December Response Letter.

[37] *See* Fidelity August Letter; SIFMA August Letter; Fidelity December Letter; Wolverine December Letter; and SIFMA December Letter.

[38] *See* Fidelity August Letter; Fidelity December Letter; Wolverine December Letter.

[39] *See* 17 CFR 230.501(a).

[40] *See* 15 U.S.C. 78c(a)(54).

[41] *See* 15 U.S.C. 80a–2(a)(51).

[42] *See* Wolverine December Letter.

[43] *See* SIFMA August Letter.

[44] *See* SIFMA December Letter.

[45] *See* December Response Letter.

communications are fair, balanced and accurate.[46]

FINRA noted that in its experience regulating member sales material, even where investors may meet an ''accredited investor'' or other standard under the federal securities laws, it is not assured that sales material used with such investors will not be misleading or fraudulent, nor are such investors immune from being deceived by such material.[47] FINRA indicates that, in FINRA's view, this is particularly true for individual investors that may have enough wealth to qualify for investing in privately placed securities, but lack the knowledge and understanding necessary to prevent investor harm from occurring.

FINRA stated that there would be no more reason to lower the threshold than to raise it to a higher one, such as the threshold for a ''qualified institutional buyer'' (certain institutions holding $100 million in securities) under Rule 144A of the Securities Act of 1933.[48]

Similarly, in response to the comments suggesting the Regulation D standard as an alternative, FINRA pointed to various observations about the accredited investor standard under Regulation D: some have asserted that the net worth, income or asset size may not be an indication of an investor's ability to bear the risk of loss[49] and that the definition may be both under-inclusive (by excluding financially sophisticated investors who do not meet the definition's wealth tests) and over-inclusive (by including wealthy financial novices).[50] FINRA concludes that the same criticisms can be made for any test of investor sophistication that is based upon measures of wealth, such as ''qualified investor'' or ''qualified purchaser.''

Moreover, FINRA indicates that it is seeking to harmonize, where appropriate, the definitions related to institutional investors under its rules; creating a different asset threshold for the definition of institutional investor under Rule 2210 would run counter to this goal.[51] Yet, FINRA acknowledged that the definition of institutional investor differs from the definition of ''institutional account'' under FINRA Rule 4512(c), as well as from the definitions of other terms such as ''accredited investor'' or ''qualified purchaser'' under the federal securities laws.

FINRA recognized that while it could narrow the definition of institutional investor under proposed FINRA Rule 2210(a)(4) to match the definition of ''institutional account'' under FINRA Rule 4512(c), regardless of which standard FINRA adopts for the proposed rule, the inconsistency with federal statutes and rules will remain. FINRA believes that the current broader definition establishes an appropriate standard for institutional communications and that narrowing the definition for purposes of consistency with FINRA Rule 4512(c) could adversely impact members that are relying on the current definition of institutional investor under NASD Rule 2211(a)(3). Accordingly, FINRA declined to revise the definition of institutional investor for the purpose of making it consistent with FINRA Rule 4512.

FINRA asked the Commission to consider that, unlike the accredited investor definition, the ''institutional investor'' definition does not prevent investors from investing in particular funds or products. Rather, FINRA explains that it simply requires members to exercise a greater degree of supervision with respect to sales material if it intends to distribute the material to individuals and certain entities that have less than $50 million in assets.

FINRA noted that Section 415 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the ''Dodd-Frank Act'') instructed the Government Accountability Office (''GAO'') to conduct a study on the appropriate criteria for determining the financial thresholds or other criteria needed to qualify for accredited investor status to invest in private funds—and to report back to Congress within three years after the date of enactment of the Dodd-Frank Act. In light of the GAO study, FINRA stated that in its view it would make little sense to adopt a standard that Congress has questioned and that potentially could become obsolete in a few years.[52]

FINRA noted that regardless of which definition FINRA chooses to adopt for the communication with the public rules, inconsistencies will remain, because FINRA cannot alter definitions contained in either federal statutes or Commission rules.[53]

The Commission believes that FINRA responded adequately to commenter concerns by providing, among other things, a detailed explanation of its reasoning for maintaining a $50 million minimum asset threshold, as described above. The Commission recognizes that the institutional investor standard in the proposed rule is not intended to stand as a bar to investment activity; it determines what types of supervisory, filing and content requirements will apply to communications.

c. The Reason To Believe Standard

A commenter stated that FINRA needs to interpret ''the reason to believe'' standard because it is subject to a variety of interpretations.[54] Another commenter recommended that FINRA replace this standard with a requirement that a member establish policies and procedures (such as the use of legends that prohibit the forwarding of material to retail investors) that are reasonably designed to limit the distribution of

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[46] *See* December Response Letter.

[47] *See* December Response Letter (citing examples of problematic practices. For example, FINRA notes that in one case, a member distributed sales literature regarding specific hedge funds to its customers that had inadequate risk disclosures about the specific risks of investing in these hedge funds and made unbalanced presentations that failed to provide investors with a sound basis for evaluating the facts associated with investments in these funds. FINRA states that these materials included projections of performance that were unwarranted. *Id.* at footnote 22 and accompanying text (citing to Altegris Investments Inc., AWC No. CAF030015 (April 15, 2003)).

FINRA cites another case, in which a member distributed sales literature regarding privately placed registered investment companies that contained inadequate risk disclosures, and that stated that the fund was seeking a targeted rate of return without providing a substantiated basis for the target. *Id.* at footnote 23 and accompanying text (citing to UBS Financial Services Inc., AWC No. CAF040051 (June 16, 2004)). In another case regarding the advertising of hedge funds, FINRA states that sales presentations and prospecting letters did not provide a sound basis for investors to evaluate the reasonableness of the targeted investment returns. For example, FINRA explains that some of the sales material included hypothetical results that were combined with the hedge fund's actual performance, giving the misimpression that the fund had actually achieved the combined performance record. *Id.* at footnote 24 and accompanying text (citing to Citigroup Global Markets, Inc., AWC No. CAF040077 (Oct. 4, 2004)).

FINRA also provides an example of a recently litigated case, in which a member distributed emails to investors that qualified as accredited investors that contained predictions or projections of performance, including claims of returns of up to 100 percent annually and ''comfortable'' returns of 25–50 percent. FINRA notes that aside from violating FINRA rules prohibiting such projections of performance, these claims also lacked any historical support, and the emails lacked risk disclosures. *Id.* at footnote 25 and accompanying text (citing to *Dep't of Enforcement* v. *Hedge Fund Capital Partners LLC,* Complaint No. 2006004122402 FINRA Discip. LEXIS 20 (Jan. 26, 2011), *appeal docketed,* Feb. 7, 2011).

[48] *See* 17 CFR 230.144A(a)(1).

[49] *See* December Response Letter at footnote 20 and accompanying text (citing to, *e.g.,* Manning Gilbert Warren III, *A Review of Regulation D: The Present Exemption Regimen for Limited Offerings Under the Securities Act of 1933,* 33 a.m. U.L. Rev. 355, 382 (1984)).

[50] *Id.* at footnote 21 and accompanying text (citing, *e.g.,* Stephen Choi, *Regulating Investors Not Issuers: A Market-Based Proposal,* 88 Cal. L. Rev. 279, 310 (2000)).

[51] *See* October Response Letter.

[52] *See* December Response Letter.

[53] *See* December Response Letter.

[54] *See* FSI August Letter.

communications to institutional investors.[55]

In response, FINRA indicated that a firm's policies and procedures are among the factors FINRA will consider in determining whether a firm has reason to believe an institutional communication will be forwarded to retail investors. However, FINRA disagreed that the mere existence of policies and procedures designed to prevent the forwarding of communications to retail investors (such as legends placed on communications) is sufficient to meet the reason to believe standard. For example, FINRA indicated that it would not consider a firm to have met the standard if it merely placed a legend on a communication warning the recipient not to forward it to retail investors, but a registered representative then orally told the recipient to distribute the communication as he pleased. In addition, FINRA indicated that a firm should not be able to treat a communication as an institutional communication in circumstances where, notwithstanding policies and procedures, the firm becomes aware that previous similar communications have been routinely redistributed to retail investors.[56]

Following publication of the Notice and Proceedings Order, one commenter reiterated its concern that the ''reason to believe'' standard creates substantial ambiguity, and urged FINRA to provide more guidance regarding member obligations under this standard.[57] In particular, the commenter inquired whether FINRA expects members to be proactive in obtaining information regarding the ultimate use of communications designed for institutional investors or whether members may satisfy their obligations by relying on assurances provided by financial advisors that such communications have not been forwarded to retail investors.

In response to the additional request for guidance, FINRA reiterated that it does not intend to impose an affirmative obligation on members to inquire whether an institutional communication will be forwarded to retail investors every time such a communication is distributed. Rather, FINRA stated that members should have policies and procedures in place reasonably designed to ensure that institutional communications are not forwarded to retail investors, and make appropriate efforts to implement such policies and procedures.[58]

FINRA further clarified that while the use of legends on institutional communications that are intended to limit a communication's distribution can be part of such policies and procedures, the use of legends by themselves is not sufficient. For example, as one commenter suggested,[59] FINRA noted that firms may wish to get periodic assurances from institutional investors that they will not forward institutional communications to retail investors. FINRA also clarified that to the extent a member or associated person becomes aware that an institutional investor is forwarding or making available institutional communications to retail investors, it must treat future communications sent to such institutional investors as retail communications, until it reasonably concludes that the improper practice has ceased.[60]

Following the publication of Amendment No. 2, an additional commenter expressed concern about the ''reason to believe standard.''[61] The commenter argued that many funds are sold through intermediary broker-dealer firms, and an intermediary firm may use institutional communications prepared by a fund's underwriter with its associated persons. The commenter believed that, in these circumstances, it would be the recipient broker-dealer that would be responsible for assuring that its associated persons' limit use of the communication to institutional investors.

FINRA agreed with the commenter that the ''reason to believe'' standard does not make the fund underwriter responsible for supervising the associated persons of recipient broker-dealers (unless the person is also associated with the underwriter). Accordingly, FINRA noted that the recipient broker-dealer is responsible for assuring that its associated persons do not forward institutional communications to retail investors. FINRA reiterated that the fund underwriter should take appropriate steps to ensure that institutional communications are appropriately labeled so that there is no confusion as to their status. FINRA also noted that, if red flags indicate that a recipient broker-dealer has used or intends to use an institutional communication provided by the underwriter with retail investors, the underwriter must follow up on those red flags and, if it determines that this is the case, discontinue distribution of the communication to that recipient broker-dealer until the underwriter reasonably concludes that the broker-dealer has adopted appropriate measures to prevent future redistribution. FINRA stated that it intended to further clarify the issue in a *Regulatory Notice* announcing adoption of the rule.[62]

The Commission believes that FINRA has responded adequately to commenter concerns regarding the ''reason to believe'' standard by providing the guidance and clarifications described above.

d. Internal Communications

Numerous commenters opposed including internal written (including electronic) communications that are intended to educate or train registered persons about the products or services offered by a member as types of internal communications within the definition of ''institutional communication,'' arguing that it would impose new compliance and supervisory requirements on internal communications that do not exist under current FINRA rules.[63] Following publication of the Notice and Proceedings Order, the commenters reiterated opposition to proposed Supplementary Material 2010.01.[64]

One commenter stated that internal education and training materials are not sales material created for public distribution, and as such, not all of Rule 2210's policy concerns apply to such materials.[65] The commenter acknowledged that internal materials should be fair, balanced and accurate to support appropriate sales practices by registered representatives, but stated that this goal could be achieved by having such communications subject only to NASD Rule 3010. In particular, the commenter noted that Rule 3010 ''provides a sufficient regulatory basis for requiring member firms to develop policies, procedures and supervisory controls to support the development of training materials that are accurate and balanced in describing a firm's products and services.''

Three commenters argued that a reasonable reading of the definition of institutional investor under NASD Rule 2211 might lead to the conclusion that it is intended to include external

[55] *See* SIFMA August Letter.

[56] *See* October Response Letter.

[57] *See* FSI December Letter.

[58] *See* December Response Letter.

[59] *See* FSI December Letter.

[60] *See* December Response Letter.

[61] *See* ICI January Letter.

[62] *See* March Response Letter.

[63] *See* Fidelity; ICI August Letter; SIFMA August Letter; and Vanguard August Letter.

[64] *See* Fidelity December Letter; ICI December Letter; SIFMA December Letter; Vanguard December Letter; and Schwab December Letter.

[65] *See* Schwab December Letter.

parties, including third-party broker-dealers and their associated persons, but not the FINRA member firm or its associated persons creating an internal communication.[66] The commenters argued that the term ''institutional sales material'' under NASD Rule 2211 could be read to exclude internal communications. The commenters also argued that the additional costs that would be imposed on firms by including internal communications within the term ''institutional communication'' would far exceed any incremental benefits to investors, given the protection investors already receive under NASD Rule 3010.[67] One commenter indicated that, should this requirement be retained, it should also cover internal communications to associated persons who are not registered persons.[68]

FINRA disagreed with the commenters who suggested that internal communications are not included within the term ''institutional sales material,'' indicating that the current definition of ''institutional sales material'' under NASD Rule 2211 includes any communication that is distributed or made available only to any NASD member or registered associated person of such a member.[69] FINRA noted that the plain language of the definition of the term ''institutional investor'' includes any broker-dealer and its associated persons and contains no express exception for a firm's internal communications to its associated persons. FINRA stated that it believes that treatment of internal educational or training material that relate to a member's products or services as institutional communications is consistent with current FINRA rules and FINRA's current and past interpretations of those rules. FINRA indicated that it has previously issued public guidance making clear that the content standards of the rules governing member communications with the public apply to a member's internal communications.[70] FINRA also indicated that it settled a number of enforcement actions against members involving misleading internal educational and training materials that alleged violations of NASD Rules 2210 and 2211.[71]

FINRA further noted that a similar comment was raised in response to FINRA's proposed amendments to its communications with the public rules in 2000. FINRA stated, in response to a commenter that asserted that a member firm's internal communications are not communications with the public, that while Rule 2210 excepts internal-use only communications from the filing requirements, FINRA had long taken the position that broker-dealer-only materials must meet the rule's content and record-keeping requirements.[72] FINRA further pointed out that, at that time, the Commission acknowledged the comment and FINRA's response in approving the proposed rule change.[73]

To address commenters concerns, FINRA revised the proposed rule change in Amendment No. 2 so that going forward, internal communications would no longer be governed by proposed FINRA Rule 2210, and instead would be governed by NASD Rule 3010 (and any successor FINRA Rule), as well as other applicable rules. FINRA indicated that it believes these other existing rule requirements effectively lead to the same review and content standards as is set forth in proposed Supplementary Material 2210.01. Therefore, FINRA determined not to include internal educational and training materials within the term ''institutional communication'' for purposes of FINRA Rule 2210, and proposed, in Amendment No. 2, to delete Supplementary Material 2210.01.[74] FINRA also amended the definition of ''institutional communication'' (proposed FINRA Rule 2210(a)(3)) to specifically exclude a member's internal communications.

FINRA reiterated that, as the commenters noted, NASD Rule 3010 requires firms to supervise internal communications, including internal communications that train or educate registered representatives. Under NASD Rule 3010, firms must establish, maintain and enforce written procedures to supervise the types of business in which they engage and to supervise associated persons' activities that are reasonably designed to achieve compliance with applicable securities laws and regulations and with applicable FINRA Rules, including the suitability rule[75] and just and equitable principles of trade.[76] FINRA said that it believes, with respect to internal communications for training and education that a firm's supervisory scheme would be deficient unless its policies and procedures are reasonably designed to ensure that such communications are fair, balanced and accurate.

FINRA further noted that firms also must determine the extent to which the review of internal communications is necessary in accordance with the supervision of their business[77] and maintain records of all internal communications relating to their business as a broker-dealer.[78]

The Commission believes that FINRA has responded adequately to comments regarding internal communications, including by amending the proposal to remove Supplementary Material 2210.01. and revising the definition of institutional communication to specifically exclude a member's internal communications. The Commission notes that FINRA cautioned firms that their supervisory policies and procedures should be structured to ensure that internal communications are fair, balanced and accurate.

B. Approval, Review and Recordkeeping

Proposed FINRA Rule 2210(b)(1)(A) generally requires an appropriately

[66] *See* Fidelity December Letter; ICI December Letter; and SIFMA December Letter.

[67] *Id. See also* Vanguard December Letter.

[68] *See* Fidelity August Letter.

[69] *See* December Response Letter (citing, NASD Rule 2211(a)(2) and (a)(3)(E)).

[70] *See* December Response Letter (citing, *e.g.,* NASD *Regulatory & Compliance Alert,* ''Ask the Analyst'' (September 1998), available at *www.finra.org*).

[71] *See* December Response Letter (citing, *e.g.,* NASD Letter of Acceptance, Waiver and Consent No. EAF0401000001 (MML Distributors, LLC) (Oct. 2005); NASD Letter of Acceptance, Waiver and Consent No. EAF0401240001 (AFSG Securities Corp.) (Oct. 2005); FINRA Letter of Acceptance, Waiver and Consent No. 20080130571 (US Bancorp Investments, Inc.) (Feb. 12, 2010); and FINRA Letter of Acceptance, Waiver and Consent No. 2008015443301 (UBS Financial Services, Inc.) (April 8, 2011)).

[72] *See* December Response Letter (citing letter from Barbara Z. Sweeney, NASD, to Katherine A. England, Assistant Director, SEC, dated November 4, 2002 (re: File No. SR–NASD–00–12)).

[73] *See* December Response Letter (citing Securities Exchange Act Release No. 47820 (May 9, 2003), 68 FR 27116 (May 19, 2003) (Order Approving Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval to Amendments No. 3 and 4 to the Proposed Rule Change by the National Association of Securities Dealers, Inc. Concerning Amendments to Rules Governing Member Communications With the Public (File No. SR–NASD–00–12))).

[74] *See* December Response Letter.

[75] *See* NASD Rule 2310 (Recommendations to Customers (Suitability)). Effective July 9, 2012, this rule is superceded by new FINRA Rule 2111. *See* FINRA *Regulatory Notice* 11–25, ''New Implementation Date for and Additional Guidance on the Consolidated FINRA Rules Governing Know-Your-Customer and Suitability Obligations,'' May 2011 *available at www.finra.org.*

[76] *See* FINRA Rule 2010.

[77] *See* December Response Letter (citing *Regulatory Notice* 07–59 (FINRA Provides Guidance Regarding the Review and Supervision of Electronic Communications) (December 2007)). FINRA explained that *Regulatory Notice* 07–59 further makes clear that a member must have reasonably designed procedures for the supervisory review of those internal communications that are of a subject matter that require review under FINRA rules and the federal securities laws.

[78] *See* December Response Letter (citing Exchange Act Rule 17a-4(a)(4); FINRA Rule 4511(a)).

qualified registered principal to approve each retail communication before the earlier of its use or filing with the Department. The rule also includes a number of exceptions and modifications to this requirement for certain types of retail communications. For example, proposed FINRA Rule 2210(b)(1)(D)(iii) would allow a member to supervise in a manner similar to correspondence any retail communication that does not make any financial or investment recommendation or otherwise promote a product or service of the member. In addition, proposed paragraph (b)(1)(E) authorizes FINRA to grant an exemption from paragraph (b)(1)(A) for good cause shown, to the extent the exemption is consistent with the purposes of the Rule, the protection of investors, and the public interest.

Commenters raised a number of concerns regarding the approval process and supervision of retail communications. The comments focused on who should be a principal qualified to approve certain communications (the ''qualified principal approval standard'') and whether communications that do not recommend specific securities should be excepted from the principal pre-use approval requirements.

1. Approval

a. Qualified Principal Approval Standard

Paragraph (b)(1)(B) in the Original Proposal would have permitted a Supervisory Analyst (as defined in NYSE Rule 344) approved pursuant to NYSE Rule 344 to approve research reports on debt and equity securities. One commenter recommended that the qualified principal approval standard be revised to permit Supervisory Analysts to review and approve any communication produced by a firm's research department, including communications that are not research reports on debt or equity securities.[79] The commenter gave as examples macroeconomic research or research on commodities.

The commenter alternatively argued that FINRA should exclude from the requirement to obtain pre-use principal approval all communications produced by a firm's research department. Another commenter recommended that FINRA exclude all research reports from proposed FINRA Rule 2210, on the ground that NASD Rule 2711 [80] sufficiently regulates these communications.[81]

In a subsequent letter, one of the commenters argued that proposed paragraph (b)(1)(B) would have a negative effect on the review and distribution of materials prepared by research department personnel, since it would not permit Supervisory Analysts to review research notes and other materials if those materials do not meet the definition of ''research report.'' [82] Instead, the proposed rule would require a registered principal to review and approve these materials. The commenter expressed the view that Supervisory Analysts are more qualified to review and approve research materials prepared by research department personnel than associated persons who have only taken a general securities principal examination.

The Commenter argued further that requiring registered principals rather than Supervisory Analysts to review these materials would disrupt well-established practices and processes that firms have developed for publishing content produced by research department personnel that does not fall within the definition of ''research report.'' Accordingly, the commenter urged that ''a Supervisory Analyst should be permitted to review materials that are not defined as ''research reports'' because they are excepted from the definition in NASD Rule 2711(a)(9), regardless of whether these materials contain a financial or investment recommendation.'' [83]

In its October Response Letter, FINRA disagreed and declined to revise the qualified principal approval standard. FINRA noted that proposed paragraph (b)(1)(D)(i) already would allow members to supervise certain types of retail communications in the same manner as correspondence and that these communications include any retail communication that is excepted from the definition of ''research report'' pursuant to NASD Rule 2711(a)(9)(A), which includes ''commentaries on economic, political or market conditions.'' FINRA asserted that to the extent a research department produces communications concerning other types of investments, such as commodities, FINRA believed that a principal with appropriate expertise, rather than a Supervisory Analyst, should review such communications.

FINRA also declined to exclude all communications produced by a firm's research department and/or all research reports. FINRA noted that the fact that a particular department within a firm produces a communication generally should not alter the manner in which the communication is reviewed and supervised. FINRA indicated that while NASD Rule 2711 does include certain required disclosures for research reports, it lacks other important content standards, such as the requirement that a communication be based on principles of fair dealing and good faith, and be fair and balanced. FINRA further indicated that proposed FINRA Rule 2210 includes important supervisory and recordkeeping standards that are not found in NASD Rule 2711. FINRA also noted that it altered the application of proposed FINRA Rule 2210's content standards to research reports where appropriate.[84] For example, it would exclude research reports from the disclosure requirements set forth in proposed FINRA Rule 2210(d)(7) for retail communications that include a securities recommendation.[85] Thus, FINRA stated its belief that the current rules and proposal appropriately focus on the nature of the communication, not its department of origin.

In Amendment No. 1, FINRA proposed one modification to proposed FINRA Rule 2210(b)(1)(D)(i), in order to clarify that a member would be required to have a principal approve a retail communication that is excepted from the definition of ''research report'' pursuant to NASD Rule 2711(a)(9)(A) if the retail communication makes any financial or investment recommendation. To accommodate commenter concerns, in its March Response Letter, in addition to permitting Supervisory Analysts to review and approve research reports on debt or equity securities (as provided in the Original Proposal), FINRA determined that Supervisory Analysts

[79] See Wilmer August Letter.

[80] NASD Rule 2711 (Research Analysts and Research Reports) is designed to address conflicts of interest that are raised when research analysts recommend securities in public communications by implementing structural reforms designed to increase analysts' independence and further manage conflicts of interest, and require increased disclosure of conflicts in research reports and public appearances. Securities Exchange Act Release No. 45908 (May 10, 2002); 67 FR 34968 (May 16, 2002).

[81] See SIFMA August Letter.

[82] See Wilmer January Letter.

[83] See Wilmer January Letter.

[84] See October Response Letter.

[85] Proposed FINRA Rule 2210(d)(7) requires retail communications that include a recommendation of securities to have a reasonable basis for the recommendation and to include disclosures regarding the member's market-making activities in the security, financial interests in the recommended securities by the firm or any associated person that is directly and materially involved in the preparation of the communication, the member's role as manager or co-manager of a public offering of the recommended securities during the past 12 months. The proposed rule also requires members to make information available regarding the recommendation and generally prohibits reference to past specific recommendations, unless certain requirements are met.

could also review and approve retail communications that are described in NASD Rule 2711(a)(9)(A) [86] and other research that does not fall within the definition of ''research report'' under NASD Rule 2711(a)(9), provided that they have technical expertise in the particular product area. FINRA noted, however, that this revision is not intended to alter current requirements that certain types of retail communications, such as retail communications concerning options, municipal securities or security futures, be approved by a principal with a specific qualification. Accordingly, FINRA amended proposed FINRA Rule 2210(b)(1)(B) as set forth in this Order.

The Commission believes that FINRA has responded adequately to comments regarding the principal pre-use approval requirement through its statements summarized above, and its modification of proposed FINRA Rule 2210(b)(1)(B) as set forth in this Order.

b. Supervision of Retail Communication Without Financial or Investment Recommendation

One commenter argued that the exception from the qualified principal pre-use approval standard for retail communications that do not make any financial or investment recommendation or otherwise promote a product or service of the member needs further clarification.[87] In contrast, another commenter recommended that the exception include only retail communications that are solely administrative in nature.[88] Another commenter requested confirmation that research-authored educational pieces, such as primers on certain asset classes that do not recommend specific securities, are excepted from the principal pre-use approval requirements under this provision.[89]

FINRA declined to revise the standard, suggesting that it viewed the proposed standard as a clearer alternative to the standard FINRA had originally proposed to its members in *Regulatory Notice* 09–55 (for retail communications that are solely administrative in nature). FINRA explained that numerous commenters had argued that the standard was unclear and insufficient, and that in response to those comments, FINRA had revised the standard to explicitly exclude retail communications that do not make any financial or investment recommendation or otherwise promote a product or service of the member.[90]

FINRA does not agree that so-called ''educational'' pieces are or should be generally excepted from the principal pre-use approval requirements under this provision. FINRA indicated that while this determination will always depend on the facts and circumstances, the purpose of such pieces may be to draw investor interest to a member's products and services, and accordingly would be viewed as promotional in nature.[91]

The Commission believes that FINRA has responded adequately to comments regarding supervision of retail communications without financial or investment recommendations by, for example, highlighting the changes it had made in response to comments on a prior version of the standard as proposed in *Regulatory Notice* 09–55.

c. Other Comments Relating to Principal Pre-Use Approval

One commenter noted that many closed-end funds are listed on the New York Stock Exchange (''NYSE'').[92] Section 202.06 of the NYSE Listed Company Manual encourages listed issuers to disseminate ''quickly to the public any news or information which might reasonably be expected to materially affect the market for its securities.'' The commenter maintained that, in the case of listed closed-end funds, this information would include, among other things, dividend announcements, and typically would be disseminated through press releases. The commenter asked that FINRA clarify that closed-end funds' press releases issued pursuant to Section 202.06 of the NYSE Listed Company Manual are excluded from the pre-use principal approval requirement. The commenter also requested that FINRA exclude these press releases from the filing requirement, as discussed below.

FINRA responded by pointing to proposed FINRA Rule 2210(b)(1)(D)(iii), noting that to the extent a member distributes or makes available a press release about a closed-end fund that does not make any financial or investment recommendation or otherwise promote a product or service of the member, the member would not be required to have a principal approve it prior to use.[93] FINRA did not amend the proposal to specifically exclude these press releases from the pre-use principal approval requirement.

The Commission believes that FINRA has responded adequately to these comments by identifying the types of press releases issued pursuant to Section 202.06 of the NYSE Listed Company Manual that would be excluded from the proposed rule's pre-use principal approval requirements (*i.e.,* those that do not make any financial or investment recommendation or otherwise promote a product or service of the member), and (as discussed below), by amending the proposal to exclude these press releases from the filing requirement.

2. FINRA's Exemptive Authority

One commenter recommended that, should FINRA grant exemptive relief from the principal pre-use approval requirements to a member or a small number of members pursuant to proposed paragraph (b)(1)(E), FINRA should announce this relief in a *Regulatory Notice* and simultaneously grant this relief to all members.[94]

FINRA responded that it generally does not intend to use this provision to grant relief to firms that have not applied for such relief. If FINRA determines that similar relief is appropriate for all members, it generally expects to file a proposed rule change with the Commission to accomplish such result. However, FINRA indicated that it will consider the best means to publish any relief granted under this provision.[95]

The Commission believes that FINRA, in its statements summarized above, has responded adequately to this comment. The Commission notes that FINRA is required, under Exchange Act Section 19(b) and Rule 19b–4 thereunder to file a proposed rule change with the Commission if a stated policy, practice, or interpretation is not reasonably or fairly implied by an existing FINRA rule and is not concerned solely with FINRA's administration (subject to certain exceptions).[96] In a March 2003 letter to the NASD (as well as all other non-clearing agency self-regulatory organizations (''SROs'')), the Division of Trading and Markets (formerly known as the Division of Market Regulation) clarified the process to be used by SROs when granting exemptions from SRO rules.[97] As stated in the letter, the only

[86] NASD Rule 2711(a)(9)(A) defines the term ''Research Report.''

[87] *See* TLGI August Letter.

[88] *See* PIABA August Letter.

[89] *See* Wilmer August Letter.

[90] *See* December Response Letter.

[91] *See* October Response Letter.

[92] *See* ICI August Letter and ICI December Letter.

[93] *See* December Response Letter.

[94] *See* ICI August Letter.

[95] *See* October Response Letter.

[96] *See* Exchange Act Rule 19b–4.

[97] *See* letter from Annette L. Nazareth, Director, Division of Market Regulation to T. Grant Callery, Executive Vice President & General Counsel, National Association of Securities Dealers, re: SRO Exemption Authority, dated March 27, 2003. A

circumstance in which exemptive authority of SROs should be exercised in lieu of employing the notice-and-comment process applicable to proposed SRO rule changes under Section 19(b) of the Exchange Act is ''where the circumstances are truly unique.'' [98] The Commission expects FINRA to maintain records of any exemptions granted.

Commission Chairman Mary Schapiro recently articulated ''that the uniform dissemination of regulatory positions tends to enhance compliance, thereby furthering investor protection.'' [99] The Commission encourages FINRA to continue to identify means of improving transparency of regulatory interpretations and positions.

3. Recordkeeping

One Commenter requested confirmation that the requirement in proposed paragraph (b)(4)(A)(i) to maintain the date of last use does not apply to research communications.[100] FINRA indicated that this requirement (if applicable) applies to all communications and that there is no exception for research.[101]

The Commission believes that FINRA has clarified adequately that there is no exception to the requirement to maintain (if applicable) a record of the date of last use for any communications under proposed paragraph (b)(4)(A)(i). For a discussion of comments regarding recordkeeping requirements for online interactive electronic content, see Section E. (Other Issues Related to Public Appearances and Online Interactive Electronic Communications) below.

C. Filing Requirements and Review Procedures

Proposed FINRA Rule 2210(c)(1) through (c)(3) would require members to file certain retail communications either at least 10 business days prior to first use or publication, or within 10 business days of first use or publication, depending on the communication. Proposed paragraph (c)(7) includes a number of exclusions from these filing requirements.

Commenters raised concerns regarding the proposed filing requirements, focusing on the volume of material that would fall under the filing requirement and suggesting various possible exclusions to decrease the filing requirement burden.[102]

1. General

One commenter expressed concern that the filing requirements of paragraph (c)(3) would subject almost all member communications to filing with FINRA.[103] Another commenter argued that FINRA staff review of filings on a post-use basis does not enhance investor protection, since the material has already been distributed.[104]

FINRA disagreed with the first concern, indicating that the filing requirements under this paragraph covers retail communications concerning registered investment companies, public direct participation programs, investment analysis tools, collateralized mortgage obligations, and retail structured products. FINRA stated that the filing requirements would not cover correspondence or institutional communications and that they also would not apply to retail communications concerning many other types of securities that are not listed in paragraph (c)(3).[105]

FINRA also disagreed with the argument that post-use review by FINRA staff fails to protect investors. FINRA indicated that it allows members to file communications on a post-use basis to prevent filing requirements from serving as an impediment to distributing sales material in a timely manner. FINRA suggested that the commenter's argument, if extended, would require that all retail communications be filed prior to use.[106] While FINRA would require pre-use filing for certain types of retail communications that it believes present potentially higher risks of being misleading to investors, FINRA believes that post-use filing is sufficient for many other types of retail communications. FINRA indicates that the filing requirements provide a check on firms that may otherwise consider including misleading statements in sales material, and brings potentially misleading material to FINRA's attention.[107]

The Commission believes that FINRA responded adequately to these comments by, among other things, clarifying the scope of the filing requirement in proposed paragraph (c)(3) and by explaining that post-use filing permits a firm to distribute sales material in a timely manner, while bringing potentially misleading material to FINRA's attention.

2. Communications Concerning Government Securities

A commenter argued that the proposed filing requirements for retail communications concerning government securities, as set forth in the Original Proposal, would greatly expand the filing obligations with regard to many types of research communications, with little benefit to investors.[108] Another commenter argued

copy of this letter is available in the Commission's Public Reference Room.

[98] *Id.* The letter states that ''[t]he broad definition of ''proposed rule change'' in Rule 19b–4 means that exemptions of general applicability that impose substantive binding requirements should be done through the notice-and-comment rulemaking process. Similarly relief from the SRO standards or obligations made generally applicable to members is rulemaking and must be done through the notice-and-comment rulemaking process.

Determining when an exemption is of general applicability is in some cases difficult. It is clear that when an exemption on its face is a class exemption, or is otherwise generally applicable, the notice-and-comment process should apply. What is less readily apparent, however, is when the exemption is not on its face generally applicable but involves factual circumstances that will be frequently replicated. In this circumstance, adherence to the notice-and-comment process will also apply. The fact that the exemption order may be unpublished or may state that it is limited to the individual firm or person to whom it is granted, does not mitigate the need for notice-and-comment procedures if the circumstances involved are so common that the SRO will in fact be granting the same exemption to all other persons similarly situated.''

[99] *See* letter from Mary L. Schapiro, Chairman, Securities and Exchange Commission to Ms. Alicia Puente Cackley, Director, Financial Markets and Community Investment, GAO, dated July 15, 2011, Appendix III, United States Government Accountability Office, Report to Congressional Committees, ''Mutual Fund Advertising: Improving How Regulators Communicate New Rule Interpretations to Industry Would Further Protect Investors,'' July 2011, *available at http://www.gao.gov/assets/330/321961.pdf* (''GAO Mutual Fund Advertising Report''). The Chairman's letter responded to the GAO Mutual Fund Advertising Report, which recommended that the SEC should take steps to ensure FINRA develops sufficient mechanisms to notify all fund companies about changes in rule interpretations for fund advertising, to help ensure investors are better protected from misleading advertisements. In a letter from FINRA responding to the GAO, FINRA described certain steps that it had already taken to address the issues raised in the report: (1) FINRA's intent to publish, through a Notice to firms or by other means, any significant new interpretation of the advertising rules that affect a broad section of the industry; (2) FINRA's plan to develop one or more mechanisms to provide a regular summary of advertising issues and its interpretation, such as through a regular letter to advertising compliance contacts and regularly scheduled webinars; and (3) ongoing consideration by FINRA's Advertising Regulation managers of the means of disseminating important matters. *See* letter from Thomas M. Selman, Executive Vice President, Regulatory Policy, FINRA to Ms. Alicia Puente Cackley, Director, Financial Markets and Community Investments, GAO, dated July 11, 2011, *available at* Appendix II, GAO Mutual Fund Advertising Report.

[100] *See* Wilmer August Letter.

[101] *See* October Response Letter.

[102] *See* ICI August Letter; Wilmer August Letter; TLGI August Letter; SIFMA August Letter; and Fidelity August Letter.

[103] *See* TLGI August Letter.

[104] *See* SIFMA August Letter.

[105] *See* October Response Letter.

[106] *See* SIFMA August Letter.

[107] *See* October Response Letter.

[108] *See* Wilmer August Letter.

that FINRA should maintain the current filing requirements for government securities on the basis that principal pre-use approval is sufficient.[109]

In response to comments, FINRA eliminated the proposed filing requirement for retail communications concerning government securities.[110] FINRA indicates that NASD Rule 2210, which requires members to file advertisements concerning government securities, has generated relatively few filings over the past few years, and FINRA's staff has found relatively few problems with the advertisements that have been filed. Given the potential burden that an expanded filing requirement for retail communications concerning government securities may impose on members compared to the relatively lower risk that such retail communications pose, FINRA believes that it is not necessary to require members to file these communications. FINRA clarified that it retains the ability to review such communications through other means, such as spot checks or targeted examinations, and to take appropriate actions against members for violations of FINRA rules.[111]

The Commission believes that FINRA addressed adequately commenter concerns by eliminating the proposed filing requirement for communications concerning government securities contained in the Original Proposal, on the basis that (i) FINRA can review these communications through other means; (ii) such communications pose a lower risk for containing misleading material, and (iii) the filing requirement may be unduly burdensome.

3. Communications Concerning Structured Products

A commenter similarly argued that the proposed filing requirements for retail communications concerning registered structured products would greatly expand the filing obligations with regard to research communications, with little benefit to investors.[112]

FINRA disagreed with the argument that there is no need to file research concerning retail structured products.[113] FINRA cited a recent report summarizing broker-dealer examinations by the staff of the Commission's Office of Compliance Inspections and Examinations, in which the Commission staff identified a number of sales-related problems concerning structured products sold to retail investors.[114] FINRA concluded that retail communications concerning retail structured products should be filed for review by FINRA staff to help ensure that such communications are not misleading.

The Commission believes that FINRA addressed adequately the comment regarding registered structured products by, among other things, explaining that review by FINRA staff may result in discovery of sales-related disclosure problems, such as failure to disclose fees or material facts about redemption.

4. Templates

Proposed paragraph (c)(7)(B) would exclude from the filing requirements 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. One commenter argued that this exclusion be expanded to cover updates of narrative information that is sourced from either an independent data provider or an investment company or its affiliate.[115] This commenter later reiterated the request, suggesting that the narrative information could also be sourced from publicly available documents filed with the SEC.[116] Two other commenters recommended that this filing exclusion be expanded to cover updates of narrative factual information from an entity that provides general information about investment companies to the public and is independent of the investment company and its affiliates.[117] One of these commenters later argued that this filing exclusion would reduce member costs, while still allowing FINRA to review updated templates through other means, such as spot-checks or examinations.[118]

FINRA declined the commenters' suggestions, indicating that adopting such a filing exclusion could potentially encompass almost all retail communications concerning investment companies, as long as a new retail communication could be related to a previously filed communication. FINRA cited concerns about the types of narrative information that would be updated, such as changes to the description of a fund's investment objectives, and concluded that in some cases additional review by Department staff may be warranted for updates of such narrative information.[119] FINRA also stated that third-party data providers often receive their information about a fund from an affiliate of the fund, and thus, in many cases, this information ultimately will be generated by either the member firm or one of its affiliates.[120] FINRA argued that such information would not be considered to have come from an independent source and that filing of updated material is the best way to ensure that members' retail communications are fair, balanced and accurate.

Following publication of Amendment No. 2, one commenter recommended that FINRA permit a risk-based principal review process for narrative updates of templates.[121] According to the commenter, ''FINRA could require firms to develop policies and procedures appropriate for their business structure,'' citing proposed FINRA Rule 2210(b)(1)(D), which permits members to supervise certain categories of retail communications in the same manner as required for supervising and reviewing correspondence.[122] The commenter argued that this approach would preserve FINRA's ability to monitor these materials, both through review via filing and through spot checks and targeted examinations.

FINRA reiterated that registered principal approval of narrative updates to templates prior to use helps to ensure that the narrative is fair, balanced and not misleading, in the same manner as prior review by registered principals of other types of mutual fund sales material.[123]

FINRA also suggested that the commenter's approach would not be workable as proposed.[124] FINRA had proposed that an appropriately qualified

[109] *See* SIFMA August Letter.

[110] *See* Amendment No. 1.

[111] *See* October Response Letter.

[112] *See* Wilmer August Letter.

[113] *See* October Response Letter.

[114] *See* October Response Letter (citing to Office of Compliance Inspections and Examinations, U.S. Securities and Exchange Commission, ''Staff Summary Report on Issues Identified in Examinations of Certain Structured Securities Products Sold to Retail Investors,'' (July 27, 2011), *available at http://www.sec.gov/news/studies/2011/ssp-study.pdf.* FINRA noted that the staff found that some free-writing prospectuses concerning principal protected notes failed to disclose risks that investors could receive less than the principal investment if these notes were redeemed prior to maturity and that there were also problems regarding disclosures of fees for some products.).

[115] *See* Fidelity August Letter.

[116] *See* Fidelity December Letter.

[117] *See* SIFMA August Letter and ICI August Letter.

[118] *See* ICI December Letter.

[119] *See* October Response Letter.

[120] *See* December Response Letter.

[121] *See* ICI January Letter.

[122] *See* ICI January Letter.

[123] FINRA noted that to the extent that such a narrative constituted a retail communication that would be subject to more flexible supervision and review standards, then those standards would apply. *See, e.g.,* proposed FINRA Rule 2210(b)(1)(D) (allowing certain categories of retail communications to be supervised and reviewed in the same manner as is required for correspondence).

[124] *See* March Response Letter.

principal approve a communication prior to a member filing the communication with FINRA.[125] Accordingly, FINRA believes that review of narrative updates to templates in a manner similar to correspondence would not be consistent with this filing requirement.

The Commission believes that FINRA has responded adequately to comments regarding templates. For example, FINRA explained, that: (1) Its review of updated or new narrative information is designed to achieve fair and balanced communications that are not misleading, (2) that information provided by third parties may not be truly independent, and (3) that a risk-based principal review process for narrative updates of templates would not be consistent with the requirement to have an appropriately qualified principal approve a communication prior to a member filing the communication with FINRA.

5. SEC-Filed Documents

Proposed paragraph (c)(7)(F) would exclude from the filing requirements prospectuses, preliminary prospectuses, fund profiles, offering circulars and similar documents that have been filed with the Commission or any state, or that are exempt from such registration. Investment company prospectuses published pursuant to Securities Act Rule 482 and ‘‘free writing prospectuses’’ that have been filed with the Commission pursuant to Securities Act Rule 433(d)(1)(ii) (prospectuses used by or referred to and distributed by or on behalf of any offering participant, other than the issuer in a manner reasonably designed to lead to its broad unrestricted dissemination) (referred to herein as ‘‘broker-prepared free writing prospectuses’’) are not covered by this exclusion.

One commenter argued that the exclusion in proposed paragraph (c)(7)(F) should cover all free writing prospectuses that are widely distributed, since they are already filed with the Commission.[126] The commenter later argued that FINRA should exclude broker-prepared free writing prospectuses from the filing requirements on the grounds that the Commission staff already reviews such prospectuses under its filing program.[127]

FINRA disagreed that the filing exclusion under proposed paragraph (c)(7)(F) should cover all widely distributed free writing prospectuses or broker-prepared free writing prospectuses that have been filed with the Commission and declined to change the proposed provision. FINRA made clear that the filing requirement only applies to widely disseminated free writing prospectuses that are prepared by or on behalf of a broker-dealer, and that it would not apply to free writing prospectuses that are not widely disseminated, nor would it apply to widely disseminated free writing prospectuses that are prepared by or on behalf of an issuer.[128]

FINRA also cited, as an example of problematic practices, widely distributed free writing prospectuses for retail structured products that it has found to have misleading content that merits review by the Department. FINRA indicated that the additional review of widely distributed free writing prospectuses would help protect investors from potentially misleading sales material.[129] FINRA maintains that while certain broker-prepared free writing prospectuses must be filed with the Commission under Securities Act Rule 433, this filing requirement does not necessarily ensure prompt Commission staff review of all such prospectuses. Thus, FINRA believes that its review will add a layer of investor protection that is appropriate under the circumstances.[130]

The commenter also argued that the pre-use filing requirements of proposed FINRA Rule 2210(c)(2) could delay publication of broker-prepared free writing prospectuses, which would be contrary to the Commission's goal of timely release of information.[131] FINRA indicated that the concern that proposed FINRA Rule 2210(c)(2)'s pre-use filing requirements would delay the issuance of free writing prospectuses is based on a faulty premise. FINRA notes that these pre-use filing requirements apply to: (A) Retail communications concerning registered investment companies that include self-created rankings; (B) retail communications concerning security futures (subject to certain exceptions); and (C) retail communications concerning bond mutual funds that include or incorporate bond mutual fund volatility ratings. FINRA stated its view that—with regard to (A) and (C) above—investment companies are not permitted to issue free writing prospectuses and—with regard to (B) above—security futures generally are exempted securities under the Securities Act.[132] FINRA maintains that there is no need for an issuer or broker-dealer to use a free writing prospectus to advertise security futures. Accordingly, FINRA stated that the pre-use filing requirements for retail communications concerning investment companies or security futures would not require a free writing prospectus to be filed with FINRA.

Although the commenter did not specifically cite to the proposed pre-filing requirement that applies to certain types of retail communications distributed by a new member during a one-year period beginning on the date that the member's FINRA membership became effective,[133] FINRA recognized that free writing prospectuses could potentially be subject to pre-filing under that new member requirement. To address the commenter's underlying concern regarding timely release of information, FINRA amended the provision governing new member communications to allow new members to file widely disseminated free writing prospectuses prepared by or on behalf of a broker-dealer within 10 business days of first use, rather than impose a pre-use filing requirement on such communications.[134]

The Commission believes that FINRA, in its statements summarized above, responded adequately to comments regarding SEC-filed documents. Among other things, FINRA stated its view that additional review by FINRA of widely distributed free writing prospectuses would help protect investors from potentially misleading sales material. FINRA also responded to the comments concerning timely issuance of information by modifying the provision governing new member communications as described above and explaining why other provisions requiring pre-filing would not apply to free writing prospectuses.

6. Communications With the Media

Two commenters recommended that the exclusion in proposed paragraph (c)(7)(H), which would exclude from the filing requirements press releases made available only to members of the media, be expanded to cover all materials that are provided to the media, such as white papers, research reports, charts, and

[125] *See* proposed FINRA Rule 2210(b)(1)(F).

[126] *See* SIFMA August Letter.

[127] *See* SIFMA December Letter.

[128] *See* October Response Letter.

[129] *See* October Response Letter.

[130] *See* December Response Letter.

[131] FINRA notes that SIFMA cited proposed FINRA Rule 2210(d)(2) in its comment letter; FINRA presumes this citation was a typographical error, since paragraph (d)(2) does not impose a filing requirement.

[132] *See* December Response Letter (citing to 15 U.S.C. 77c(a)(14)).

[133] *See* proposed FINRA Rule 2210(c)(1)(A).

[134] *See* Amendment No. 2; proposed FINRA Rule 2210(c)(1)(A).

educational materials.[135] Another commenter alternatively argued that the proposed rule should treat communications provided solely to the media as correspondence.[136]

FINRA declined to expand the filing exclusion for press releases made available only to members of the media to include other types of communications. FINRA indicated that to the extent a member is using a media outlet to distribute retail communications other than press releases, FINRA believes that such retail communications should be filed with the Department for review if they are subject to a separate filing requirement; otherwise, the media could become a conduit by which firms could avoid those filing requirements. In addition, FINRA noted that facts and circumstances surrounding a communication will determine whether that communication to a member of the media qualifies as correspondence, a retail communication or an institutional communication. FINRA does not believe it makes sense to characterize all such communications as correspondence.

The Commission believes that FINRA has responded adequately to comments regarding communications with the media, including by explaining why providing a communication (other than a press release) solely to a member of the media would not be a sufficient basis to exclude such communication from the filing requirements or to characterize such communication as correspondence.

7. Lists of Products

One commenter supported the filing exclusion in proposed paragraph (c)(7)(L), which would exclude from the filing requirements communications that refer to types of investments solely as part of a listing of products or services offered by the member, but noted that ''it seemingly would apply to, among other documents, a retirement plan enrollment guide, which includes a listing of a plan's investment options.'' [137]

FINRA indicated that the commenters' understanding was correct only to the extent an enrollment guide listed the types of investments available through the plan. FINRA clarified that to the extent an enrollment guide mentioned the individual funds or other investment options available through a plan, the filing exclusion would not be available. The Commission believes that FINRA has responded adequately to the issue raised by the commenter under proposed paragraph (c)(7)(L), including by providing examples of enrollment guides that would not be eligible for the filing exclusion.

8. Communications Concerning Closed-End Funds

One commenter argued that FINRA should exclude from the filing requirements all retail communications concerning closed-end funds.[138] The commenter argued that such communications pose lower risks than communications concerning other products (such as structured products), and that having a principal review such retail communications prior to use provides sufficient investor protection. Another commenter requested that FINRA clarify that closed-end funds' press releases issued pursuant to Section 202.06 of the NYSE Listed Company Manual be excluded from the filing requirements.[139]

FINRA noted that it does not believe it should exclude from the filing requirements other types of retail communications concerning closed-end funds, stating that it is not persuaded by the fact that a principal must approve such communications prior to use. FINRA indicated that the same principal approval requirement applies to other types of retail communications that are subject to a filing requirement. In addition, FINRA indicated that its staff found through filings and investigations of closed-end fund communications under the current rules that such communications frequently require changes in order to be consistent with applicable advertising rules. For example, FINRA indicated that its staff has found significant problems with retail communications used to promote auction-rate securities issued by closed-end funds.

FINRA indicated that proposed FINRA Rule 2210(c)(7)(C) would exclude from the Rule's filing requirements any retail communication that does not make any financial or investment recommendation or otherwise promote a product or service of the member. To the extent a member distributes or makes available a press release about a closed-end fund that does not make any financial or investment recommendation or otherwise promote a product or service of the member, FINRA noted that the member would not be required to have a principal approve it prior to use. To address one of the commenters' concerns, however, FINRA amended proposed FINRA Rule 2210(c)(7) to add a separate exclusion from the filing requirements for press releases concerning closed-end investment companies listed on the NYSE that are issued pursuant to Section 202.06 of the NYSE Listed Company Manual (or any successor provision).[140]

The Commission believes that FINRA has responded adequately to comments about communications concerning closed-end funds. For example, FINRA explained that it seeks to review such communications because it has found that some communications produced by closed-end funds have been inconsistent with current regulations governing communications. In addition, in response to comments concerning press releases issued pursuant to Section 202.06 of the NYSE Listed Company Manual, the Commission believes that FINRA appropriately responded to comments by amending the proposal by adding an exclusion for such press releases as described above.

9. Communications Posted on Online Interactive Electronic Forums

A commenter recommended that FINRA add a new filing exclusion for retail communications posted on an online interactive electronic forum, similar to the exception from the principal pre-use approval requirements under proposed FINRA Rule 2210(b)(1)(D)(ii).[141] FINRA initially disagreed that there should be a filing exclusion for such retail communications and declined to make the change.[142]

As discussed in more detail below, commenters raised a number of additional concerns regarding the treatment of communications on online interactive electronic forums. In its December Response Letter, FINRA recognized that a member may face supervisory and operational difficulties if it is required to file an online forum post given that the member will be supervising such communications in the same manner as correspondence. Accordingly, FINRA amended proposed FINRA Rule 2210(c)(7) to add a filing exclusion for retail communications that are posted on online interactive

[135] *See* Fidelity August Letter and SIFMA August Letter.

[136] *See* ICI August Letter.

[137] *See* ICI August Letter.

[138] *See* SIFMA August Letter and SIFMA December Letter.

[139] *See* ICI December Letter. As discussed under Section B.1.c. above, the ICI also requested that FINRA exclude such press releases from the pre-use approval requirements.

[140] *See* Amendment No. 2 Rule 2210(c)(7).

[141] *See* SIFMA August Letter. The commenter also stated that ''the better solution'' would be to revise proposed FINRA Rule 2210(f) to specify that online postings are a type of public appearance that do not constitute retail communications. This comment is discussed later in this Order.

[142] *See* October Response Letter.

electronic forums. FINRA cautioned that members should be aware that this exception does not apply to any filing requirement that may arise under either federal law or Commission rules.[143]

The Commission believes that FINRA has responded adequately to comments by, among other things, amending the proposal to add a filing exclusion for retail communications that are posted on online interactive electronic forums.

10. Mutual Fund Shareholder Reports

One commenter argued that FINRA should exempt a mutual fund's Management's Discussion of Fund Performance (''MDFP'') from filing with FINRA on the ground that it is already filed with the Commission and subject to certain control and certification requirements under federal law and Commission rules.[144] The commenter also noted that Section 408(c) of the Sarbanes-Oxley Act requires the Commission staff to review issuers' disclosures, including the MDFP, at least once every three years.

FINRA pointed out that it currently requires members to file the MDFP and sales material portion of a mutual fund annual or semi-annual report if a member intends to use the report to market the fund to prospective investors.[145] FINRA explained that the existing filing requirement under NASD Rule 2210 is limited to those shareholders reports that are being provided to prospective investors—and does not apply to shareholder reports provided only to existing shareholders for informational purposes. FINRA further highlighted that this limitation is designed to ensure that a filing requirement can achieve its purpose, which is to ensure that shareholder reports that the fund uses to market its shares to retail and other investors are reviewed in the same manner as other fund marketing material. FINRA stated that it does not require firms to file financial statements that appear in shareholder reports since the filing requirement is further tailored to require the filing only of the sales material and MDFP portions, which are narrative in form.

FINRA stated that a mutual fund's sales material and MDFP typically provide content beyond that which the Commission requires for a shareholder report, noting that the shareholder report may contain: an interview with the portfolio manager; a performance chart, such as a chart depicting how much the investor would have earned had he invested in the fund many years earlier; or the fund's historical performance with a comparison to an index. FINRA indicated that the reports routinely describe the prospects for the fund, opportunities in which the fund is investing, and the possible effects of market conditions on the fund's performance: all information designed to appeal to prospective investors of the mutual fund as well as existing shareholders.

FINRA explained that its current review program has found problems with a significant number of fund shareholder reports. Among those that were filed with FINRA in 2011, FINRA reports that approximately 7.5 percent required substantive comments to make the shareholder report fair, balanced and not misleading.[146] For example, FINRA stated that it recently commented on a shareholder report that illustrated a fund's past performance by providing performance concerning other accounts of the investment adviser, without disclosing the differences between those accounts and the advertised fund. FINRA cited another recently filed report that provided an ''overall credit rating'' of ''A-versus AA3'' for a fund, without disclosing material information necessary to balance this rating, such as the fact that it was not provided by a nationally recognized statistical rating organization. FINRA noted yet another recently filed shareholder report that provided non-standardized performance without providing the standardized one, five and ten year performance required by Securities Act Rule 482.

FINRA stated its position that although shareholder reports are filed with the Commission, they might be reviewed by Commission staff only on a three-year cycle.[147] In contrast, FINRA noted that it reviews all shareholder report sales material and MDFPs that are filed with the Department and that the Department's comprehensive review program discourages funds from including content that is misleading or potentially harmful to investors.

FINRA emphasized that it is sensitive to the costs that the communications rules impose upon the industry, and has agreed to changes to its existing rules and the proposed amendments to accommodate these concerns in a manner consistent with investor protection.[148] However, FINRA stated that it believed the costs associated with the shareholder report filing requirement appear to be substantially less than the amount estimated by the industry. One commenter estimated that ''a significant number of Institute member firms pay more than $20,000 in fees annually to file shareholder reports with FINRA.'' [149] FINRA noted the commenter's explanation that this estimate was based upon the assumption that a fund complex that files 100 shareholder reports twice a year at FINRA's minimum filing fee would pay $20,000 in filing fees, and that 31 firms that are members of the commenter have more than 100 funds in their complexes.

FINRA argued that this cost estimate appears overstated because many fund complexes combine multiple funds' shareholder reports into a single document, which they file one time with FINRA. FINRA noted that of the 10 fund complexes that filed the highest volume of shareholder reports in 2011, only two issue a separate shareholder report for each fund.[150] For example, FINRA indicated that it is not uncommon for fund groups to combine shareholder reports for multiple target date funds, money market funds or municipal bond funds in a single document.

In light of the use of mutual fund shareholder reports to market the fund, and the substantive concerns raised by some shareholder reports, FINRA stated that it continues to believe that fund shareholder report sales material and MDFPs that will be used with prospective investors should be subject to the same filing requirements as other mutual fund sales material. Consequently, FINRA declined to exempt a fund shareholder report sales material and MDFP from proposed FINRA Rule 2210's filing requirements.

The Commission believes that FINRA has responded adequately to comments regarding the MDFP filing requirement. For example, FINRA cited to substantive

[143] *See, e.g.,* 15 U.S.C. 80a–24(b); 17 CFR 230.497.

[144] *See* ICI December Letter and ICI January Letter.

[145] *See* March Response Letter.

[146] FINRA stated that its Department staff codes mutual fund shareholder reports as ''performance reports,'' which includes not only fund shareholder reports, but also other periodic performance reports, such as quarterly fund reports and other types of periodic fund performance updates. The 7.5 percent figure reflects comments made on all communications coded as performance reports, although most performance reports are sales material and MDFPs included within mutual fund shareholder reports. *Id.*

[147] *See* December Response Letter.

[148] See March Response Letter.

[149] *See* ICI January Letter.

[150] *See* March Response Letter. FINRA noted that these 10 largest fund complexes filed approximately 30 percent of all mutual fund performance reports received by FINRA in 2011 (which, as noted above, includes shareholder reports)—and of these fund complexes, one creates multiple-fund shareholder report documents for all of its funds, seven create multiple-fund shareholder report documents for at least some of their funds, and only two issue a separate shareholder report document for each fund.

concerns that it has identified in some fund shareholder reports, emphasizing that the Department's review program may serve to discourage funds from including content that is misleading or potentially harmful to investors.

D. Content Standards

Proposed paragraph 2210(d) generally requires all communications to be based on principles of fair dealing and good faith, be fair and balanced, and provide a sound basis for evaluating the facts in regard to any particular security, industry or service. The proposed rule prohibits the use of false, exaggerated, unwarranted, promissory or misleading statements or claims in communications. Additionally, the proposed rule sets forth specific requirements that apply to the use of comparisons; disclosure of the member's name; tax considerations; disclosure of fees, expenses, and standardized performance; testimonials; and recommendations.

Commenters raised various concerns about FINRA's proposed content standards.[151] The comments focused on predictions of future performance, the detail required of tax consideration disclosure, the prominence requirement for disclosure of fees and expenses and requirements applicable to communications concerning recommendations of securities.

1. Projections of Performance

One commenter requested confirmation that proposed paragraph (d)(1)(F), which generally would prohibit communications from predicting or projecting performance, implying that past performance will recur, or making any exaggerated or unwarranted claim, opinion or forecast would not apply to communications produced by a member's research department.[152]

FINRA indicated that proposed paragraph (d)(1)(F) would apply to all communications, including those produced by a member's research department. However, FINRA indicated that it does not believe that the provision's restrictions would inhibit the types of content typically found in research communications. FINRA noted that the provision includes an exception expressly permitting price targets that meet the standards of NASD Rule 2711. In addition, FINRA noted that it does not believe that the type of content described by the commenter, such as forward-looking statements or earnings estimates commonly provided in research reports, would be considered projections of performance for purposes of the provision. FINRA provided additional guidance indicating that, in general, the provision is intended to prohibit specific percentage or dollar-based projections of performance of an investment. Nevertheless, FINRA noted that proposed paragraph (d)(1)(F) would prohibit research communications from including any exaggerated or unwarranted claim, opinion or forecast.

The Commission believes that FINRA has responded adequately to this comment, including by providing guidance about the types of content that may or may not be prohibited under proposed paragraph (d)(1)(F).

2. Tax Considerations

One commenter argued that the disclosure requirements in proposed FINRA Rule 2210(d)(4) impose complicated content standards and disclosure requirements on certain retail communications and correspondence that discuss tax considerations of investments and investment accounts and should be limited instead to a requirement to disclose that an investor should seek professional tax advice due to the complexity and changing nature of the tax code.[153]

FINRA declined to make the change, indicating that it believes that the disclosures listed in proposed paragraph (d)(4) are important to help an investor understand the context and limitations of communications that discuss tax implications of investments and investment accounts. Additionally, FINRA cautioned against any member preparing a communication that it believes may be inaccurate in its representations of tax considerations due to the complexity of tax laws and rules.

In Amendment No. 1, FINRA modified proposed paragraph (d)(4) to clarify that it intended to require such retail communications to disclose that ordinary tax rates apply to withdrawals from tax-deferred investments in illustrations of tax-deferred products or accounts to the extent withdrawals are subject to ordinary income tax rates.[154]

The Commission believes that FINRA has responded adequately to the comment regarding tax disclosure requirements under proposed FINRA Rule 2210(d)(4) by, among other things, emphasizing the importance of the proposed disclosures for facilitating investor comprehension.

3. Standardized Performance Information

One commenter opposed a requirement in proposed FINRA Rule 2210(d)(5) that sets forth certain disclosure requirements concerning investment company fees and expenses with respect to retail communications and correspondence that advertise a fund's performance.[155] The commenter suggested that instead of requiring certain standardized performance and expense information to be included in a prominent text box with respect to print advertisements that include fund performance, FINRA should instead revise proposed FINRA Rule 2210 to require funds to prominently present standardized performance, maximum sales charges, and expense ratios.

FINRA declined this recommendation, indicating that prior to the adoption of NASD Rule 2210(d)(3),[156] FINRA stated that it had found that some mutual fund print advertisements placed standardized performance information in footnotes while placing non-standardized performance information in the body of a print advertisement, despite equal prominence requirements contained in Securities Act Rule 482. Additionally, FINRA noted that it found that NASD Rule 2210(d)(3) helped clarify that placing performance information in footnotes does not meet the equal prominence requirements of Rule 482, and made print performance advertisements more fair and balanced.

The Commission believes that FINRA has responded adequately to the comment opposing the disclosure requirements carried forward from NASD rule 2210(d)(3) by explaining, among other things, why it views the proposed requirement as an important tool for making print performance communications more fair and balanced.

4. Recommendations of Securities

Proposed FINRA Rules 2210(d)(7) and 2210(f)(1) would require retail communications and public appearances that include a recommendation of securities to have a reasonable basis for the recommendation, and to make certain disclosures. Among other things, the Original Proposal provided that a retail communications or a public appearance that includes a recommendation of securities would have to disclose, if applicable, that the member or any

[151] *See* Wilmer August Letter; TLGI August Letter; and ICI August Letter.

[152] *See* Wilmer August Letter.

[153] *See* TLGI August Letter.

[154] *See* Amendment No. 1; proposed FINRA Rule 2010(d)(4)(c)(vii)(d).

[155] *See* ICI August Letter.

[156] Proposed FINRA Rule 2210(d)(5) generally carries forward the requirements of NASD Rule 2210(d)(3).

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. FINRA received a number of comments concerning these proposed requirements.

Two commenters recommended that the disclosure requirements apply only to public appearances and retail communications that are published or used in any electronic or other media.[157] These commenters noted that it is not necessary to mandate extensive disclosure requirements for public appearances before small groups.

Two commenters argued that the requirement to disclose the financial interests of any associated person with the ability to influence the content of the communication is unclear, too broad, and difficult to administer.[158] The commenters argued that many persons within a firm may be able to influence a communication's content, and it would be difficult to track each person's financial interests with respect to particular retail communications or public appearances. One of the commenters also recommended that this disclosure requirement be limited to associated persons who are ''directly and materially involved in the preparation of the content.'' [159] The other commenter questioned the need for this disclosure at all, which it considered to be ''meaningless to the majority of retail investors.'' [160]

One commenter recommended that the requirement to disclose the financial interests of any associated person with the ability to influence the content of the communication be deleted and replaced with a requirement to disclose the financial interests of a member's officers or partners, which the commenter stated is similar to the current disclosure requirements for securities recommendations in NASD IM–2210–1(6).[161] The commenter argued that this alternative would ''provide meaningful disclosures to customers, without requiring members to implement costly monitoring systems and processes.''

By contrast, another commenter urged FINRA to broaden the disclosure requirements for retail communications and public appearances that contain securities recommendations. This commenter argued that the proposed standard (associated persons with the ability to influence the content of a communication) is too narrow.[162]

Two commenters focused particular attention on the proposed disclosure requirements as they would apply to public appearances. These commenters argued that the proposed standard is unworkable in this context, particularly where a speaker is answering a question about a particular security, and that such appearances would be impossible to monitor.[163] One of those commenters also argued that the standard is unfair, since it would impose disclosure requirements on registered representatives who recommend securities that are not imposed even on research analysts that recommend securities in public appearances.[164]

One commenter suggested as an alternative that the disclosure requirements of proposed FINRA Rule 2210(d)(7) apply to public appearances only if a member or associated person intends to recommend a security.[165] Another commenter offered as an alternative a more general requirement that an associated person making a public appearance disclose any actual, material conflict of interest related to a particular recommendation of which the person knows or has reason to know at the time of the public appearance.[166] The commenter noted that this standard is similar to the public appearance requirements that apply to research analysts under NASD Rule 2711(h).

One of the commenters recommended that FINRA clarify that the disclosure requirements in proposed FINRA Rule 2210(d)(7)(A)(ii) do not apply to indirect holdings, such as securities that are held by mutual funds or other pooled vehicles in which an associated person invests.[167]

One commenter recommended that the exception in proposed FINRA Rule 2210(d)(7)(D)(i), which would except from disclosure requirements any communication that meets the definition of ''research report'' or is a public appearance by a research analyst for purposes of NASD Rule 2711 and includes all of the applicable disclosures required by that Rule, be expanded to cover all communications created by a firm's research department, including debt research and research related communications that are not research reports.[168]

In response to comments, FINRA has amended the disclosure requirements for both retail communications and public appearances that include securities recommendations. As suggested by several commenters, in Amendment No. 1, FINRA narrowed the scope of the persons whose financial interests would have to be disclosed to those involved in the preparation of a communication. As revised, a retail communication that includes a securities recommendation would have to disclose if 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, unless the extent of the financial interest is nominal.

FINRA also modified paragraph (d)(7)(D) to clarify that the disclosure requirements in paragraph (d)(7)(A) and the provisions regarding past specific recommendations in paragraph (d)(7)(C) do not apply to a retail communication that recommends only registered investment companies or variable insurance products; however, such communications still must have a reasonable basis for the recommendation. In addition FINRA noted that pursuant to proposed paragraph (d)(7)(B), a member must provide, or offer to furnish upon request, available investment information supporting the recommendation in those communications.[169]

FINRA clarified that the disclosure requirements in proposed FINRA Rule 2210(d)(7)(A)(ii), do not apply to the portfolio investments of an investment company or other fund owned by the member or such associated person.[170]

FINRA indicated that the revised standard provides sufficient information to investors reading a retail

[157] *See* Fidelity August Letter and SIFMA August Letter.

[158] *See* Fidelity August Letter and FSI August Letter.

[159] *See* Fidelity August Letter.

[160] *See* FSI August Letter.

[161] *See* SIFMA August Letter.

[162] *See* PIABA August Letter.

[163] *See* Fidelity August Letter and ICI August Letter.

[164] *See* ICI August Letter.

[165] *See* Fidelity August Letter.

[166] *See* ICI August Letter.

[167] *See* Fidelity August Letter.

[168] *See* Wilmer August Letter.

[169] *See* October Response Letter. FINRA noted that the proposed requirement in paragraph (d)(7)(B) to provide the price at the time a recommendation is made applies only to a recommendation of a corporate equity security, and thus does not apply to the recommendation of an investment company security or variable insurance product.

[170] FINRA stated that the disclosure requirements do not apply to any communication that recommends only registered investment companies or variable insurance products. *See* proposed FINRA Rule 2210(d)(7)(D)(ii).

communication to warn them of potential conflicts of interest. It also reduces the burdens on members with regard to tracking financial interests that must be disclosed. FINRA also revised the disclosure standards for public appearances that include securities recommendations. As revised, the requirements under proposed FINRA Rule 2210(f) would apply only to public appearances by associated persons (since members do not engage in public appearances except through their associated persons). As amended, an associated person making a public appearance would have to disclose, as applicable, his or her own financial interests in any of the securities of the issuer of the recommended security, and the nature of the financial interest, unless the extent of the financial interest is nominal. Additionally, the associated person would have to disclose any actual, material conflict of interest of the associated person or member of which the associated person knows or has reason to know at the time of the public appearance. FINRA noted that these disclosure requirements would not apply to any public appearance by a research analyst for purposes of NASD Rule 2711 that includes all of the applicable disclosures required by that Rule. FINRA further noted that the disclosure requirements also would not apply to a recommendation of investment company securities or variable insurance products; provided, however, that the associated person must have a reasonable basis for the recommendation. FINRA stated that it believes that this standard will still provide important information regarding potential conflicts to investors, while reducing the compliance burden to firms in administering this standard.

The Commission believes that FINRA addressed adequately comments regarding the disclosure requirements for both retail communications and public appearances that include securities recommendations. FINRA has amended these provisions in several respects to address commenter concerns. For example, FINRA has narrowed the scope of persons whose financial interests must be disclosed to capture the member or any associated person that is directly and materially involved in the preparation of the content of the communication. FINRA also revised the disclosure standards for public appearances that include securities recommendations for purposes of providing important information regarding potential conflicts to investors without unduly burdening firms. Additionally, FINRA explained why it would not be necessary to expressly exclude indirect holdings from the disclosure requirements in proposed FINRA Rule 2210(d)(7)(A)(ii).

E. Other Issues Related to Public Appearances and Online Interactive Electronic Communications

Currently, the term ''public appearance'' is included as a category within the broader term ''communications with the public,'' and includes participation in an online interactive electronic forum.[171] Under proposed FINRA Rule 2210, public appearances would no longer be a separate category of the term ''communications,'' and instead would be governed by FINRA Rule 2210(f). Proposed paragraph 2210(f) sets forth certain content, supervisory and other requirements that apply to public appearances. The term also would not include posts on online interactive electronic forums, which would be considered retail communications. Under proposed FINRA Rule 2210(b)(1)(D)(ii), members would be permitted to supervise and review retail communications that are posted on an online interactive electronic forum in the same manner as required for supervising and reviewing correspondence under NASD Rule 3010(d). Thus, members would not have to approve each such retail communication prior to use, and would have flexibility regarding how they establish their supervisory systems.

One commenter opposed proposed FINRA Rule 2210(f)(2), which would require each member to establish written procedures that are appropriate to its business, size, structure and customers to supervise its associated persons' public appearances, arguing that it is duplicative of supervisory requirements that already exist under NASD Rule 3010.[172] FINRA disagreed with this objection. FINRA maintains that while NASD Rule 3010 already generally requires a member to establish and maintain written procedures to supervise its associated persons' activities,[173] FINRA rules also include provisions regarding the supervision of particular activities where appropriate.[174] In this case, FINRA believes that proposed FINRA Rule 2210(f)(2) provides additional information regarding the type of supervision it expects members to maintain in connection with public appearances, and thus is appropriate.

Two commenters opposed the elimination of the term ''public appearance'' as a communication category, particularly with respect to online interactive electronic communications.[175] These commenters argued that posts on online interactive electronic forums are more analogous to ''physical public appearances.'' They also argued that recordkeeping requirements would be less burdensome if posts on social media Web sites were considered public appearances.

FINRA disagreed that it is necessary to continue to treat posts on online interactive electronic forums as public appearances. FINRA noted that it has created an exception from the pre-use principal approval requirements for such posts, permitting members to supervise and review such posts in the same manner permitted for correspondence.[176] Moreover, FINRA notes that this proposed standard would codify guidance already provided regarding supervision of posts on social media Web sites.[177]

Following publication of the Notice and Proceedings Order, the commenters reiterated that FINRA should maintain its current definition of ''public appearance'' under NASD Rule 2210 and include online interactive electronic communications within this framework, ''recognizing that these communications are more analogous to physical public appearances.'' [178] One commenter expressed concern that otherwise, online interactive electronic communications may fall into the definitions of correspondence, institutional communications or retail communications, which would complicate how the rules apply to such communications.[179] The other commenter recommended that FINRA exclude content that is interactive rather than static from the filing requirements under proposed FINRA Rule 2210(c), arguing that the burden of filing interactive online postings would far outweigh any potential benefits.[180]

In response to comments reiterating concerns about online interactive

[171] *See* NASD Rule 2210.

[172] *See* ICI August Letter.

[173] *See* NASD Rule 3010(b)(1).

[174] *See, e.g.,* FINRA Rule 2330(d) (supervisory procedures regarding the purchase or exchange of deferred variable annuities).

[175] *See* Fidelity August Letter and SIFMA August Letter.

[176] *See* proposed FINRA Rule 2210(b)(1)(D)(ii).

[177] *See* October Response Letter (citing *Regulatory Notice* 10–06 (Guidance on Blogs and Social Networking Web sites) (January 2010) and *Regulatory Notice* 11–39 (Guidance on Social Networking Web sites and Business Communications) (August 2011)).

[178] *See* Fidelity December Letter and SIFMA December Letter.

[179] *See* Fidelity December Letter.

[180] *See* SIFMA December Letter.

electronic communications, FINRA disagreed that participation on an online interactive electronic forum is more analogous to a physical public appearance than other electronic communications. FINRA noted that an online interactive electronic forum post generally remains available to the public for an extended period of time. FINRA noted that unless an interview or other public speaking activity is recorded and made available afterwards through some other medium, it no longer is available to the public after the interview or speech is completed. Thus, FINRA believes it is more appropriate to classify online interactive electronic forum posts generally as retail communications rather than public appearances.

FINRA recognized that participation on online electronic forums often occurs on a real-time basis and does not lend itself easily to pre-use principal approval. Accordingly, FINRA proposed to allow firms the flexibility to supervise participation on online electronic forums in the same manner as they supervise correspondence, which can include post-use review.[181] FINRA believes the concerns expressed by a commenter regarding whether an online forum post is correspondence, an institutional communication or a retail communication are overstated because FINRA believes that as a general matter, under the rule proposal, the supervisory requirements will be the same in each case.

As discussed above, FINRA recognized the potential difficulties associated with filing an online forum post, and accordingly amended proposed FINRA Rule 2210(c)(7) in Amendment No. 2, to add a filing exclusion for retail communications that are posted on online interactive electronic forums.

The Commission believes that FINRA has responded adequately to these comments. For example, FINRA responded to the comment suggesting that the proposed rule contains requirements duplicative of NASD Rule 3010 by clarifying that the proposed rule sets forth more specific information regarding the type of supervision it expects members to maintain in connection with public appearances. FINRA responded to comments regarding the treatment of online interactive electronic communications by noting that (1) the proposed rule permits members to supervise and review such communications in the same manner permitted for correspondence, (2) online interactive electronic forum posts generally remain available to the public for extended periods of time—which suggests they are more appropriately classified as retail communication than public appearance, and (3) as noted above, FINRA amended the proposal to add a filing exclusion for such communications in light of potential difficulties associated with filing.

F. Social Media

Three commenters expressed concern with the amount of content and data related to social media that must be stored under Commission recordkeeping rules.[182] These commenters recommended that the Commission, FINRA and the securities industry work together to create a new paradigm for electronic recordkeeping. Two commenters also urged FINRA to take a longer-term, comprehensive approach to the regulation of social media taking into consideration evolving media and technology, as well as the costs and benefits of regulation.[183] One of those commenters recommended that FINRA use its Social Media Task Force or another committee to consider how the communications rules should apply to mobile devices and provide guidance or new rules that are tailored to these technologies.[184] Another commenter recommended that FINRA codify in its communications rules the guidance that it provided in *Regulatory Notices* 10–06 and 11–39.[185]

FINRA noted that the commenters' concerns regarding the Commission's recordkeeping rules are outside the scope of the proposed rule change. FINRA indicated that it will continue to work with the industry going forward to address issues raised under FINRA rules, and may issue more guidance or propose new rules regarding these issues in the future as appropriate.

The Commission believes that FINRA responded adequately to these comments by indicating that it will continue to monitor and address issues that arise under FINRA rules in the social media landscape, whether through its Social Media Task Force or other means it deems suitable. The Commission also believes that Commission recordkeeping rules are outside the scope of the proposed rule change. Under Exchange Act Rule 17a–4, a broker-dealer is required to maintain originals of all communications received and copies of all communications sent relating to its ''business as such'' including all communications which are subject to the rules of a self regulatory organization regarding communications with the public.

G. Other General Comments

One commenter indicated that the proposed rule change will not improve the flow of communications, which in turn will compromise investor protection.[186] FINRA disagreed, indicating that the proposed rule change seeks to balance the need for members to communicate with their customers and the need for such communications to be fair and balanced. FINRA believes that members still will be able to communicate with their customers through a number of channels, and that the proposed rules will enhance rather than compromise investor protection.

One commenter noted that it is difficult to follow the proposed rules in the form presented in the Proposing Release and urged FINRA to simplify that presentation.[187] FINRA noted that it presents the proposed rule text in the format required by SEC Form 19b–4 under the Exchange Act.

The Commission believes that FINRA has responded adequately to comments regarding the flow of communications and the complexity of the proposed rule by, among other things, emphasizing that the proposed rule is designed to enhance investor protection, while still providing members a number of channels for communicating with customers.

As FINRA noted in response to comments the presentation of the proposed rule is consistent with the requirements of SEC Form 19b–4. The Commission also notes that in an effort to assist commenters in reviewing proposed Amendment No. 1, FINRA submitted as a comment letter an alternative version of Exhibit 4 showing the full proposal marked with the changes in Amendment No. 1.[188] Additionally, FINRA has revised its rule text to seek to provide clarity where commenters have pointed out ambiguities.

H. Implementation Timeframe

One commenter recommended that FINRA allow at least six months after

[181] *See* December Response Letter (citing to *Regulatory Notice* 10–06 (Guidance on Blogs and Social Networking Web Sites) (January 2010); *Regulatory Notice* 07–59 (FINRA Provides Guidance Regarding the Review and Supervision of Electronic Communications) (December 2007)).

[182] *See* Fidelity August Letter; ICI August Letter; and Vanguard August Letter.

[183] *See* ICI August Letter and Vanguard August Letter.

[184] *See* Fidelity August Letter.

[185] *See* FSI August Letter.

[186] *See* TLGI August Letter.

[187] *See* SIFMA August Letter.

[188] *See* Letter from Philip A. Shaikun, FINRA, to Elizabeth M. Murhpy, Secretary, SEC, dated November 2, 2011 *available at www.sec.gov.*

Commission approval of the proposed rule change before these changes become effective.[189] Another commenter recommended that the compliance date be 10 business days after the second calendar quarter end following Commission approval.[190] These commenters also recommended that if FINRA subjects internal training and education materials to proposed FINRA Rule 2210, FINRA should permit a compliance time period of nine months after Commission approval. Another commenter requested that FINRA provide, at a minimum, 12 months for members to adapt to the changes.[191]

FINRA stated that it recognizes that members will need time to alter their internal policies and procedures in response to new requirements imposed by the proposed rule change. FINRA indicated on multiple occasions that it plans to publish a *Regulatory Notice* no later than 90 days following Commission approval of the rule changes.[192] FINRA has stated that the implementation date will be no later than 365 days following Commission approval. In establishing this schedule, FINRA agreed to consider members' need to adopt and implement policies and procedures necessary to comply with the new rules.

FINRA has clarified that it will take into account members' comments in establishing the implementation timeframe for members to adapt to changes. Therefore, the Commission believes that FINRA has responded adequately to the comments regarding the implementation timeframe of the proposed rule.

I. FINRA's General Comments Regarding the Proposal

FINRA believes that the proposed rule change, as amended, satisfies the statutory standard for Commission approval. FINRA indicated that the proposed rule change is primarily intended to simplify FINRA's advertising rules by reducing the number of communications categories, codifying long-standing interpretations of the rules, and clarifying certain provisions. FINRA also stated that the industry supports most of these amendments, which it believes should simplify application of the rules by compliance professionals and other broker-dealer personnel. FINRA also believes that the proposed rule change would continue to ensure that FINRA's rules protect investors from false and misleading communications.

FINRA noted that it has been responsive to industry and Commission staff comments. The industry and other members of the public have had four formal opportunities (one provided by FINRA and three by the Commission) to comment on iterations of the proposal. Throughout the comment process FINRA believes that it has responded to commenters' concerns. FINRA noted that many of the comments concerned provisions of existing NASD Rules 2210 and 2211 that FINRA had not originally proposed to amend.

Among the changes that FINRA has proposed in response to comments are the following:

- Eliminating the existing requirement that internal training material is subject to NASD Rule 2211;
- Explicitly excluding retail communications that are posted on online interactive electronic forums from the filing requirement;
- Expanding a Supervisory Analyst's authority to approve retail communications;
- Eliminating the current filing requirement for advertisements concerning government securities;
- Providing a new exception from the filing and principal pre-use approval requirements for those retail communications that do not make a financial or investment recommendation or otherwise promote a product or service of the member;
- Permitting firms to combine multiple retirement plans offered by the same employer for purposes of determining whether there are 100 participants, thereby making it easier for such an employer to qualify as an institution for purposes of the rule;
- Permitting retail communications concerning collateralized mortgage obligations (CMOs) to be filed within 10 days of first use, rather than 10 days prior to use as required by the existing rule; and
- Authorizing FINRA to grant exemptions from both the filing and principal pre-use approval requirements for good cause shown.

FINRA believes that these changes to the existing rules would address concerns raised by the industry in the comment process while maintaining rigorous investor protections.

J. General Commission Findings

The Commission has carefully reviewed the proposed rule change, the comments received, and FINRA's response to the comments, and finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association. In particular, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Act,[193] which, among other things, requires that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation.[194]

As discussed above, the Commission believes that FINRA addressed adequately concerns regarding pre-filing and supervision requirements that could impact efficiency; and notes that the proposed rule's overarching goal of simplifying the regulatory framework enhances efficiency. As FINRA noted in the March Response Letter, the intent of the proposed rule is to simplify communications rules by decreasing the number of communications categories, codifying long-standing interpretations of the rules, and clarifying certain provisions. The Commission believes that the proposed rule simplifies the framework under which broker-dealers are required to supervise communications, disclose information to investors and file information with regulators.

The Commission also believes that FINRA has addressed adequately competition concerns that could arise from differing treatment of certain products or categories of communications. The Commission believes that the proposed requirements for enhanced supervision and review of communications to retail investors by new members, containing certain rankings or ratings and/or concerning more complex products is designed to prevent misleading communications and to protect investors.

The Commission has reviewed the record for the proposed rule change and notes that the record does not contain any information to indicate that the proposed rule would have a significant effect on capital formation. The Commission believes that the intent of the proposed rule is beneficial and that the changes will enhance consumer confidence by promoting fair and balanced communications from broker-dealers to the investing public.

As noted in each category above, the Commission believes that FINRA has

[189] *See* Fidelity August Letter and Fidelity December Letter.

[190] *See* ICI August Letter.

[191] *See* FSI December Letter.

[192] *See* October Response Letter and December Response Letter.

[193] 15 U.S.C. 78o–3(b)(6).

[194] *See* 15 U.S.C. 78c(f).

considered carefully and responded adequately to comments and concerns raised about previous versions of the proposed rule. As evidence of FINRA's commitment to drafting a narrowly tailored rule while maintaining comprehensive investor protection standards, the Commission points to the discussion above which highlights the many revisions FINRA made to the proposal to address comments and concerns raised through four separate opportunities for comment.

VI. Accelerated Approval

The Commission finds goods cause, pursuant to Section 19(b)(2) of the Exchange Act,[195] for approving the proposed rule change, as modified by Amendments Nos. 1, 2, and 3 thereto, prior to the 30th day after publication of notice of the filing of Amendment No. 3 in the **Federal Register**. The proposed rule change was informed by FINRA's consideration of, and the incorporation of many suggestions made in comments on a 2009 proposal to members to harmonize and modernize the communications with the public rules,[196] the Original Proposal, the Notice and Proceedings Order, and Amendment No. 2. Amendment No. 3 reflects FINRA's efforts to further address commenter concerns and minimize burdens resulting from the proposed rule's requirements.

Accordingly, the Commission finds that good cause exists to approve the proposal, as modified by Amendment Nos. 1, 2 and 3 on an accelerated basis.

VII. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether Amendment No. 3 to the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an email to *rule-comments@sec.gov.* Please include File Number SR–FINRA–2011–035 on the subject line.

Paper Comments

• Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–FINRA–2011–035. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–FINRA–2011–035 and should be submitted on or before April 25, 2012.

VIII. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[197] that the proposed rule change (SR–FINRA–2011–035), as modified by Amendments Nos. 1, 2 and 3, be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[198]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–8043 Filed 4–3–12; 8:45 am]

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[195] 15 U.S.C. 78s(b)(2).

[196] *See* Regulatory Notice 09–55.

[197] 15 U.S.C. 78s(b)(2).

[198] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66677; File No. SR–C2–2012–006]

Self-Regulatory Organizations; C2 Options Exchange, Incorporated; Order Approving Proposed Rule Change Relating to Its Automated Improvement Mechanism

March 29, 2012.

On January 31, 2012, the C2 Options Exchange, Incorporated ("Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend C2 Rule 6.51, which relates to the Exchange's Automated Improvement Mechanism ("AIM"). The proposal would permit a participant ("Participant"), when submitting an agency order to AIM to initiate an auction against a single price submission, to elect to have last priority in the AIM auction's order allocation.[3]

The proposed rule change was published for comment in the **Federal Register** on February 17, 2012.[4] The Commission received no comments on the proposal.

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange[5] and, in particular, the requirements of Section 6(b)(5) of the Act,[6] in that it is designed to provide additional flexibility for Participants to obtain executions on behalf of their customers through AIM because the initiating Participants may elect to have

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] In an AIM auction, described here generally, a Participant submits into the mechanism an order that it represents as agent ("Agency Order") along with a contra-side order at a specified price (which must comply with parameters set forth in Rule 6.51) and for the same size that either represents principal interest of the Participant or is a solicited order. Certain Participants, as set forth in Rule 6.51, then can compete with the contra-side order by submitting bids (offers) to execute against the Agency Order. After better-priced orders are filled and public customers competing at the best price receive their allocations, the Participant is granted priority ahead of other participants to execute against 40% (in some circumstances 50%) of the original size of the Agency Order. Under the proposed rule change, the initiating Participant will be able to elect to have last priority.

[4] *See* Securities Exchange Act Release No. 66384 (February 13, 2012), 77 FR 9717.

[5] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[6] 15 U.S.C. 78f(b)(5).