INVESTMENT COMPANY INSTITUTE

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November 19, 2009

Ms. Marcia E. Asquith
Senior Vice President and Corporate Secretary
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, D.C. 20006-1500

Re: *Request for Comment on Proposed New Rules Governing Communications with the Public (FINRA Regulatory Notice No. 09-55)*

Dear Ms. Asquith:

The Investment Company Institute[1] welcomes the opportunity to express its views on FINRA's proposed amendments to its rules governing communications with the public.[2] The proposed amendments, among other things, would: (i) replace the existing categories of communications with three new communications categories, which would generate additional filing and principal review obligations for FINRA member firms; (ii) require these firms to file all retail communications concerning closed-end funds within ten business days of first use; (iii) require pre-use filing of retail communications concerning structured notes; (iv) expressly permit the use of templates; (v) alter the requirements regarding the disclosure of expense ratios in retail communications; and (vi) retain the current requirements related to investment analysis tools.

The Institute commends FINRA for undertaking the initiative to simplify its rules governing communications with the public as it carries out the task of consolidating the NASD and NYSE rulebooks. We have several recommendations that would further improve the effectiveness of, and facilitate members' compliance with, these rules. We also provide our views on a few advertising-related issues that are not addressed by the proposal but which are of importance to our members.

Our specific comments on the proposal include the following, all of which are discussed in greater detail below:

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[1] The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of $11.45 trillion and serve almost 90 million shareholders.

[2] *See* FINRA Regulatory Notice No. 09-55 (September 2009) ("Notice"). FINRA is the Financial Regulatory Authority, Inc. (f/k/a National Association of Securities Dealers, Inc. or "NASD").

- Correspondence, as currently defined, should continue to be excluded from principal review and filing with FINRA;

- Retail communications sent to existing customers that are not promotional in nature should not be required to be filed;

- The filing exclusion for press releases that are made available only to members of the media should be retained;

- Retail communications related to structured notes should be required to be filed prior to use;

- Requirements regarding public appearances should be tailored to take into account the nature of the public appearance;

- Retail communications based on templates should be excluded from principal approval, filing, and recordkeeping requirements;

- The proposed modifications with respect to the required sources of expense information to be disclosed in retail communications should be abandoned; and

- The text box presentation requirement for print advertisements should be replaced with a prominence requirement.

The letter contains several recommendations regarding the appropriate regulation of the use of social media by mutual fund firms, recommends that retail communications based on non-interactive investment analysis tools be permitted, and urges FINRA to apply a materiality standard to the disclosure required to accompany subsidized yields.

I. Filing and Principal Review Requirements

The proposal would eliminate the current NASD definitions of: (i) advertisement; (ii) sales literature; (iii) institutional sales material; (iv) public appearance; (v) independently prepared reprint; and (vi) correspondence. The proposal also would eliminate the current NYSE definitions of: (i) communication; (ii) advertisement; (iii) market letter; and (iv) sales literature. The definitions would be replaced by the following three communication categories:

- Institutional communication would include communications that fall under the current definition of "institutional sales material" (*i.e.,* communications that are distributed or made available only to institutional investors);

- Retail communication would include any written (including electronic) communication that is distributed or made available to more than 25 retail investors. "Retail investor" would include any person other than an institutional investor, regardless of whether the person is an existing or prospective customer; and

- Correspondence would include any written (including electronic) communication that is distributed or made available to 25 or fewer retail investors, regardless of whether they are existing or prospective customers.

While we commend FINRA for seeking to simplify its categorization of communications, we are concerned that the ultimate effect of these changes would be to increase the filing burdens on FINRA member firms and the volume of communications to be reviewed by principals prior to use. We have several recommendations that would be consistent with the goal of simplification without collaterally increasing burdens on member firms.

Retail Communications. The proposal would require filing and pre-use principal review of all "retail communications" concerning registered investment companies rather than all "advertisements and sales literature" concerning registered investment companies. As a result, some communications with customers currently considered "correspondence" now would be categorized as a retail communication subject to the requirements for pre-use principal review and filing. FINRA has not offered any rationale for expanding firms' review and filing obligations, and we have not been able to discern one. Because correspondence would remain subject to supervisory review under Rule 3010(d), content standards, and recordkeeping requirements, the absence of pre-use principal review and filing should not raise investor protection concerns. Therefore, we recommend continuing to exclude all "correspondence," as that term is currently defined, from principal review and filing.[3]

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[3] The current definition of correspondence includes any written letter or electronic mail message and any market letter distributed by a member to one or more existing retail customers; and fewer than 25 prospective retail customers within any 30 calendar-day period. FINRA senior staff explained at a recent conference that the proposed elimination of the 30-calendar day period was based on firms not tracking the amount of correspondence sent to prospective customers in any 30-day period, thereby indicating the absence of a need for this element of the rule. While our larger members confirmed that this is their practice, smaller members track their correspondence so as to determine if and when they have a filing obligation. They were concerned that their filing obligations would be significantly increased if there was no time period against which to measure the 25 person ceiling. In addition, retaining the current definition of correspondence would permit firms to continue to send out market letters to more than 25 retail customers in a timely fashion, a practice FINRA has recently endorsed and our members have embraced, particularly given the recent market volatility. *See* FINRA Regulatory Notice 09-10 (February 2009) ("Market Letter Notice") (permitting post-use principal approval of market

If FINRA does not to retain the existing definition of correspondence, it is imperative that it continue to exclude from filing and principal review any correspondence to existing retail customers that does not make any financial or investment recommendation or otherwise promote a member product. Otherwise, correspondence such as periodic account statements, notices of changes in required minimum account balances, and privacy statements could be considered to be retail communications subject to filing and principal approval. This appears to be an unintended consequence, given the enormous costs without any corresponding benefit if this was required. FINRA could avoid this unintended result by excepting from the principal approval and filing requirements retail communications that are not promotional in nature (rather than those that are "solely administrative in nature"). We believe that such a change would be consistent with FINRA's intent given that currently non-promotional communications are not subject to prior approval or filing since they typically fall within the definition of correspondence.

Press Releases. The proposal would eliminate a filing exclusion for press releases that are made available only to members of the media. According to the Notice, FINRA believes that firms generally have not used this exclusion because they almost always post press releases on their websites. We disagree with this premise. While we did not formally survey our members, it is our understanding that many firms do not post every press release on their websites. Rather, they make an individual determination as to whether to provide a release solely to the press or to also post it to their websites. Therefore, we recommend retaining the current exclusion to avoid unnecessarily increasing filing costs for many FINRA member firms.

In addition, we recommend treating as correspondence communications provided solely to the media because they are not used with customers or the public. Firms often provide background and educational materials concerning products, services, and market information to the media with the purpose of educating the media on investing concepts and alerting them to new research, products, and services.

Many closed-end funds are listed on the New York Stock Exchange ("NYSE") and, therefore are subject to the NYSE's "immediate release policy" that encourages them to disseminate certain information, including dividend announcements, through press releases.[4] We recommend that FINRA subject press releases that make dividend and other announcements and that do not promote a member's products or services to the same requirements as correspondence. The increased time and costs associated with pre-use principal approval and filing would come with little apparent benefit, as these press releases would remain subject to content standards, supervision, and recordkeeping.

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letters, recognizing that pre-use approval might inhibit the timely flow of information to traders and investors who base their investment decisions on timely market analysis).

[4] *See* Section 202.06 of the NYSE Listed Company Manual.

Structured Notes. The Institute supports the proposed requirement that member firms file, prior to use, retail communications concerning any publicly offered securities derived from, or based on, a single security, a basket of securities, an index, a commodity, a debt issuance, or a foreign currency. Review will help to ensure that potential customers are provided with fair and balanced disclosure, particularly given the rapid development of structured products with a variety of features.

II. Public Appearances

The proposal would apply new disclosure standards to public appearances[5] that include securities recommendations. While we do not object to the disclosures in the context of scripted public appearances (or retail communications or correspondence), the new disclosures should not be made applicable to public appearances where securities recommendations are made spontaneously in response to an impromptu question posed by an interviewer. For example, a fund portfolio manager might be asked by a financial program moderator about his or her top two stock picks. It would be unreasonable to expect the portfolio manager to disclose along with that recommendation whether its employer was a manager or co-manager of a public offering of any securities of the recommended issuer within the past 12 months. This is information he or she likely would not know, and to require this knowledge in order to be able to make a public appearances is unreasonable.

The proposal would require member firms that sponsor a seminar, forum, radio or television interview to comply with certain content standards. It is not uncommon for member firms to sponsor radio or television programs simply by displaying a firm logo or a "sponsored by" voiceover. It seems unreasonable to require the member firm with this limited involvement to have responsibility for the content of the program.[6] It similarly seems unreasonable to require a firm to be responsible for content created and presented by another firm. This situation arises, for example, where several firms make individual presentations in a single forum. We recommend that FINRA clarify that a member firm would be responsible only for the content of its own presentation, not the entire content of such a program.

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[5] Under the proposal, the current provision defining public appearances would be eliminated and the substance of the definition and other requirements regarding public appearances would be moved to Rule 2210(f). To eliminate creating the perception that public appearances are no longer subject to Rule 2210, we recommend including a cross reference to the public appearance provision in Rule 2210's definitional section.

[6] FINRA previously has recognized the need to tailor requirements when a communication merely identifies a member. *See* Rule 2210(c)(7)(D) (excluding from the filing requirements retail communications that do no more than identify the member).

III. Closed-End Funds

The proposal would require firms to file all retail communications concerning closed-end funds within ten business days of first use, including those distributed after the fund's initial public offering ("IPO"). We support the proposed change. Investors should have the same protections concerning retail communications about closed-end funds that are distributed after the IPO as those distributed during the IPO.

We have one technical comment that takes into account how closed-end funds are distributed. Some closed-end funds employ a distributor that is a FINRA member firm to prepare communications about the funds. Other closed-end funds or their advisers prepare these communications themselves. Since neither the funds nor their advisers are FINRA member firms, FINRA rules, including the proposed filing requirement, do not apply to them. To avoid any confusion, we request FINRA to explicitly affirm that its rules only reach member firms that prepare closed-end funds communications.[7] We also request that FINRA affirm that the distributor of a closed-end fund is not responsible for communications prepared by unaffiliated broker-dealers that are selling fund shares in the secondary market. We believe statements along these lines are necessary, given the novelty of post-IPO closed-end fund communications being required to be filed with FINRA.

IV. Templates

The proposal would exclude from filing retail communications that are based on templates that were previously filed with FINRA, the changes to which are limited to updates of more recent statistical or other non-narrative information. We believe that the proposed exclusion should be implemented in a somewhat modified form. We recommend excluding retail communications based on these templates from principal approval and recordkeeping (in addition to filing) because these updates are not new content to which approval, filing and recordkeeping are intended to apply. Our recommendation is consistent with long-standing FINRA staff guidance.[8]

In addition, we recommend that FINRA exclude from principal review, filing, and recordkeeping any templates that previously were filed with FINRA, the changes to which are limited to non-material changes to narrative data and alternative narrative where such narrative was previously filed with FINRA and its use in the template does not alter its meaning from that which was previously

[7] For the same reasons, we request that FINRA insert the word "member" before the word "communication" in Rule 2210(d)(1)(A) and the words "by a member" after the phrase "correspondence means any written (including electronic) communication that is distributed" in Rule 2210(a)(2). The recommended changes would clarify that the rules apply to FINRA *member* communications.

[8] *See* Letter to Forrest R. Foss, Vice President and Associate Legal Counsel, T. Rowe Price Associates, Inc. from Thomas M. Selman, Senior Vice President, Investment Companies/Corporate Financing, NASD Regulation, Inc., dated January 28, 2002.

filed with FINRA. Our understanding is that this recommendation too would be consistent with current FINRA practice. FINRA requires filing of a template (with content subject to filing) the first time it is used with the public and requires such a template to be filed again only if there are material changes to the template.[9] A non-material narrative changes in templates might include, for example, a company name listed in the field for a fund's top ten portfolio holdings. Templates often are used in material prepared for retirement plans. For example, an enrollment guide might include a listing of a plan's investment options, which include a brief description of each fund. A firm may use that same fund description in a fact sheet prepared for retail customers. We do not believe investor protection would be enhanced in any way if a fact sheet updated to incorporate a more recent fund description from an enrollment guide was required to be filed. We therefore urge FINRA to implement our recommendation, which would reduce filing costs for member firms without eliminating any meaningful FINRA review.

V. Sales Charge and Expense Ratio Disclosure

Rule 2210(d)(3) currently requires communications with the public, other than institutional sales material and correspondence, that present the performance of a non-money market mutual fund to disclose the fund's maximum sales charge and operating expense ratio as set forth in the fund's current prospectus fee table. The proposal would alter this by requiring disclosure of the maximum sales charge and operating expense ratio based on the fund's prospectus or annual report, whichever is more current as of the date of publication or submission for publication of a communication. No rationale is provided for the proposed change.

In the past, we supported requiring funds to prominently disclose in advertisements and sales literature expense ratios that appeared in shareholder reports rather than those which appeared in the prospectus.[10] We cannot, however, support the rule as proposed. In our conversations with Institute members, this element of the proposal was repeatedly identified as the most troubling because of the great expense and administrative burdens it would impose. To require funds to sometimes provide expense information from one source and other times from a second source will require them to significantly revamp their systems and, in some cases, obtain a second feed from a third party vendor at a substantially increased cost.[11] Enormous administrative burdens will be placed on all firms, regardless of whether expense information is generated in-house or obtained from a third party. This particularly

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[9] The wording of proposed Rule 2210(c)(7)(A) seems to limit non-material changes only to statistical or other non-narrative information.

[10] *See* Letter to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission from Frances M. Stadler, Deputy Senior Counsel, Investment Company Institute, dated September 17, 2004 (recommending that expense ratios be based on the fund's actual expenses for the period covered, which would include any fee waivers or reimbursements).

[11] One feed would be required to obtain expense information that appears in prospectuses and a second feed would be required to obtain information that appears in shareholder reports.

will be the case in instances where this information appears in a communication for a large number of funds, such as in materials prepared for fund marketplaces. In addition, we are concerned that requiring the source of expense information to be repeatedly modified will inevitably lead to inadvertent processing errors, a result that would not serve the best interests of investors. We therefore strongly recommend eliminating this element of the proposal.

A fund currently is required to present its standardized performance information, maximum sales charge, and annual expense ratio in a prominent text box in print advertisements. We recommend eliminating this presentation requirement because it is unnecessary to achieve the goal of ensuring that the required information is sufficiently prominent. Rather, FINRA should revise Rule 2210 to require the presentation of standardized performance, maximum sales charge, and expense ratio prominently. Our recommended approach would help to ensure that certain key items of information are presented in a manner that promotes investor awareness while providing funds with more flexibility in designing their print retail communications. It also would make FINRA's requirements regarding print retail communications consistent with its requirements regarding other retail communications.[12] In addition, FINRA should make clear in any notice to members that compliance with the presentation requirements in Rule 482 under the Securities Act of 1933 regarding standardized performance quotations and maximum sales charges[13] also satisfies Rule 2210's prominence requirement. Our recommendation will provide for consistency between Securities and Exchange Commission ("SEC" or "Commission") and FINRA rules. Such consistency is appropriate where, as here, the rules share the same policy goal of ensuring fair and balanced presentations that effectively communicate important information to investors. Establishing uniform standards also will facilitate compliance by member firms.

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[12] We also have a technical comment intended to clarify the scope of the text box requirement if FINRA determines to retain this requirement. Proposed Rule 2210(d)(5)(B) requires the maximum sales charge and expense ratio information to be placed in a prominent text box in any print advertisement. Because the term, "advertisement," would no longer be defined, the scope of the text box requirement would be unclear. To clarify this, we recommend that FINRA reiterate that the requirement applies only to print advertisements, such as a print newspaper, magazine or other periodical. *See* NASD Notice to Members 06-48 (September 2006) (stating that the text box requirement applies only to advertisements that appear in print advertisements, such as print newspaper, magazine or other periodical and not to printed sales literature, such as fund fact sheets, brochures or form letters nor to Web sites, television or radio commercials, or any other electronic communication).

[13] Rule 482 prescribes specific type size and style requirements for certain required disclosures, including information about a fund's maximum sales charge. In addition, Rule 482 requires certain disclosure (including maximum sales charge information) to be presented in close proximity to performance data and, in a print advertisement, to be presented in the body of the advertisement and not in a footnote. A fund's one, five, and ten year average annual total returns must be set out with equal prominence and any other performance measures must be set out in no greater prominence than the required quotations of total return. *See also* Rule 34b-1(b)(1) under the Investment Company Act of 1940, which extends these presentation requirements to investment company sales literature that contains performance data.

VI. Recordkeeping Requirements

The proposal would add a new requirement that member firms keep a record of the name of any person who prepares or *distributes* any institutional communication. While we do not object to maintaining a record of the person preparing the communication, it will be onerous for member firms to track everyone who distributes a communication, particularly when made available as a template and used by multiple advisers or retirement plan sponsors. Accordingly, we recommend that FINRA eliminate this requirement.

VII. Need for a Reasonable Transition Period

FINRA has not proposed a transition period in connection with the proposed requirements. Adequate lead time is necessary for the preparation of retail communications meeting the new requirements and their filing with, and approval by, FINRA. We recommend that FINRA provide a compliance period of approximately six months. Instead of requiring fund performance materials to comply with revised Rule 2210 within 180 days after adoption or as of an arbitrary effective date, we recommend that the compliance date for the rule changes be ten business days after the second calendar quarter end following the adoption of the final rule changes. Basing the compliance date on a calendar quarter end will enable FINRA members to coordinate their implementation of the rule changes with a regularly scheduled update of fund retail communications.[14] In addition, we recommend that FINRA be flexible so as to permit greater use of templates for filing purposes during this transition period.

VIII. Other Issues Not Addressed By the Proposal

A. Social Media

While the Notice does not address funds' use of social media, we understand that FINRA is interested in hearing industry views on the most appropriate regulation of social media. This is a very important and timely topic. Members of the fund industry have begun to establish social media sites, and others are exploring the possibility of doing so. Uncertainty about the application of current rules to this new media has been an obstacle, inhibiting the greater use of social media in the fund industry to communicate with customers and others. Accordingly, we believe that it is very important for FINRA to provide firms with appropriate guidance regarding their regulatory obligations. We are pleased that toward that end, FINRA has established a Social Networking Task Force consisting of representatives from member firms, including mutual fund firms.

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[14] Ten business days is the amount of time it typically takes funds to update their retail communications after the close of a calendar quarter.

While we have formulated recommendations on a number of the more straightforward issues (*e.g.,* filing requirements with respect to firm and third party content), we have not reached final conclusions on other issues that are more complex, such as the degree of oversight needed, if any, over third party content. We provide our preliminary views on these more complex issues below, but note that, in the future, we may modify our position in response to the particulars of any proposal FINRA might publish and the evolution of this media.

Interactive Retail Communications. Given the desirability of a regulatory regime that accounts for the interactive nature of social media, FINRA should consider establishing a fourth category of communications, titled "interactive retail communications."[15] These communications would be subject to the same requirements as other retail communications except with respect to principal approval. Under this approach, interactive retail communications would be subject to pre-use principal approval to the same extent that retail communications currently are (*e.g.,* those concerning registered investment companies), *except* to the extent that a firm determines that particular communications instead should be subject to post-use principal approval because of the time sensitive nature of the information or other circumstances that warrant its prompt dissemination. This approach would be consistent with views expressed by FINRA with respect to market letters.[16]

To the extent that FINRA takes this approach, it seems reasonable to require firms designating such communications as being subject to principal post-use approval to establish written procedures reasonably designed to assure that the communications comply with applicable standards as appropriate for its business, size, structure, and customers. These procedures could be required, for example, to provide for the education and training of associated persons as to the firm's procedures governing interactive retail communications, documentation of such education and training, and surveillance and follow-up to ensure the implementation and adherence to such procedures. Similar to other contexts, firms might be required to update these policies as appropriate and maintain evidence that they have been properly implemented.

This approach would allow firms the flexibility to design procedures for interactive communications appropriate to each firm's business model and responsive to evolving technology.

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[15] We recommend that FINRA consider providing guidance on what types of communications would be part of this category, which might include tweets, Facebook and other social media postings, and other similar communications that involve at or near real-time communications. FINRA also may want to consider permitting firms to designate other communications as interactive communications to allow firms to respond to new technology. We would not object to FINRA, as a more immediate short-term measure, interpreting these communications as correspondence.

[16] *See* Market Letter Notice.

Filing Requirements and Third Party Content. One of the major challenges our members face when using fund sponsored social media sites (*e.g.,* Twitter and Facebook) is to determine which information posted must be filed with FINRA. In our view, member firms should be required to file "tweets"[17] and other postings by the firm concerning registered investment companies (and postings with other content subject to filing under Rule 2210(d)(3)). This type of content is fully under the member's control, and filing would provide FINRA with the opportunity to oversee and influence this burgeoning area of communication.

Member firms should not, on the other hand, be required to file communications posted by third parties. This is not content that is under the control of the member firm, and it would be more reasonable and appropriate to limit a firm's filing obligations to that content that is under its control.[18] This approach would be consistent with SEC guidance provided in the context of companies' use of interactive websites.[19]

FINRA may want to consider requiring member firms to have a reasonable framework of supervisory procedures to oversee third party content to some extent. For example, FINRA might consider requiring firms to have supervisory procedures requiring periodic screening of third party communications for customer complaints.[20] If FINRA were to take this approach, it is important that FINRA not consider a firm's use of objective screening measures as causing third party content to be considered the firm's content. For example, some firms use objective screening criteria to, among other reasons, assist in their compliance with the "Good Samaritan blocking and screening" safe harbor under the Communications and Decency Act[21] to protect from general liability for third party content and postings. Further, firms are likely to have a "content take down" notice policy under the Digital Millenium Copyright Act of 1996 within their website's terms in order to obtain safe harbor protection from copyright infringement claims regarding content posted by third parties.

At FINRA's recent Advertising Regulation Conference, FINRA senior staff indicated that member firms have been permitted to file at one time all the tweets aggregated for one day along with

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[17] Tweets are text-based posts on Twitter.com, a real-time micro blogging site, that are limited to 140 characters.

[18] Similarly, a firm should not be responsible for any Facebook-generated content (*e.g.,* pop up advertisements) that appears on its Facebook page, content which is beyond its control.

[19] *See* SEC Release No. 34-58288 (August 1, 2008) [73 FR 45862, 45873 (August 7, 2008)] ("[a] company is not responsible for the statements that third parties post on a Web site the company sponsors, nor is a company obligated to respond to or correct misstatements made by third parties.")

[20] If FINRA takes this approach, it also should clarify that firms do not have responsibility for handling as complaints anonymous communications that criticize the firm.

[21] 47 U.S.C. Section 230.

one filing fee. We agree with this approach and recommend that FINRA formalize this guidance and expand it to encompass all similar postings for one day.

Required Disclosures. Another issue related to social media is whether and how FINRA and SEC required disclosures should be made. If either FINRA or the SEC requires disclosure to be provided along with any particular content, we recommend permitting firms to link to the appropriate disclosure from a tweet or other communication with space limitations. In addition, this approach would be consistent with FINRA's recognition of the permissible use of hyperlinks to provide investors with information in electronic media.[22] We also encourage FINRA, as a general matter, to interpret its requirements in a flexible manner to permit the fund industry to avail themselves of the advantages of new technologies as they develop.

Recordkeeping. Given that social media is a dynamic, constantly changing, interactive means of communication, there are significant questions about the extent to which member firms are required to keep records related to their social media sites. One possible approach would be to require member firms to maintain a record of their own content, and not that of a third party unless it is necessary to provide context for the firm's content or is otherwise a required record.[23] For example, if a firm posted an article on its blog, third parties commented, and the firm did not respond to those comments, this approach would not require a firm to retain these third party postings.[24] However, if a posting was a complaint or if the firm responded to the third party posting, firms would be required to retain that third party content.

B. Investment Analysis Tools

In recent years, retail investors have increasingly sought access to information to help them make investment decisions, and the mutual fund industry has responded by using increasingly sophisticated technology that includes both interactive and non-interactive investment analysis tools to generate financial educational and other materials.[25]

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[22] *See Ask the Analyst – Electronic Communications and Mutual Funds* (June 1997) (permitting an Internet banner advertisement that contains only a mutual fund or fund family name to link to the home page containing properly disclosed prospectus offering language rather than including the language in the advertisement itself).

[23] We recognize that member firms must comply with both FINRA rules and SEC rules regarding recordkeeping. We would seek to work with the SEC to effectuate changes to Securities Exchange Act Rule 17a-4 to develop a reasonable framework for recordkeeping related to social media.

[24] FINRA's Podcast, Electronic Communications: Blogs, Bulletin Boards, and Chat Rooms (February 23, 2009) seems to support the recommended approach. In that podcast, in a discussion of chat rooms, FINRA staff commented that any remarks by a firm's registered representative would have to be printed out and kept as a required record but there was no mention of any recordkeeping or other obligations with respect to remarks made by other participants in the chat room.

[25] For example, some firms use investment analysis tools whose engines are fueled by Monte Carlo simulations. Monte Carlo simulations randomly select thousands of plausible market scenarios and allow for effective stress testing of investment strategies across scenarios – both those that have, and have not, occurred. Monte Carlo simulations help investors

The proposal would retain, without any change, the current requirements applicable to investment analysis tools and their related reports, advertisements, and sales literature in new FINRA Rule 2214. NASD Interpretive Material 2210-6 currently permits member firms to provide an investment analysis tool, written reports indicating the results generated by such tool and related advertisements and sales literature under certain conditions.[26]

In recent conversations, FINRA staff has informally indicated to us that only sales literature and advertisements that relate to an *interactive* investment analysis tool are permissible.[27] We cannot discern a policy reason for this limitation and believe that investors will be better served by being provided with information generated by both interactive and non-interactive investment analysis tools. This is valuable information that can help investors determine how to allocate their investments to maximize their chance of achieving retirement and other investment goals.

We therefore recommend that FINRA expressly permit member firms to use both interactive and non-interactive tools and disseminate related reports, and retail communications. To help protect investors from misleading communications, we recommend that reports and retail communications related to non-interactive tools be subject to the same disclosure, filing, supervision and other requirements set forth in current requirements. For example, any possible concerns about "cherry picking" superior performance that occurred over certain time periods could be addressed by requiring

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determine how to allocate their assets, how much they should save for retirement and other financial needs, how much retirement income can be withdrawn with a reasonable expectation of not running out of assets in their lifetime, how long they can reasonably expect their retirement assets to last, and a reasonable estimate of remaining assets at the end of a planned retirement period.

[26] Investment analysis tool is defined as "an interactive technological tool that produces simulations and statistical analyses that present the likelihood of various investment outcomes if certain investments are made or certain investment strategies or styles are undertaken, thereby serving as an additional resource to investors in the evaluation of potential risks and returns of investment choices."

[27] Despite these recent statements, the precise scope of current NASD IM-2210(6) is unclear. While it expressly permits member firms to provide customers with access to an interactive tool, a release preceding its adoption suggests that other types of automated tools would not be considered to be prohibited projections of investment strategies and therefore would be permissible in the absence of IM-2210-6. Specifically, the NASD stated in its rule filing with the Commission that "Rule 2210(d)(2)(N) [currently Rule 2210(d)(1)(D)] does not prohibit, and this Interpretive Material does not apply to, automated educational tools that are hypothetical or general in nature. For instance, rule 2210(d)(2)(N) generally does not prohibit, and this Interpretive Material does not cover, portfolio-based planning tools that merely generate a suggested mix of asset classes, broad categories of securities or funds, or probabilities as to how classes of financial assets or styles of investing might perform." *See* SEC Release No. 34-47590 (March 28, 2003) [68 FR 16325 (April 3, 2003) at note 1]. *See also* Letter to Barbara Z. Sweeney, Office of the Corporate Secretary, NASD, from Tamara K. Reed, Associate Counsel, Investment Company Institute, dated October 1, 2002 (noting that NASD members had long been permitted to provide tools that simulate or analyze asset allocations among various asset classes or types of assets and recommending that the NASD clarify this point).

multiple scenarios to be presented in retail communications. (This could be accomplished either through an express condition or through continuing to define investment analysis tool as those tools that present "the likelihood of various investment outcomes.")[28] It would also seem reasonable that specific investment products not be permitted to be identified in these materials, consistent with the materials' general financial educational purposes.

C. Fee Waivers

FINRA has for some time taken the view that if a member firm *voluntarily* subsidizes fund expenses, an advertisement with that fund's yield would have to present both subsidized and unsubsidized yield to be considered fair and balanced under NASD Rule 2210(d)(1)(A). It is our understanding that most recently, FINRA modified that position so that even if fund expenses are subsidized pursuant to a contract with the fund's investment adviser, an advertisement with the fund's yield has to present both subsidized and unsubsidized yields to be considered fair and balanced. This view is inconsistent with Commission views on the disclosure required in advertisements when fund expenses are subsidized. In particular, when the Commission proposed, and later adopted, Rule 482 under the Securities Act of 1933, it stated that the obligation to disclose the effects of subsidization is imposed under the antifraud rules[29] and that failure to disclose subsidization where the subsidization affects the performance in a material manner would cause the advertisement to omit to state a material fact.[30] These statements suggest that investors would not always need to know the fact of subsidization and the fund's unsubsidized yield, but rather, that investors needed to be provided with this information only if it was material. We agree. Given the variety of possible subsidization arrangements, a materiality standard helps assure that investors are provided with the information they need to know to make an informed investment decision. We therefore recommend that FINRA permit funds whose investment adviser has waived fees to only disclose the fact of subsidization and provide both the subsidized and unsubsidized yields in retail communications if the effect of the subsidization on performance is material.

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[28] We recommend that investment analysis tools offered exclusively to institutional investors and related written reports or communications be subject to the same requirements with the exception of post-use access and filing. *See, e.g.,* IM-2210-6 (regarding use of these materials with institutional investors).

[29] In explaining the materiality standard, the Commission distinguished between voluntary and contractual subsidizations. *See* Investment Company Act Release No. IC-15315, (September 17, 1986) at note 55.

[30] *See* Investment Company Act Release No. 16245 (February 2, 1988) at text preceding and following note 37.

The Institute appreciates the opportunity to comment on this significant proposal. If you have any questions or need additional information, please contact me at (202) 218-3563.

Sincerely,

/s/

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