



FINRA Communication Rules

Rule 2210 governs three categories of “communications” by FINRA member firms: institutional communications, retail communications and correspondence. The Rule sets forth requirements relating to approval, review and recordkeeping of communications; filing requirements and review procedures; and content standards.

As discussed below, the Rule’s general content standards apply to all communications and are meant to ensure that communications are fair, balanced and not misleading. Retail communications are subject to the highest degree of regulation under the Rule. The Rule focuses mainly on the nature of the addressee of the communication, rather than on the type of instrument described in the communication. A communication made to an investor regarding a security or regarding a product that, in some circumstances, may not be viewed as a security will be covered by the Rule. Consequently, communications to investors regarding registered securities, exempt securities or “non-securities” are subject to the Rule’s requirements.

Appendix A of this article contains a summary chart, which includes the applicable definitions, as well as the approval, review and recordkeeping requirements for each type of communication under Rule 2210. Below we highlight the requirements and application of Rule 2210.

Content of Communications

The communications rules include both general and specific content standards. Certain general standards apply to all communications, such as requirements that communications be fair and balanced and provide a sound basis for evaluating the facts with respect to any particular security, industry or service, and prohibitions on omitting material facts the absence of which would make the communication misleading. More particular content standards apply to specific securities.¹

Approval, Review and Recordkeeping Requirements

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

Retail Communications: Approval and Review

A retail communication must be approved before the earlier of its first use or its filing with the FINRA Advertising Regulation Department (the “Department”).² An appropriately qualified registered principal of the firm must approve each retail communication. However, a Series 16 Supervisory Analyst may review the following retail communications:

- Research reports on debt and equity securities;
- Retail communications as described in FINRA Rule 2241(a)(11)(A) (list of research-related communications that do not fall within the definition of “research report” under FINRA Rule 2241); and
- Other research that does not meet the definition of “research report” under FINRA Rule 2241(a)(11),³ provided that the Supervisory Analyst has technical expertise in the particular product area.

¹ FINRA Regulatory Notice 12-29 (“Notice 12-29”), found at <https://goo.gl/fDVccU>.

² Rule 2210(b)(1)(A).

³ FINRA Rule 2241(a)(11) defines a “research report” as any written (including electronic) communication that includes an analysis of equity securities of individual companies or industries (other than an open-end registered investment company that is not listed or traded on an exchange), and that provides information reasonably sufficient upon which to base an investment decision. Among other communications, this term does not include communications that are limited to the following: (i) discussions of broad-based indices; (ii) commentaries on economic, political or market conditions; (iii) technical analyses concerning the demand and supply for a sector, index or industry based on trading volume and price; (iv) statistical summaries of multiple companies’ financial data, including listings of current ratings; (v) recommendations regarding increasing or decreasing holdings in particular industries or sectors; or (vi) notices of ratings or price target changes, provided that the member simultaneously directs the readers of the notice to the most recent research report on the subject company that includes all current applicable

A Series 16 Supervisory Analyst may not approve a retail communication that requires a separate registration (such as retail communications concerning options, security futures or municipal securities) unless the supervisory analyst also holds the other registrations.⁴

If (i) another member has filed the retail communication with the Department and has received a letter from the Department stating that it appears to be consistent with applicable standards; and (ii) the member using it in reliance upon the previous filing and approval has not materially altered it and will not use it in a manner that is inconsistent with the conditions of the Department's letter, then the retail communication does not have to be pre-approved by a principal.⁵

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

- Any retail communication that is excepted from the definition of "research report" under FINRA Rule 2241(a)(aa)(A), unless the communication makes any financial or investment recommendation;
- Any retail communication that is posted on an online interactive electronic forum;⁶ and
- Any retail communication that does not make any financial or investment recommendation or otherwise promote a product or service of the member.⁷

An appropriately qualified principal must approve **any** communication that is filed with the Department, even if a communication otherwise would come under an exception to the principal pre-use approval requirements of FINRA Rule 2210(b)(1)(A).⁸

A member firm may petition FINRA for an exemption from the principal pre-use approval requirement for good cause shown. In granting an exemption, FINRA will consider whether the exemption is consistent with the purposes of the Rule, investor protection and the public interest. Exemptive relief granted under this provision will apply only to the firms that have applied for such relief.⁹

Online Interactive Electronic Forums

FINRA considers chat rooms, online seminars, and any portion of a blog or a social networking site such as Facebook, Twitter or LinkedIn that is used to engage in real-time interactive communications to be online interactive electronic forums. The mere updating of a non-interactive blog (or any other firm web page) does not cause it to become an interactive electronic forum, even if the updating occurs frequently.¹⁰ A static posting on an interactive electronic forum, such as profile, background or wall information, is deemed to be an advertisement under Rule 2210 and therefore requires prior approval. Interactive content can be copied or forwarded and posted in a static forum, thus rendering it an advertisement. The portion of a website that does not provide for real-time electronic communications does not qualify for any of Rule 2210's exceptions for an online interactive electronic forum.

Institutional Communications: Approval and Review

With respect to institutional communications, the member firm must have written procedures for review by a principal. Those procedures must be reasonably designed to ensure that institutional communications comply with applicable standards. If the procedures do not require review of all institutional communications, they must include provision for the education and training of associated persons regarding these communications. FINRA has the right to request evidence that these supervisory procedures have been implemented and carried out.¹¹

Although internal communications are excepted from the definition of institutional communication, member firms still must supervise these communications, including a firm's internal communications that train or educate registered representatives. In this regard, a firm's supervisory policies and procedures concerning internal training and education materials must be reasonably designed to ensure that such materials are fair, balanced and accurate, and consistent with the applicable offering materials.¹²

disclosures required by this rule and that such research report does not contain materially misleading disclosures, including disclosures that are outdated or no longer applicable.

⁴ Rule 2210(b)(1)(A), (B).

⁵ Rule 2210(b)(1)(C).

⁶ See "Online Interactive Electronic Forums," below.

⁷ Rule 2210(b)(1)(D).

⁸ Rule 2210(b)(1)(F).

⁹ Rule 2210(b)(1)(E); Notice 12-29.

¹⁰ See FINRA Regulatory Notice 10-06 ("Notice 10-06"), found at <https://goo.gl/uHXNS4>.

¹¹ Rule 2210(b)(3).

¹² Notice 12-29.



Retail and Institutional Communications: Recordkeeping

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

- a copy of the communication and the dates of first and (if applicable) last use;
- the name of any registered principal who approved the communication and the date that approval was given;
- in the case of a retail communication or institutional communication that is not approved prior to first use by a registered principal, the name of the person who prepared or distributed the communication;
- information concerning the source of any statistical table, chart, graph or other illustration used in the communication;
- for retail communications that rely on the exception from pre-approval for retail communications previously filed with, and approved by, the Department,¹³ the name of the firm that filed the retail communication with the Department and a copy of the Department review letter; and
- for any retail communication that includes or incorporates a performance ranking or performance comparison of a registered investment company, a copy of the ranking or performance used in the retail communication.¹⁴

The recordkeeping requirements only require retention of the records of all communications made or received by a firm or its associated persons on an online interactive electronic forum and that relate to its “business as such,” even though third-party posts are not generally treated as the member firm’s or its associated persons’ communications under Rule 2210 (unless they are covered by the “entanglement” and “adoption” theories discussed below). If a firm’s or any of its associated persons’ social media posting that is not considered relating to the firm’s business as such (*i.e.*, personal) is replied to with a posting that does relate to the firm’s business as such, then the firm must retain records of that reply.¹⁵

Neither the SEC nor FINRA has specifically defined the term “business as such,” although FINRA has said that “[w]hether a particular communication is related to the business of the firm depends upon the facts and circumstances.”¹⁶

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

In Regulatory Notice 17-18, FINRA clarified that its recordkeeping requirements apply to digital communications, including text messaging and chat services, and reminded firms that they must ensure that they can retain any business communications before using those services for business purposes.¹⁷

Generally, a third-party post on a social media site established by a firm or any of its personnel would not be considered a communication by the firm or its personnel, to which the supervision, recordkeeping, filing or content requirements would apply. However, under certain circumstances, third-party posts could become attributable to the firm and considered communications with the public subject to the requirements of Rule 2210. For example, if the firm or any of its personnel involved themselves in the preparation of the content of the third-party post, or paid for the post, then the third-party post would be considered to be a communication with the public by the firm or its personnel under an entanglement theory. Or if, for example, after the third-party content was posted, the firm or its personnel explicitly or implicitly endorsed or approved the post, then, under an adoption theory, the post would constitute a communication with the public.¹⁸

Generally, if a member firm shares or links to third-party content, that content is deemed to have been adopted by the firm. Notice 17-18 provides some examples:

- Sharing or linking to specific content posted by independent third parties is an adoption of that content by the member firm; in that case, the member firm must ensure that the adopted content, when read in context with the statements in the originating post, complies with Rule 2210’s standards applicable to firm communications;
- Sharing or linking to content that in turn links to other content, if the member firm has influence or control over that other content, is also an adoption by the member firm of that other content; and

¹³ See discussion above regarding principal pre-use approval requirements for retail communications.

¹⁴ Rule 2210(b)(4)(A).

¹⁵ FINRA Regulatory Notice 11-39 (“Notice 11-39”), found at: <https://goo.gl/VCpz6c>; FINRA Regulatory Notice 17-18 (April 2017) (“Notice 17-18”), available at: <https://goo.gl/dhfyph>; Securities and Exchange Act Rule 17a-4(b).

¹⁶ Notice 11-39.

¹⁷ Notice 17-18.

¹⁸ Notice 10-06.



- Sharing or linking to content that itself is primarily a vehicle for other links, or where the content available through such links forms the entire basis of the article, is an adoption by the member firm of the content accessed through such links.¹⁹

However, the simple sharing or linking to content that contains links to other content over which the member firm has no influence or control is not an adoption by the member firm of the content available at those other links. Also, if a member firm includes on its website a link to a section of an independent third-party site, whether or not the member firm has adopted the content of the other site will depend on whether the link is “ongoing” or if the member firm has influence or control over the content of the third-party site. In the latter case, the third-party content will become attributable to the member firm through an entanglement theory. Content at a linked site will not be adopted by the member firm if the link is ongoing, which means that the link is continuously available to investors who visit the member firm’s site, investors have access to the linked site whether or not it contains favorable material about the member firm and the linked site could be updated or changed by the independent third party, and investors would still be able to use the link at the member firm’s site.

Nonetheless, if the firm has any influence or control over the content of the third-party site, the content of that site will be attributable to the firm through an entanglement theory. Any language used by the member firm to introduce the link must conform to the content standards of Rule 2210(d).²⁰

Correspondence: Recordkeeping, Supervisory and Review

The FINRA rules, the Exchange Act and the applicable Exchange Act rules relating to books and records apply to correspondence. Members must preserve for a period of at least six years any correspondence for which there is no specified period under the FINRA rules or applicable Exchange Act rules. Correspondence must be preserved in a format and media that comply with Rule 17a-4 under the Exchange Act. The names of the persons who prepared outgoing correspondence and who reviewed the correspondence must be ascertainable from the retained records, and these records must be readily available to FINRA upon request.²¹

All correspondence is subject to the supervision and review requirements of FINRA Rule 3110(b)(4), which provides, in part, that each member must establish procedures for the review and endorsement by a registered principal in writing, on an internal record, of all transactions and for the review by a registered principal of incoming and outgoing correspondence of its registered representatives. These procedures should be in writing and be designed to reasonably supervise each registered representative. The procedures should be designed to, among other things, properly identify and handle customer complaints and to ensure that customer funds and securities are handled in accordance with firm procedures.²²

Filing Requirements and Review Procedures

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

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

“Pre-Use” Filing Requirements

A new FINRA member firm must file with the Department, at least 10 business days prior to its first use, any retail communication that is published or used in any electronic or other public media, including any generally accessible website, newspaper, magazine or other periodical, radio, television, telephone or audio recording, video display, signs or billboards, motion pictures, or telephone directories (other than routine listings).²³ Once 10 business days have passed since the filing, the new member may use the retail communication; the member is not required to wait for approval by the Department after the 10 business day-period has elapsed. The period for which a pre-use filing is required begins on the date when FINRA’s Central Registration Depository shows that FINRA membership has become effective and ends one year later.

There are exceptions to the pre-use filing requirement. Any retail communication of a new member firm that is a free writing prospectus (“FWP”) that has been filed with the SEC under the Securities Act of 1933 (“Securities Act”) Rule 433(d)(1)(ii) may be filed within 10 business days of first use rather than 10 business days prior to first use. Securities Act Rule 433(d)(1)(ii) applies to broker-

¹⁹ Notice 17-18.

²⁰ Notice 17-18.

²¹ Rule 2210(b)(4)(B); FINRA Rule 4511; FINRA Rule 3110.09.

²² Rule 2210(b)(2).

²³ Rule 2210(c)(1).



prepared free writing prospectuses that are used or referred to, and widely disseminated by, an underwriter or dealer.²⁴ A new member firm may also petition FINRA for an exemption from the pre-use filing requirement for good cause shown.²⁵

Although the pre-use filing requirement only applies to retail communications on its face, the Department has the authority to require a new member firm to file other communications prior to their use. If the Department determines that a member has departed from the standards of the Rule, it may require that the member file with the Department all communications (rather than just retail communications), or the portion of the member's communications that is related to any specific types or classes of securities or services, at least 10 business days prior to first use.²⁶

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

- Retail communications concerning registered investment companies (including mutual funds, exchange-traded funds, variable insurance products, closed-end funds and unit investment trusts) that include or incorporate performance rankings or performance comparisons of the investment company with other investment companies when the ranking or comparison category is not generally published or is the creation, either directly or indirectly, of the investment company, its underwriter or an affiliate (together with a copy of the data on which the ranking or comparison is based); and
- Retail communications concerning security futures, with the exception of (i) retail communications concerning security futures that are submitted to another self-regulatory organization having comparable standards pertaining to those retail communications; and (ii) retail communications in which the only reference to security futures is contained in a listing of the services of a member.²⁷

Concurrent with Use Filing Requirements

The following must be filed with the Department within 10 business days of first use or publication ("concurrent with use"):

- Retail communications that promote or recommend a specific registered investment company or family of registered investment companies other than those subject to the pre-use filing requirements;
- Retail communications concerning public direct participation programs;²⁸
- Any retail communication concerning collateralized mortgage obligations registered under the Securities Act; and
- Any retail communication concerning any security that is registered under the Securities Act and that is derived from or based on a single security, a basket of securities, an index, a commodity, a debt issuance or a foreign currency (that is, "registered structured products"), except (i) retail communications already subject to the pre-use filing requirements or (ii) the retail communications described in the three bullet points above.²⁹

Department approval is not required for any concurrent filings. However, the Department has historically made comments on these documents when it believed that they were not prepared in accordance with FINRA's standards.

A member firm may petition FINRA for an exemption from the concurrent with use filing requirements. In accordance with the FINRA 9600 procedural rules, FINRA may conditionally or unconditionally grant an exemption from the concurrent with use filing rules for good cause shown after taking into consideration all relevant factors, to the extent such exemption is consistent with the purposes of the Rule, the protection of investors and the public interest.³⁰

²⁴ Rule 2210(c)(1).

²⁵ Rule 2210(c)(9)(A).

²⁶ Rule 2210(c)(9)(B).

²⁷ Rule 2210(c)(2)(A)-(B).

²⁸ FINRA Rule 2310 defines a "direct participation program" as "a program which provides for flow-through tax consequences regardless of the structure of the legal entity or vehicle for distribution including, but not limited to, oil and gas programs, real estate programs, agricultural programs, cattle programs, condominium securities, Subchapter S corporate offerings and all other programs of a similar nature, regardless of the industry represented by the program, or any combination thereof. A program may be composed of one or more legal entities or programs but when used herein and in any rules or regulations adopted pursuant hereto the term shall mean each of the separate entities or programs making up the overall program and/or the overall program itself. Excluded from this definition are real estate investment trusts, tax qualified pension and profit sharing plans pursuant to Sections 401 and 403(a) of the Internal Revenue Code and individual retirement plans under Section 408 of that Code, tax sheltered annuities pursuant to the provisions of Section 403(b) of the Internal Revenue Code, and any company including separate accounts, registered pursuant to the Investment Company Act."

²⁹ Rule 2210(c)(3).

³⁰ Rule 2210(c)(9)(B).



Filing Requirements, Generally

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

- Retail communications that previously have been filed with the Department and that are to be used without material change;
- Retail communications that are based on templates that were previously filed with the Department the changes to which are limited to (i) updates of more recent statistical or other non-narrative information and (ii) non-predictive narrative information that describes market events during the period covered by the communication or factual changes in portfolio composition or is sourced from a registered investment company’s regulatory documents filed with the SEC;³¹
- Retail communications that do not make any financial or investment recommendation or otherwise promote a product or service of the member;
- Retail communications that do no more than identify a national securities exchange symbol of the member or identify a security for which the member is a registered market maker;
- Retail communications that do no more than identify the member or offer a specific security at a stated price;
- Prospectuses, preliminary prospectuses, fund profiles, offering circulars, annual or semi-annual reports and similar documents that have been filed with the SEC or any state in compliance with applicable requirements, similar offering documents concerning securities offerings that are exempt from SEC and state registration requirements,³² and FWP’s that are exempt from filing with the SEC, except that an investment company prospectus published under Securities Act Rule 482 and a FWP that is required to be filed with the SEC under Securities Act Rule 433(d)(1)(ii) will not be considered a prospectus for purposes of this exclusion;³³
- Retail communications prepared in accordance with Section 2(a)(10)(b) of the Securities Act (tombstones) or any rule thereunder, such as Rule 134, and announcements as a matter of record that a member has participated in a private placement, unless the retail communications are related to publicly offered direct participation programs or securities issued by registered investment companies;
- Press releases that are made available only to members of the media;
- Any reprint or excerpt of any article or report issued by a publisher (a “reprint”), provided that
 - the publisher is not an affiliate of the member using the reprint or any underwriter or issuer of a security mentioned in the reprint that the member is promoting;
 - neither the member using the reprint nor any underwriter or issuer of a security mentioned in the reprint has commissioned the reprinted article or report; and
 - the member using the reprint has not materially altered its contents except as necessary to make the reprint consistent with applicable regulatory standards or to correct factual errors;
- Correspondence;
- Institutional communications;
- Communications that refer to types of investments solely as part of a listing of products or services offered by the member;
- Retail communications that are posted on an online interactive electronic forum;
- Press releases issued by closed-end investment companies the securities of which are listed on the New York Stock Exchange (the “NYSE”) under Section 202.06 of the NYSE Listed Company Manual (or any successor provision); and

³¹ With respect to updates provided by third-party data providers sourced from SEC filings, FINRA reminds member firms to obtain assurances from the data provider regarding the quality of the data and its consistency with SEC source data. Notice 16-41

³² Recent amendments to Rule 2210(c)(7)(F) clarified FINRA’s intent to exclude from the filing requirements issuer-prepared offering documents concerning securities offerings that are exempt from registration. Member firms may be required to file unregistered securities documents with FINRA under FINRA Rules 5122 or 5123, however. Notice 16-41 and n.7.

³³ Preliminary or summary “term sheets,” which do not contain final pricing information and are FWP’s that are exempt from filing with the SEC under Rule 433(d)(5)(i), are not subject to the filing requirements of Rule 2210(c)(1) – (4).



- Research reports (as defined in FINRA Rule 2241) that concern only securities that are listed on a national securities exchange, other than research reports required to be filed with the SEC pursuant to Section 24(b) of the Investment Company Act.

Press releases, reprints, correspondence and institutional communications, although exempt from the Department's filing requirements, are deemed filed with FINRA for purposes of Section 24(b) of the Investment Company Act of 1940 and Rule 24b-3 thereunder.³⁴

Filing Requirements: Specific Applications

Unregistered Products – The concurrent with use filing requirement only applies to retail communications for registered products. Communications relating to unregistered products, such as bank notes and certificates of deposit, are not subject to the filing requirements.

Television and Video Communications – The filing of a draft storyboard of a television or video retail communication does not satisfy the filing requirement. The final “filmed” version must be filed with the Department within 10 business days of first use or broadcast.³⁵

Online Interactive Electronic Forums – FINRA has advised that if the purpose of the forum is, for example, to sell securities or promote a particular mutual fund, then the filing requirements would apply.³⁶

Speaking Engagements – Speaking engagements are not subject to pre-use approval or any filing requirements. However, firms are required to establish appropriate written policies and procedures to supervise public appearances by associated persons.

Content Standards

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

- All member communications must be based on principles of fair dealing and good faith, must be fair and balanced, and must provide a sound basis for evaluating the facts in regard to any particular security or type of security, industry, or service. No member may omit any material fact or qualification if the omission, in light of the context of the material presented, would cause the communications to be misleading.
- No member may make any false, exaggerated, unwarranted, promissory or misleading statement or claim in any communication.
- No member may publish, circulate or distribute any communication that the member knows or has reason to know contains any untrue statement of a material fact or is otherwise false or misleading.
- Information may be placed in a legend or footnote only if that placement would not inhibit an investor's understanding of the communication.
- Members must ensure that statements are clear and not misleading within the context in which they are made, and that they provide balanced treatment of risks and potential benefits.
- Members must consider the nature of the audience to which the communication will be directed and must provide details and explanations appropriate to the audience.
- Communications may not predict or project performance, imply that past performance will recur, or make any exaggerated or unwarranted claim, opinion or forecast; provided, however, that this provision does not prohibit:
 - A hypothetical illustration of mathematical principles, provided that it does not predict or project the performance of an investment or investment strategy;
 - An investment analysis tool, or a written report produced by an investment analysis tool, that meets the requirements of FINRA Rule 2214; and

³⁴ Rule 2210(c)(7)

³⁵ Rule 2210(c)(4).

³⁶ See Notice 10-06, Q4 (“The treatment of a blog under Rule 2210 depends on the manner and purposes for which the blog has been constructed.”).



- A price target contained in a research report on debt or equity securities, provided that the price target has a reasonable basis, the report discloses the valuation methods used to determine the price target, and the price target is accompanied by disclosure concerning the risks that may impede achievement of the price target.³⁷

Required Information

The Rule requires all retail communication and correspondence to:

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

These requirements do not apply to so-called “blind” advertisements used to recruit personnel.³⁸

Content Requirements: Specific Applications

Comparisons – A member firm may use comparisons in any communication, provided that any comparison between investments or services in retail communications must disclose all material differences between them, including (as applicable) investment objectives, costs and expenses, liquidity, safety, guarantees or insurance, fluctuation of principal or return, and tax features.³⁹

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

Advertisements by Investment Companies – Retail communications and correspondence that present the performance of a non-money market mutual fund must disclose the fund’s maximum sales charge and operating expense ratio as set forth in the fund’s current prospectus fee table.⁴⁰

Proprietary Index – The publication by a FINRA member of its proprietary index while the member knew, or had reason to know, that the index contained materially inaccurate information has been found to constitute a violation of Rule 2210(d)(1)(B).⁴¹

Discussions of Tax Implications – There are general and very specific content standards for tax considerations in communications. In retail communications and correspondence, references to tax-free or tax-exempt income must indicate which income taxes apply, or which do not, unless income is free from all applicable taxes. If income from an investment company investing in municipal bonds is subject to state or local income taxes, this fact must be stated, or the illustration must otherwise make it clear that income is free only from federal income tax. Communications may not characterize income or investment returns as tax-free or exempt from income tax when tax liability is merely postponed or deferred, such as when taxes are payable upon redemption. Any comparative illustration of the mathematical principles of tax-deferred versus taxable compounding must meet specific requirements set forth in the Rule.⁴²

Testimonials – If any testimonial in a communication concerns a technical aspect of investing, the person making the testimonial must have the knowledge and experience to form a valid opinion. Retail communications or correspondence providing any testimonial concerning the investment advice or investment performance of a member or its products must prominently disclose the following:

- The fact that the testimonial may not be representative of the experience of other customers;
- The fact that the testimonial is no guarantee of future performance or success; and

³⁷ Rule 2210(d)(1).

³⁸ Rule 2210(d)(3).

³⁹ Rule 2210(d)(2).

⁴⁰ Rule 2210(d)(5).

⁴¹ FINRA Letter of Acceptance, Waiver and Consent No. 2014042781801.

⁴² Rule 2210(d)(4).



- If more than \$100 in value is paid for the testimonial, the fact that it is a paid testimonial.⁴³

If a representative of member firm “likes” or shares favorable comments posted by third parties on a business-related site supervised and retained by a member firm or its registered representatives, then the comments would be adopted by the firm or representative and would be subject to Rule 2210, including the content, supervision, recordkeeping and testimonial requirements. Disclosure of the testimonial requirements of Rule 2210(d)(6) discussed above may be made either in the interactive electronic communication itself, in close proximity to the testimonial or through a clearly marked hyperlink using language such as “important testimonial information.”⁴⁴

Prospectuses – Prospectuses, preliminary prospectuses, fund profiles and similar documents that have been filed with the SEC and FWP’s that are exempt from filing with the SEC are not subject to the content standards of FINRA Rule 2210(d);⁴⁵ however, these standards do apply to investment company “omitting prospectuses” published under Securities Act Rule 482 and dealer-prepared, widely disseminated FWP’s that are required to be filed with the SEC under Securities Act Rule 433(d)(1)(ii).⁴⁶

Third Party Websites – If a member firm co-brands any part of a third-party website, such as by placing the firm’s logo prominently on the site, then, under an adoption theory, it is responsible for the content of the entire site.⁴⁷

Recommendations

All retail communications that include a recommendation of securities must have a reasonable basis for the recommendation. In any communication, a member must provide, or offer to furnish upon request, available investment information supporting the recommendation. When a member recommends a corporate equity security, the member must provide the price at the time the recommendation is made.⁴⁸

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

- That at the time the communication was published or distributed, the member was making a market in the security being recommended, or in the underlying security if the recommended security is an option or security future, or that the member or associated persons will sell to or buy from customers on a principal basis;
- That the member or any associated person that is directly and materially involved in the preparation of the content of the communication has a financial interest in any of the securities of the issuer whose securities are recommended, and the nature of the financial interest (including, without limitation, whether it consists of any option, right, warrant, future, long or short position), unless the extent of the financial interest is nominal; and
- That the member was manager or co-manager of a public offering of any securities of the issuer whose securities are recommended within the past 12 months.⁴⁹

A retail communication or correspondence may not refer, directly or indirectly, to past specific recommendations of the member that were or would have been profitable to any person. A retail communication or correspondence is, however, allowed to set out or offer to furnish a list of all recommendations as to the same type, kind, grade or classification of securities made by the firm within the immediately preceding period of not less than one year. The list must provide certain information regarding each recommended security and include a prescribed cautionary legend warning investors not to assume that future recommendations will be profitable.⁵⁰

Speaking Engagements and Public Appearances

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

⁴³ Rule 2210(d)(6).

⁴⁴ Notice 17-18.

⁴⁵ See footnote 33.

⁴⁶ Rule 2210(d)(8).

⁴⁷ Notice 11-39.

⁴⁸ Rule 2210(d)(7)(A), (B).

⁴⁹ Rule 2210(d)(7)(A)(i)-(iii).

⁵⁰ Rule 2210(d)(7)(C).



connection with public appearances are considered communications for purposes of the Rule and, as a result, can be retail communications.⁵¹

For public appearances by associated persons, if an associated person recommends a security in a public appearance, the associated person must have a reasonable basis for the recommendation. The associated person also must disclose, as applicable, the following conflicts of interest:

- That the associated person has a financial interest in any of the securities of the issuer whose securities are recommended, and the nature of the financial interest, unless the extent of the financial interest is nominal; and
- Any other actual, material conflict of interest of the associated person or firm of which the associated person knows or has reason to know at the time of the public appearance.⁵²

These disclosure requirements do not apply to a public appearance by a research analyst for purposes of FINRA Rule 2241⁵³ that includes all of the applicable disclosures required by that rule. The disclosure requirements also do not apply to a recommendation of investment company securities or variable insurance products, provided that the associated person must have a reasonable basis for the recommendation.⁵⁴

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

⁵¹ Notice 12-29; Rule 2210(f)(1).

⁵² Rule 2210(f)(2).

⁵³ FINRA Rule 2241(a)(8) defines a “research analyst” as an associated person “who is primarily responsible for, and any associated person who reports directly or indirectly to such a research analyst in connection with, preparation of the substance of a research report, whether or not any such person has the job title of ‘research analyst.’”

⁵⁴ Rule 2210(g).



APPENDIX A: SUMMARY

Type of Communication	Principal Pre-Use Approval	FINRA Filing	Recordkeeping
<p>Institutional Communication</p> <ul style="list-style-type: none"> Written/electronic communications distributed or made available only to institutional investors Does not include internal communications If a member has “reason to believe” communication will be forwarded to retail investors, communication may be a “retail communication” 	<p>Written procedures must address education and training regarding communications.</p>	<p>Not required to be filed.</p>	<p>Three years from date of last use. Keep on file:</p> <ul style="list-style-type: none"> name of preparer, copy of communication, source of statistical information or illustration, date of first and last use, and if principal did review, then name and date of approval.
<p>Retail communication</p> <ul style="list-style-type: none"> Any written/electronic communication distributed or made available to more than 25 retail investors within a 30-day period Generally includes advertisements, sales literature, and reprints Sales scripts intended for use with retail customers 	<p>Requires approval before earlier of use or filing with FINRA.</p> <p>Principal registration of approver will depend on type of material.</p> <p><u>Exceptions:</u> Pre-approval is not required for:</p> <ul style="list-style-type: none"> Previously filed materials: (1) another firm filed it with FINRA and has received a review letter from FINRA, and (2) firm using it has not made material changes and will not use in a manner inconsistent with the FINRA letter; communications excluded from research report definition and that do not include any investment recommendation; materials posted in an online interactive electronic forum; and any other communication that does not include an investment recommendation 	<p>For new members, 10 business days prior to first use: any retail communication published or used broadly.</p> <p>Within 10 business days of first use or publication: a communication concerning an SEC-registered structured product,⁵⁵ a TV or video segment</p> <p>Exceptions to filing requirement:</p> <ul style="list-style-type: none"> communications previously filed, to be used without material change; communications based on template previously filed (that will include updated statistical or changes to non-narrative info and non-predictive narrative information that describes market events during the period covered by the communication or factual changes in portfolio composition or is sourced from a registered investment company’s regulatory documents filed with the SEC); materials that do not include a recommendation or promote a product; 	<p>Three years from date of last use. File must include:</p> <ul style="list-style-type: none"> copy of communication, date of first use, date of last use, name of principal who approved, date approval received, if pre-approval not required because another firm filed it, name of firm and their FINRA review letter, and source of any statistical information or illustration.

⁵⁵ Rule 2210(c)(3)(E) includes retail communications concerning any SEC-registered security derived from or based on a single security, a basket of securities, an index, a commodity, a debt issuance or a currency.

Type of Communication	Principal Pre-Use Approval	FINRA Filing	Recordkeeping
		<ul style="list-style-type: none"> • communications that only identify an exchange symbol or a security for which the member is a market maker or offer a specific security at a price; • a prospectus or preliminary prospectus, fund profiles or annual or semi-annual reports filed with SEC or any state, or similar offering documents concerning securities offerings that are exempt from SEC and state registration, and free writing prospectuses that are exempt from SEC filing, Except that an investment company prospectus published under Rule 482 and a FWP filed with the SEC under Rule 433(d)(1)(ii) are not considered a prospectus for the purpose of this exclusion;⁵⁶ • communications prepared in accordance with Securities Act Section 2(a)(10)(b), such as Rule 134 notices; • press releases available only to media; • reprints of published articles provided (a) member is not affiliated with publisher, (b) member or issuer or underwriter of any security mentioned has not commissioned, (c) member hasn't altered contents; • correspondence; • institutional communications; • material posted on online interactive electronic forum; • research reports that concern only listed securities 	

⁵⁶ FWPs filed by an underwriter under Rule 433(d)(1)(ii) in a manner that will result in broad unrestricted distribution must be filed with FINRA, such as brochures posted on a public website, publicly available website pages about structured products.

Type of Communication	Principal Pre-Use Approval	FINRA Filing	Recordkeeping
Correspondence <ul style="list-style-type: none"> • any written/electronic communication distributed or made available to 25 or fewer retail investors within a 30-day period 	Firm shall establish reasonable supervisory review process as required by Rule 3110.	Not required to be filed.	Record retention requirements set out in Rule 3110.

Subject to Filing	Not Subject to Filing
<ul style="list-style-type: none"> • FWPs that are red herrings (filed under Rule 433(d)(1)(ii) if distributed broadly, on an unrestricted basis (“underwriter FWPs”)) • If used broadly or on an unrestricted site: <ul style="list-style-type: none"> ○ a brochure ○ a product description ○ website product discussions 	<ul style="list-style-type: none"> • Preliminary pricing supplements (424(b) filings) • Final pricing supplements (424(b) filings) • Offering documents for certificates of deposit, bank notes, or 144A issuances • FWPs that are final term sheets, filed with the SEC • FWPs that are exempt from the SEC’s filing requirements, such as preliminary or summary “term sheets” that do not contain final pricing information and are FWPs under Rule 433(d)(5)(i)

Definitions

“*Institutional communication*” means any written (including electronic) communication that is distributed or made available only to institutional investors, but does not include a member’s internal communications.⁵⁷ If a member has “reason to believe” that the communication will be forwarded to retail investors, the communication may be a “retail communication” as discussed below.

An “*institutional investor*” means any:

- A. Bank, savings and loan association, insurance company or registered investment company;
- B. Investment adviser registered either with the Securities and Exchange Commission (the “SEC”) under Section 203 of the Investment Advisers Act of 1940 or with a state securities commission (or any agency or office performing like functions); or
- C. Other person (whether a natural person, corporation, partnership, trust or otherwise) with total assets of at least \$50 million, regardless of whether the person has an account with a member;
- D. governmental entity or subdivision thereof;
- E. employee benefit plan, or multiple employee benefit plans offered to employees of the same employer, that meet the requirements of Section 403(b) or Section 457 of the Internal Revenue Code and in the aggregate have at least 100 participants, but does not include any participant of those plans;
- F. qualified plan, as defined in Section 3(a)(12)(C) of the Securities Exchange Act of 1934 (“Exchange Act”), or multiple qualified plans offered to employees of the same employer, that in the aggregate have at least 100 participants, but does not include any participant of those plans;
- G. FINRA member or registered person of that member; and
- H. person acting solely on behalf of any such institutional investor.

No member may treat a communication as having been distributed to an institutional investor if the member has reason to believe that the communication or any excerpt thereof will be forwarded or made available to any retail investor.⁵⁸

“*Retail communication*” means any written or electronic communication that is distributed or made available to more than 25 retail investors within a 30-day period. This generally includes advertisements, sales literature, reprints and even includes sales scripts intended for use with retail customers. “*Retail investor*” means any person other than an institutional investor, regardless of whether the person has an account with a member.⁵⁹

“*Correspondence*” means any written (including electronic) communication that is distributed or made available to 25 or fewer retail investors within any 30-calendar-day period.⁶⁰

Institutional Communications as Retail Communications; “Reason to Believe” Standard

If a member has “reason to believe” a communication will be forwarded to retail investors, then that communication may be a “retail communication.” The “reason to believe” standard does not impose an affirmative obligation on firms to inquire whether an institutional communication will be forwarded to retail investors every time such a communication is distributed. However, firms should have policies and procedures in place reasonably designed to prevent institutional communications from being forwarded to retail investors and make appropriate efforts to implement those policies and procedures. Those procedures may include the use of legends warning the recipient of an institutional communication that it is for institutional investor use only.⁶¹

When a member is offering securities or other investments through another member, the inclusion of a legend would not be sufficient, in and of itself, if (for example) there is reason to believe that the other member is distributing the communication to retail investors. Absent such knowledge to the contrary, a member may reasonably rely on a legend restricting usage of the communication to institutional investors in treating the communication as an institutional communication.⁶²

⁵⁷ Rule 2210(a)(3).

⁵⁸ Rule 2210(a)(4), 4512(c).

⁵⁹ Rule 2210(a)(6).

⁶⁰ Rule 2210(a)(2).

⁶¹ Notice 12-29.

⁶² FINRA Rule 2210 Questions and Answers, Institutional Communications, Q1, found at: <https://goo.gl/hrKkhd>.



To the extent that a firm becomes aware that a recipient institutional investor is forwarding or making available institutional communications to retail investors, the firm must treat future communications to such institutional investor as a retail communication until it reasonably concludes that the improper practice has ceased.⁶³

A password protected website limited to institutional investors would be an institutional communication. However, any non-password protected website or communication by means of unrestricted social media would be a retail communication.⁶⁴

Correspondence versus Retail Communication

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

Contacts

Bradley Berman

New York

T: (212) 506-2321

E: bberman@mayerbrown.com

Michael Russo

New York

T: (212) 506-2391

E: mrusso@mayerbrown.com



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⁶³ Notice 12-29.

⁶⁴ Notice 12-29.

