WHITEPAPER

NAVIGATING FINRA RULE 2210: A GUIDE TO COMPLIANT COMMUNICATION

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Advertisement and communications with investors may prove a cause for concern for investment platforms and issuers as the Financial Industry Regulatory Authority (FINRA) fine-tunes its regulations. The evolution of relevant technology has left member firms pushing the envelope and faced with the dichotomy of cutting-edge communication and older FINRA Rules which sometimes make it difficult to make decisions as to permissible communication types and content in this mercurial environment. In the past few years, however, FINRA has provided much guidance and modification of its communication rules, increasing the importance of a quick review of the contents of FINRA Rule 2210 and its impact and implications on member firm communications.

"Communications" and FINRA Rule 2210

FINRA Rule 2210 (the "Rule") governs broker dealers' communications with the public, including both retail communication and communication with institutional investors. The overall purpose aims to provide cohesive standards for the content, approval, recordkeeping, and filing of communications with FINRA. Generally speaking, broker dealers must comport with Rule 2210 when communicating with the public. Previous guidelines, however, garnered much disapproval for failure to establish clear processes and categorizations for such communications. Revamped in 2013, the new Rule represents a comprehensive reworking of the approval, filing, and content requirements.

Importantly, the Rule delineates communications into three broad categories, collapsing the previous six categories and reorganizing these buckets of "communication" based on the nature of the audience to whom the material is being communicated rather than the nature of the material being communicated, as before. The Rule defines communications as either: (1) retail communication, (2) correspondence, or (3) institutional communication. These categorizations of communication carry key implications, making an understanding of the parameters of each category integral to compliant operations.

Retail Communication

Rule 2210 defines retail communication as "any written (including electronic) communication that is distributed or made available to more than 25 retail investors within any 30 calendar-day period."[1] This represents the broadest and most scrutinized category of communication.[2]

Correspondence

According to the Rule, 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."[3] Note that this means any communication reaching exactly 25 members constitutes a

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"correspondence" rather than a "retail communication" making the size of the audience exceedingly vital. Correspondence receives a more relaxed treatment than retail communication, likely due to its less sizeable audience and therefore a lesser likelihood of misleading or harming the public.

Institutional Communication

"Any written (including electronic) communication that is distributed or made available only to institutional investors, but does not include a member's internal communications" constitutes an institutional communication under the Rule.[4] An institutional investor is a non-bank person or organization that trades securities in large enough share quantities or dollar amounts that they qualify for preferential treatment and lower commissions. Institutional investors often face fewer protective regulations because they are assumed to possess more transactional knowledge and expertise and are deemed better able to protect themselves. As a result, institutional communications receive less scrutiny than retail communications or correspondence.

Internal Communication

FINRA has further clarified that internal communications are expressly not covered by the Rule, even though previous iterations and interpretations have contemplated their inclusion. "Internal communication" refers exclusively to communications within a firm. If a firm uses material to train or educate registered representatives of other broker-dealers (whether affiliated or unaffiliated), the material would be considered an institutional communication.[5] Regardless, firms still must supervise these internal communications, including those communications used for training or education of registered representatives, to ensure compliance with suitability requirements and general equitable principles of trade.[6] The member firm additionally maintains the duty to ensure that internal training and education materials prove fair and balanced.

Permissible Content of Communications

The Rule includes both general and specific content standards. As modified in 2013, the Rule maintains the same general content standards in place prior to the revisions, namely that 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."[7] Further, members cannot make any "false, exaggerated, unwarranted, promissory, or misleading statements."[8] The general content standards applicable to all communications include:[9]

1. 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.
2. No member may omit any material fact or qualification if the omission, in light of the context of

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the material presented, would cause the communications to be misleading.

3. No member may make any false, exaggerated, unwarranted, promissory or misleading statement or claim in any communication.
4. 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.
5. Information may be placed in a legend or footnote only if that placement would not inhibit an investor's understanding of the communication or prove misleading.
6. 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.
7. Communications must be consistent with the risks of fluctuating prices and the uncertainty of dividends, rates of return and yield inherent to investments.
8. 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.

Additional, specific content requirements apply based on the type of communication and type of issuance to which the content relates. Two of the most common content types encountered by member firms remain communications including testimonials and recommendations.

Specific Requirements Concerning 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.[10] Retail communications or correspondence providing any testimonial concerning the investment advice or investment performance of a member or its products must prominently disclose:

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

Specific Requirements Concerning 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 of the recipient, available investment information supporting the recommendation. When a member recommends a corporate equity security, the member must provide the price of the security at the time the recommendation is made.[11]

All retail communications that include a recommendation of securities must disclose the following conflicts of interest, to the extent applicable:[12]

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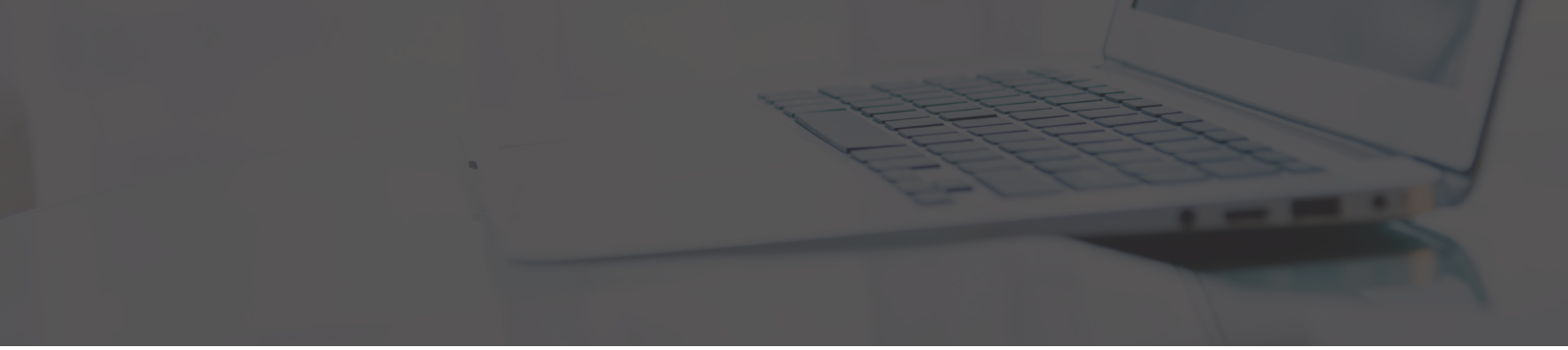

1. That, at the time the communication was published or distributed, the member was making a market in the security being recommended, or in the underlying security if the recommended security is an option or security future, or that the member or associated persons will sell to or buy from customers on a principal basis;
2. 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
3. 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.

Communications Approval and Review

Modifications to Rule 2210 now require an "appropriately qualified registered principal of the member" approve "each retail communication before the earlier of its use or filing with FINRA's Advertising Regulation Department."[13] However, a Series 16 Supervisory Analyst may review the following retail communications: (1) research reports on debt and equity securities; (2) retail communications as described in NASD Rule 2711(a)(9)(A) (list of research-related communications that do not fall within the definition of "research report" under NASD Rule 2711); and (3) other research that does not meet the definition of "research report" under NASD Rule 2711(a)(9)2, provided that the supervisory analyst has technical expertise in the particular product area.

A communication may avoid approval by a registered principal, however, 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 the communication 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.[14]

Member firms must also have written procedures for review by a principal for the review of institutional communications. The firm must reasonably design these procedures to ensure that institutional communications comply with all 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.[15]

Further, all correspondence is subject to the supervision and review requirements of FINRA Rule 3110(b)(4), which provides, in relevant 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

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and of incoming and outgoing correspondence of its registered representatives.[16] These procedures should be in writing and be designed to reasonably supervise each registered representative. The procedures should be designed to properly identify and handle customer complaints and to ensure that customer funds and securities are handled in accordance with firm procedures.

Compliant Recordkeeping

Rule 2210 prescribes detailed recordkeeping procedures as well. The Rule indicates that members must retain all retail communications and institutional communications for the retention period required under SEC Rule 17a-4(b) and, similarly, in a compliant format as required by the same. Further, these records must include the following:

1. A copy of the communication and the dates of first and (if applicable) last use;
2. The name of any registered principal who approved the communication and date of approval;
3. In the case of retail communications or institutional communications, the name of the person who prepared or distributed the communication, unless approved prior to first use;
4. Information concerning the source of any statistical data or illustration used; and
5. The name of the member that filed any retail communication with the Department for any retail communication for which a principal approval is not required along with a copy of the corresponding review letter from the Department.

Therefore, firms engaging in such communication must establish adequate procedures for maintaining appropriate records. This system should be established as early as feasible but in no event at least as early as the firm's first communications as defined by FINRA. Failure to properly retain such communications and corresponding information may subject the firm to increased scrutiny of subsequent communications and will certainly land the firm in trouble with FINRA.

Appropriate Filing with FINRA

Rule 2210 outlays a number of filing requirements for certain types of retail communications. Members may not publish or circulate these communications unless filed at least 10 business days prior to first use or publication and subsequently approved (or amended as specified) by FINRA. These categories of communications include: (1) communications concerning registered investment companies including self-created rankings; (2) communications regarding securities futures with certain exceptions; and (3) communications that include bond mutual fund volatility ratings.[17] FINRA may impose additional filing requirements on a firm as sanctions. This is most common when the firm has departed from the provided content standards. In this event, FINRA may require that all subsequent communications be filed within 10 days of first use or any period it deems reasonable.[18] Conversely, FINRA may find good cause to exempt a firm from these filing requirements altogether.[19]

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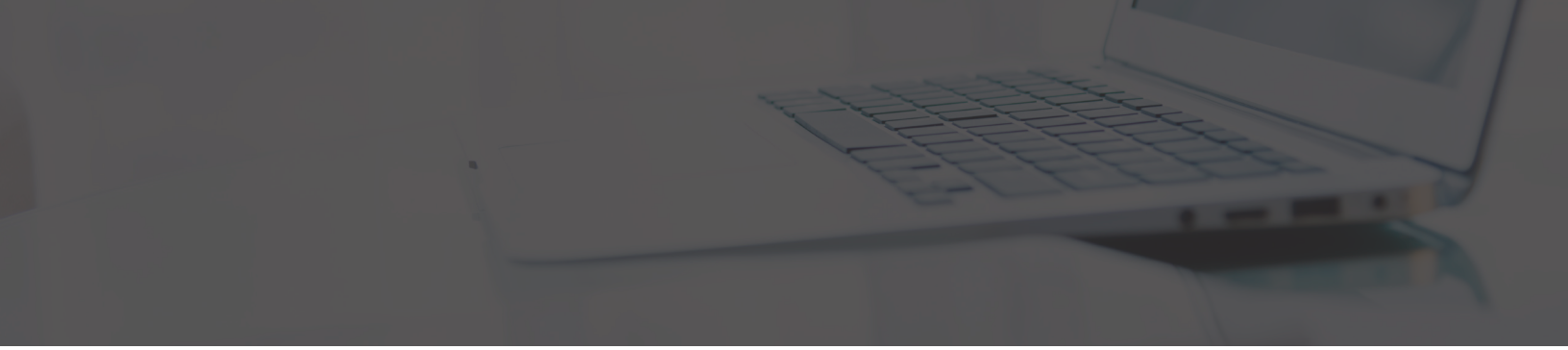

The Rule reaffirms preexisting obligations that certain other categories of retail communications be filed in the same timeframe (10 days prior to first use or publication) even though such communications are not broadly disseminated. These categories include retail communications: (1) regarding public direct participation programs; (2) templates for investing analysis tools; (3) registered investment companies, including communications regarding closed-end funds; (4) publicly offered structured or derivative products; and (5) concerning registered CMO's.[20]

Importantly, new members have additional filing requirements for the first year after FINRA membership becomes effective. Such members must follow the 10 day filing requirement for any broadly disseminated retail communications that are published or use any means of electronic or public media. This new mechanisms seeks to educate members early and prevent later infractions.

Exclusions from Filing Requirements

Certain categories of communications, however, are excluded from the above-referenced filing requirements. These include: (1) retail communications that have been previously filed and are to be used again without material change;[21] (2) retail communications based on templates that were previously filed with FINRA where any changes are limited to updating statistical or "other non-narrative" information; (3) retail communications that "do not make any financial or investment recommendation or otherwise promote a product or service" of the member;[22] (4) retail communications that only identify the listed securities stock symbol; (5) retail communications that only identify the member or stated price for securities; (6) fund profiles, or similar documents filed with the SEC or any state, not including investment company "omitting prospectuses" or free writing prospectuses; (7) retail communications announcing a member is participating in a private placement -- with some exceptions; (8) press releases provided to the media only; (9) reprints of published articles published by the member or affiliates; (10) correspondence; (11) institutional communications;[23] (12) listings of products or services offered; (13) posting on an interactive electronic forum;[24] and (14) press releases issued by NYSE listed investment companies.[25]

Implications for Social Media

Perhaps the largest area for concern today remains the relatively problematic world of social media. The Rule provides for explicit exemption[26] from pre-approval requirements for retail communications posted in online interactive forums, such as chat rooms or online seminars, that do not make any financial or investment recommendation, or otherwise promote a product or service of the member firm.[27] However, firms still must supervise and maintain records of the communications. Furthermore, such social media communications may themselves be deemed "correspondence" and therefore fall under the general exception from filing requirements enjoyed by this category of communication.[28] Such social media, however, must be supervised and reviewed by an appropriately qualified

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principal,[29] though best practices suggest a more rigid course of action. As a result, firms are not exempt from establishing protective procedures even for social media posts falling outside the requirements of the Rule; these posts remain subject to the review and retention requirements.

Use of Social Media by Associated Persons

Firms intending to allow associated persons to use social media for business purposes should first have clear and detailed supervisory policies, procedures, and controls in place. To that end, registered principals must review, prior to use, any social media site that an associated person intends to use for business purposes. Further, the principal should assess the totality of what that principal will require to adequately supervise the associated person and ensure that he has the tools to capture and review such communications.[30] Third-party service providers initially formed for the purpose of archiving e-mail and other electronic communications have expanded technology to cover these rapidly evolving social media sites. Certain of these third parties provide enhanced tools firms can leverage to supervise social media used to communicate for business purposes. Firms should consider these added features when selecting preferred social media partners, keeping in mind archiving functionality. Once a social media partner, or several partners, has been selected, the firm should discount use of any other media platform by its associated persons to prevent any noncompliant action for which the firm may be liable.

Effects of Third-Party Partner Social Media Infractions

Similarly, a firm may become responsible for third-party posts on its sites or content on third-party sites if the firm has adopted or becomes entangled with such third-party content.[31] A firm may be deemed to be "entangled" with a third-party post or content on a third-party site if the firm participates in the development or preparation of the content.[32] A firm may be deemed to "adopt" a third-party post or content on a third-party site if the firm or its personnel explicitly or implicitly endorses or approves the post or its content.[33] Further, if a firm co-brands a third-party site by, for example, placing its logo prominently on the site, it will effectively adopt the content of the *entire site*.[34] This is of particular concern to firms that often form partnerships for increased exposure and branding. Be wary of the use of your firm's logo on partner sites as well as the social media practices and policies of partners. Similarly, use of co-branding necessitates approval of all content by both parties. Ensure that a process remains in place for such approval and for ensuring the rights of involved partners.

In addition, firms may not establish a hyperlink to any third-party site that the firm knows or has reason to know contains false or misleading content.[35] Member firms should set up barriers and prominent disclaimers regarding third-party content where possible. Such barriers and disclaimers may compose the facts and circumstances that FINRA considers in analyzing whether a firm adopted

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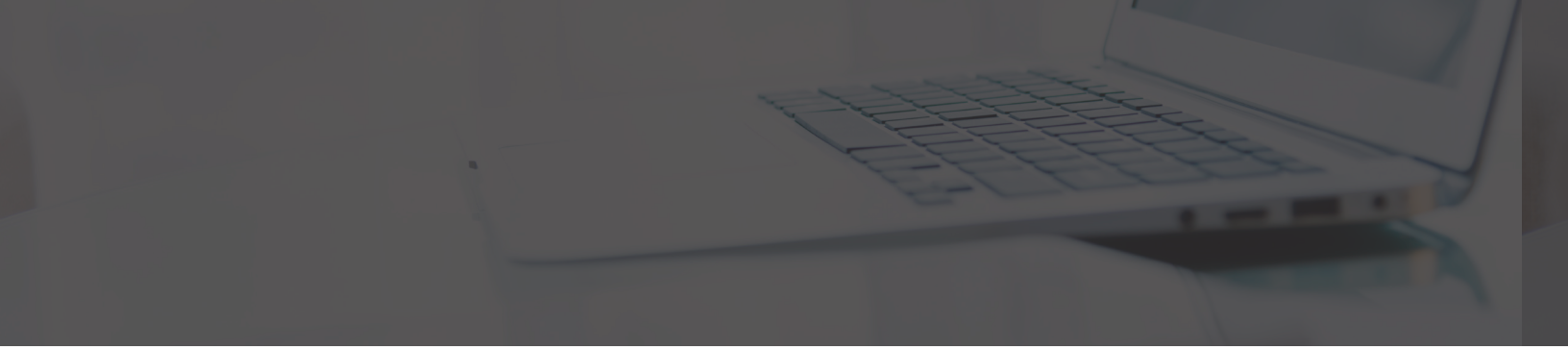

or became entangled with third-party postings.[36] Firms linking to third-party sites or posts should include a disclaimer that third-party posts do not reflect the views of the firm and have not been reviewed by the firm in order to prevent the firm from being viewed as endorsing such posts.[37]

Additional Social Media Considerations

For recordkeeping purposes, business communications made through social media must be treated no differently than any other electronic communication. Such communications must be preserved for a period of not less than 3 years, with the first 2 years preservation occurring in an easily accessible form location.[38] "The content of the communication determines whether it must be preserved, regardless of the ownership of the device used, the technology employed, or the nature of the forum used to transmit the communication."[39] This is a critical component for any firm permitting the use of social media, as each firm must be able to retrieve and retain such records to properly supervise activity.

Conclusion

FINRA continues to struggle maintaining the tenuous balance between technological advances in communication and its purpose in protecting the general public. As modified in 2013, the Rule redefines the categorization of communications with special attention paid to the audience rather than the purported purpose or content. The Rule continues to monitor the content, approval, recordkeeping, and filing of communications with FINRA. Understanding the Rule, its interpretation, and subsequent modifications and amendments remains integral to establishing and maintaining not only compliant business practices, but best practices key to elevating overall firm compliance and performance.

Additionally, investment platforms and issuers working with a broker-dealer or other associated entity must ensure that each party maintains compliant communication protocols. In order to ensure compliance, no statements should be made on behalf of an associated entity or on a site which utilizes co-branding without the express approval of all interested parties. Such approval should be secured by sending the proposed communication to all parties and requiring written approval from the designated person or communications manager. Failure to do so may implicate partners for communications violations and maintaining this process is, therefore, paramount. Further, all firms should require education early and often to verify that all employees engaged in outward communication understand the requirements and implications of FINRA's established rules and strictly maintain and enforce established procedures for complying with such rules. Compliant communication is the core of operating within the confines of FINRA's purview and remains a central pillar in cooperating with the spirit of FINRA regulation; namely the protection and education of the public seeking to invest.

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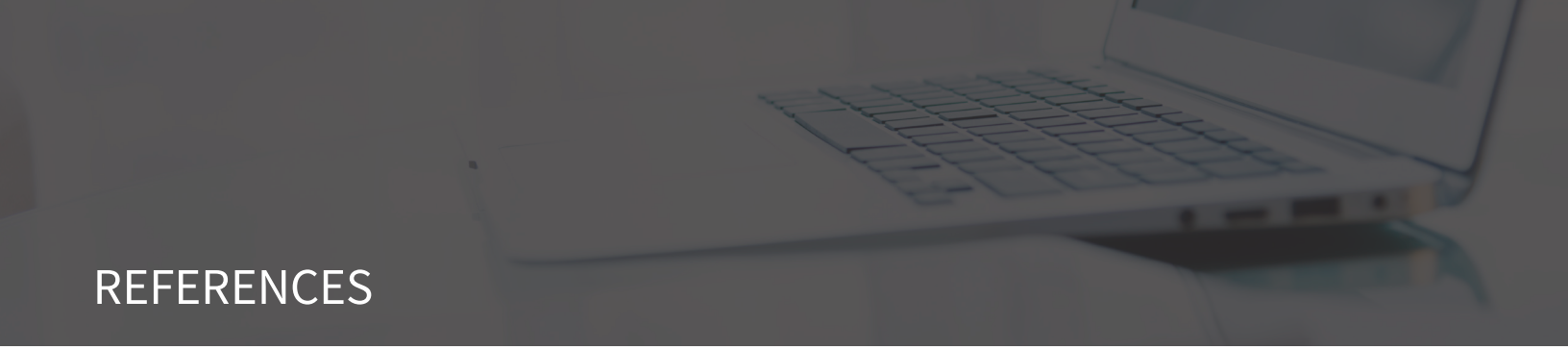

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[1] FINRA Rule 2210(a)(5).
[2] Morrison & Foerster LLP, *Frequently Asked Questions About the FINRA Communication Rules 4* (2015), available at http://www.mofo.com/~/media/Files/PDFs/CM_FAQs/FAQsFINRACommunicationRules.pdf.
[3] FINRA Rule 2210(a)(2).
[4] FINRA Rule 2210(a)(3).
[5] Financial Industry Regulatory Authority, *FINRA Rule 2210 Questions and Answers (2103), available at* https://www.finra.org/industry/finra-rule-2210-questions-and-answers.
[6] Gregory P. Gnall & Linda Riefberg, *Guide To FINRA's New Communications With The Public Rule* (Oct. 23, 2012).
[7] *Id.* (citing FINRA Rule 2210(b)(1)(A).
[8] FINRA Rule 2210(b)(1)(A).
[9] FINRA Rule 2210(d)(1).
[10] FINRA Rule 2210(d)(6).
[11] FINRA Rule 2210(d)(7)(A), (B).
[12] FINRA Rule 2210(d)(8).
[13] Rule 2210 (b)(1)(A).
[14] FINRA Rule 2210(b)(1)(C).
[15] Morrison & Foerster LLP *supra* note ii at 6.
[16] FINRA Rule 2210(b)(2).
[17] FINRA Rule 2210(c)(2).
[18] FINRA Rule 2210 (c)(1)(B).
[19] FINRA Rule 2210(c)(9).
[20] FINRA Rule 2210(c)(3).
[21] FINRA would not consider revising a retail communication to appear in a different format to be a material change, provided that the content has not materially changed. For example, if a firm has previously filed a retail communication in the format that it appears on a desktop or laptop computer, and the firm is redesigning the presentation to appear on a tablet or smart phone, the firm would not have to refile the version that will appear on a tablet or smart phone. *See* Financial Industry Regulatory Authority *supra* note v.
[22] General market commentaries or economic discussions not used for the purpose of promoting a product or service of the firm would be considered retail communications that do not make any financial or investment recommendation or otherwise promote a product or service of the member. *See* FINRA Rules 2210(b)(1)(D)(iii) & 2210(c)(7)(C) and Financial Industry Regulatory Authority *supra* note v.
[23] Unless FINRA specifically directs a firm to file its institutional communications pursuant to FINRA Rule 2210(c)(1)(B), a firm is not required to file its institutional communications with the Advertising Regulation Department. If a firm chooses voluntarily to file a third-party research report that qualifies as an institutional communication, an appropriately qualified principal must approve the report prior to filing. *See* FINRA Rule 2210(b)(1)(F) and Financial Industry Regulatory Authority *supra* note v.
[24] 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. *See* FINRA Regulatory Notice 10-06 and Financial Industry Regulatory Authority *supra* note v.
[25] *See generally* FINRA Rule 2210 and Gnall & Riefbery *supra* note vi.
[26] FINRA Rule 2210 treats interactive electronic forum posts, such as social media status updates, as retail communications rather than public appearances, however, the rule specifically excludes these posts from both the principal pre-use approval requirements and the filing requirements. *See* FINRA Rules 2210(b)(1)(D)(ii) & 2210(c)(7)(M) and *see generally* Financial Industry Regulatory Authority *supra* note v.
[27] FINRA Rule 2210(b)(1)(D).
[28] Remember that this categorization requires the communication be made to fewer than 25 retail investors.
[29] FINRA Rule 2210(b)(2).
[30] Ethan L. Silver & Jayun Koo, *FINRA's Regulation Of Its Members' Use Of Social Media* 46 SEC. & COMM. REG. REV. 237, 241 (Nov. 23, 2013).
[31] *Id.* at 242.
[32] FINRA Regulatory Notice 10-06 at 7, 8.
[33] *Id.*
[34] FINRA Regulatory Notice 11-39 at 6.
[35] *Id.* at 3.
[36] *See generally* Silver & Koo *supra* note xxx.
[37] *Id.*
[38] SEC Exchange Act Rules 17a-3 and 17a-4 and FINRA Rule 4510. Additionally, social media communications may not constitute retail communications if the site is password protected. Any non-password protected website or communication by means of unrestricted social media would be a retail communication. A password protected website limited to institutional investors would be an institutional communication and, therefore, would not trigger any filing requirement or restriction under Rule 2210.
[39] Silver & Koo *supra* note xxx at 238.