

2012 Advertising Regulation Conference

# Rules Reference Guide



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# NASD Conduct Rules

## 2210 Communications with the Public

**(a) Definitions** - For purposes of this Rule and any interpretation thereof, “communications with the public” consist of:

**(1) “Advertisement.”** Any material, other than an independently prepared reprint and institutional sales material, that is published, or used in any electronic or other public media, including any Web site, newspaper, magazine or other periodical, radio, television, telephone or tape recording, videotape display, signs or billboards, motion pictures, or telephone directories (other than routine listings).

**(2) “Sales Literature.”** Any written or electronic communication, other than an advertisement, independently prepared reprint, institutional sales material and correspondence, that is generally distributed or made generally available to customers or the public, including circulars, research reports, performance reports or summaries, form letters, telemarketing scripts, seminar texts, reprints (that are not independently prepared reprints) or excerpts of any other advertisement, sales literature or published article, and press releases concerning a member’s products or services.

**(3) “Correspondence”** as defined in Rule 2211(a)(1).

**(4) “Institutional Sales Material”** as defined in Rule 2211(a)(2).

**(5) “Public Appearance.”** Participation in a seminar, forum (including an interactive electronic forum), radio or television interview, or other public appearance or public speaking activity.

**(6) “Independently Prepared Reprint.”**

(A) Any reprint or excerpt of any article issued by a publisher, provided that:

(i) the publisher is not an affiliate of the member using the reprint or any underwriter or issuer of a security mentioned in the reprint or excerpt and that the member is promoting;

(ii) neither the member using the reprint or excerpt nor any underwriter or issuer of a security mentioned in the reprint or excerpt has commissioned the reprinted or excerpted article; and

(iii) the member using the reprint or excerpt has not materially altered its contents except as necessary to make the reprint or excerpt consistent with applicable regulatory standards or to correct factual errors;

(B) Any report concerning an investment company registered under the Investment Company Act of 1940, provided that:

(i) the report is prepared by an entity that is independent of the investment company, its affiliates, and the member using the report (the “research firm”);

(ii) the report’s contents have not been materially altered by the member using the report except as necessary to make the report consistent with applicable regulatory standards or to correct factual errors;

(iii) the research firm prepares and distributes reports based on similar research with respect to a substantial number of investment companies;

(iv) the research firm updates and distributes reports based on its research of the investment company with reasonable regularity in the normal course of the research firm’s business;

- (v) neither the investment company, its affiliates nor the member using the research report has commissioned the research used by the research firm in preparing the report; and
- (vi) if a customized report was prepared at the request of the investment company, its affiliate or a member, then the report includes only information that the research firm has already compiled and published in another report, and does not omit information in that report necessary to make the customized report fair and balanced.

## **(b) Approval and Recordkeeping**

### **(1) Registered Principal Approval for Advertisements, Sales Literature and Independently Prepared Reprints**

- (A) A registered principal of the member must approve by signature or initial and date each advertisement, item of sales literature and independently prepared reprint before the earlier of its use or filing with NASD's Advertising Regulation Department ("Department").
- (B) With respect to debt and equity securities that are the subject of research reports as that term is defined in Rule 472 of the New York Stock Exchange, the requirements of paragraph (A) may be met by the signature or initial of a supervisory analyst approved pursuant to Rule 344 of the New York Stock Exchange.
- (C) A registered principal qualified to supervise security futures activities must approve by signature or initial and date each advertisement or item of sales literature concerning security futures.
- (D) The requirements of paragraph (A) shall not apply with regard to any advertisement, item of sales literature, or independently prepared reprint if, at the time that a member intends to publish or distribute it:
  - (i) another member has filed it 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 this paragraph has not materially altered it and will not use it in a manner that is inconsistent with the conditions of the Department's letter.

### **(2) Recordkeeping**

- (A) Members must maintain all advertisements, sales literature, and independently prepared reprints in a separate file for a period beginning on the date of first use and ending three years from the date of last use. The file must include:
  - (i) a copy of the advertisement, item of sales literature or independently prepared reprint, and the dates of first and (if applicable) last use of such material;
  - (ii) the name of the registered principal who approved each advertisement, item of sales literature, and independently prepared reprint and the date that approval was given, unless such approval is not required pursuant to paragraph (b)(1)(D); and

(iii) for any advertisement, item of sales literature or independently prepared reprint for which principal approval is not required pursuant to paragraph (b)(1)(D), the name of the member that filed the advertisement, sales literature or independently prepared reprint with the Department, and a copy of the corresponding review letter from the Department.

(B) Members must maintain in a file information concerning the source of any statistical table, chart, graph or other illustration used by the member in communications with the public.

### **(c) Filing Requirements and Review Procedures**

#### **(1) Date of First Use and Approval Information**

The member must provide with each filing under this paragraph the actual or anticipated date of first use, the name and title of the registered principal who approved the advertisement or sales literature, and the date that the approval was given.

#### **(2) Requirement to File Certain Material**

Within 10 business days of first use or publication, a member must file the following communications with the Department:

(A) Advertisements and sales literature concerning registered investment companies (including mutual funds, variable contracts, continuously offered closed-end funds, and unit investment trusts) not included within the requirements of paragraph (c)(3). The filing of any advertisement or sales literature that includes or incorporates a performance ranking or performance comparison of the investment company with other investment companies must include a copy of the ranking or comparison used in the advertisement or sales literature.

(B) Advertisements and sales literature concerning public direct participation programs (as defined in FINRA Rule 2310).

(C) Advertisements concerning government securities (as defined in Section 3(a)(42) of the Act).

(D) any template for written reports produced by, or advertisements and sales literature concerning, an investment analysis tool, as such term is defined in Rule IM-2210-6.

#### **(3) Sales Literature Containing Bond Fund Volatility Ratings**

Sales literature concerning bond mutual funds that include or incorporate bond mutual fund volatility ratings, as defined in Rule IM-2210-5, shall be filed with the Department for review at least 10 business days prior to use (or such shorter period as the Department may allow in particular circumstances) for approval and, if changed by NASD, shall be withheld from publication or circulation until any changes specified by NASD have been made or, if expressly disapproved, until the sales literature has been refiled for, and has received, NASD approval. Members are not required to file advertising and sales literature which have previously been filed and which are used without change. The member must provide with each filing the actual or anticipated date of first use. Any member filing sales literature pursuant to this paragraph shall provide any supplemental information requested by the Department pertaining to the rating that is possessed by the member.

#### **(4) Requirement to File Certain Material Prior to Use**

At least 10 business days prior to first use or publication (or such shorter period as the Department may allow), a member must file the following communications with the Department and withhold them from publication or circulation until any changes specified by the Department have been made:

- (A) Advertisements and sales literature concerning registered investment companies (including mutual funds, variable contracts, continuously offered 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. Such filings must include a copy of the data on which the ranking or comparison is based.
- (B) Advertisements concerning collateralized mortgage obligations.
- (C) Advertisements concerning security futures.

#### **(5) Requirement for Certain Members to File Material Prior to Use**

(A) Each member that has not previously filed advertisements with the Department (or with a registered securities exchange having standards comparable to those contained in this Rule) must file its initial advertisement with the Department at least 10 business days prior to use and shall continue to file its advertisements at least 10 business days prior to use for a period of one year.

(B) Notwithstanding the foregoing provisions, the Department, upon review of a member's advertising and/or sales literature, and after determining that the member has departed from the standards of this Rule, may require that such member file all advertising and/or sales literature, or the portion of such member's material which is related to any specific types or classes of securities or services, with the Department, at least 10 business days prior to use.

The Department will notify the member in writing of the types of material to be filed and the length of time such requirement is to be in effect. Any filing requirement imposed under this paragraph will take effect 21 calendar days after service of the written notice, during which time the member may request a hearing under Rules 9551 and 9559.

#### **(6) Filing of Television or Video Advertisements**

If a member has filed a draft version or "story board" of a television or video advertisement pursuant to a filing requirement, then the member also must file the final filmed version within 10 business days of first use or broadcast.

#### **(7) Spot-Check Procedures**

In addition to the foregoing requirements, each member's written and electronic communications with the public may be subject to a spot-check procedure. Upon written request from the Department, each member must submit the material requested in a spot-check procedure within the time frame specified by the Department.



## **(8) Exclusions from Filing Requirements**

The following types of material are excluded from the filing requirements and (except for the material in paragraphs (G) through (J)) the foregoing spot-check procedures:

- (A) Advertisements and sales literature that previously have been filed and that are to be used without material change.
- (B) Advertisements and sales literature solely related to recruitment or changes in a member's name, personnel, electronic or postal address, ownership, offices, business structure, officers or partners, telephone or teletype numbers, or concerning a merger with, or acquisition by, another member.
- (C) Advertisements and sales literature 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.
- (D) Advertisements and sales literature that do no more than identify the member or offer a specific security at a stated price.
- (E) Prospectuses, preliminary prospectuses, fund profiles, offering circulars and similar documents that have been filed with the Securities and Exchange Commission (the "SEC") or any state, or that is exempt from such registration, except that an investment company prospectus published pursuant to SEC Rule 482 under the Securities Act of 1933 will not be considered a prospectus for purposes of this exclusion.
- (F) Advertisements prepared in accordance with Section 2(10)(b) of the Securities Act of 1933, as amended, or any rule thereunder, such as SEC Rule 134, and announcements as a matter of record that a member has participated in a private placement, unless the advertisements are related to direct participation programs or securities issued by registered investment companies.
- (G) Press releases that are made available only to members of the media.
- (H) Independently prepared reprints.
- (I) Correspondence.
- (J) Institutional sales material.

Although the material described in paragraphs (c)(8)(G) through (J) is excluded from the foregoing filing requirements, investment company communications described in those paragraphs shall be deemed filed with NASD for purposes of Section 24(b) of the Investment Company Act of 1940 and Rule 24b-3 thereunder.

**(9) Material that refers to investment company securities**, direct participation programs, or exempted securities (as defined in Section 3(a)(12) of the Act) solely as part of a listing of products or services offered by the member, is excluded from the requirements of paragraphs (c)(2) and (c)(4).

**(10) Pursuant to the Rule 9600 Series**, NASD may exempt a member or person associated with a member from the pre-filing requirements of this paragraph (c) for good cause shown.

#### **(d) Content Standards**

##### **(1) Standards Applicable to All Communications with the Public**

(A) All member communications with the public shall 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 the light of the context of the material presented, would cause the communications to be misleading.

(B) No member may make any false, exaggerated, unwarranted or misleading statement or claim in any communication with the public. No member may publish, circulate or distribute any public communication that the member knows or has reason to know contains any untrue statement of a material fact or is otherwise false or misleading.

(C) Information may be placed in a legend or footnote only in the event that such placement would not inhibit an investor's understanding of the communication.

(D) Communications with the public may not predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast. A hypothetical illustration of mathematical principles is permitted, provided that it does not predict or project the performance of an investment or investment strategy.

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

##### **(2) Standards Applicable to Advertisements and Sales Literature**

(A) Advertisements or sales literature providing any testimonial concerning the investment advice or investment performance of a member or its products must prominently disclose the following:

(i) The fact that the testimonial may not be representative of the experience of other clients.

(ii) The fact that the testimonial is no guarantee of future performance or success.

(iii) If more than a nominal sum is paid, the fact that it is a paid testimonial.

(B) Any comparison in advertisements or sales literature between investments or services 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.

(C) All advertisements and sales literature must:

- (i) prominently disclose the name of the member and may also include a fictional name by which the member is commonly recognized or which is required by any state or jurisdiction;
- (ii) reflect any relationship between the member and any non-member or individual who is also named; and
- (iii) if it includes other names, reflect which products or services are being offered by the member.

This paragraph (C) does not apply to so-called “blind” advertisements used to recruit personnel.

### **(3) Disclosure of Fees, Expenses and Standardized Performance**

(A) Communications with the public, other than institutional sales material and public appearances, that present non-money market fund open-end management investment company performance data as permitted by Rule 482 under the Securities Act of 1933 and Rule 34b-1 under the Investment Company Act of 1940 must disclose:

- (i) the standardized performance information mandated by Rule 482 and Rule 34b-1; and
- (ii) to the extent applicable:
  - a. the maximum sales charge imposed on purchases or the maximum deferred sales charge, as stated in the investment company’s prospectus current as of the date of submission of an advertisement for publication, or as of the date of distribution of other communications with the public; and
  - b. the total annual fund operating expense ratio, gross of any fee waivers or expense reimbursements, as stated in the fee table of the investment company’s prospectus described in paragraph (a).

(B) All of the information required by paragraph (A) must be set forth prominently, and in any print advertisement, in a prominent text box that contains only the required information and, at the member’s option, comparative performance and fee data and disclosures required by Rule 482 and Rule 34b-1.

### **(e) Violation of Other Rules**

Any violation by a member of any rule of the SEC, the Securities Investor Protection Corporation or the Municipal Securities Rulemaking Board applicable to member communications with the public will be deemed a violation of this Rule 2210.

*[Amended by SR-FINRA-2008-044 eff. Feb. 5, 2009.]*

*Selected Notices to Members: 98-83, 99-16, 00-15, 00-22, 03-38, 04-36, 06-48, 09-10.*

## **IM-2210-1 Guidelines to Ensure That Communications With the Public Are Not Misleading**

Every member is responsible for determining whether any communication with the public, including material that has been filed with the Department, complies with all applicable standards, including the requirement that the communication not be misleading. In order to meet this responsibility, member communications with the public must conform with the following guidelines. These guidelines do not represent an exclusive list of considerations that a member must make in determining whether a communication with the public complies with all applicable standards.

(1) Members must ensure that statements are not misleading within the context in which they are made. A statement made in one context may be misleading even though such a statement could be appropriate in another context. An essential test in this regard is the balanced treatment of risks and potential benefits. Member communications should be consistent with the risks of fluctuating prices and the uncertainty of dividends, rates of return and yield inherent to investments.

(2) Members must consider the nature of the audience to which the communication will be directed. Different levels of explanation or detail may be necessary depending on the audience to which a communication is directed. Members must keep in mind that it is not always possible to restrict the audience that may have access to a particular communication with the public. Additional information or a different presentation of information may be required depending upon the medium used for a particular communication and the possibility that the communication will reach a larger or different audience than the one initially targeted.

(3) Member communications must be clear. A statement made in an unclear manner can cause a misunderstanding. A complex or overly technical explanation may be more confusing than too little information.

(4) In communications with the public, income or investment returns may not be characterized as tax-free or exempt from income tax when tax liability is merely postponed or deferred, such as when taxes are payable upon redemption.

(5) In advertisements and sales literature, 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. For example, 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.

(6) Recommendations

(A) In making a recommendation in advertisements and sales literature, whether or not labeled as such, a member must have a reasonable basis for the recommendation and must disclose any of the following situations which are applicable:

(i) that at the time the advertisement or sales literature was published, the member was making a market in the securities 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;

(ii) that the member and/or its officers or partners have 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;

(iii) that the member was manager or co-manager of a public offering of any securities of the recommended issuer within the past 12 months.

(B) The member shall also provide, or offer to furnish upon request, available investment information supporting the recommendation. Recommendations on behalf of corporate equities must provide the price at the time the recommendation is made.

(C) A member may use material referring to past recommendations if it sets forth all recommendations as to the same type, kind, grade or classification of securities made by a member within the last year. Longer periods of years may be covered if they are consecutive and include the most recent year. Such material must also name each security recommended and give the date and nature of each recommendation (e.g., whether to buy or sell), the price at the time of the recommendation, the price at which or the price range within which the recommendation was to be acted upon, and indicate the general market conditions during the period covered.

(D) Also permitted is material that does not make any specific recommendation but which offers to furnish a list of all recommendations made by a member within the past year or over longer periods of consecutive years, including the most recent year, if this list contains all the information specified in subparagraph (C). Neither the list of recommendations, nor material offering such list, shall imply comparable future performance. Reference to the results of a previous specific recommendation, including such a reference in a follow-up research report or market letter, is prohibited if the intent or the effect is to show the success of a past recommendation, unless all of the foregoing requirements with respect to past recommendations are met.

*[Adopted by SR-NASD-2000-12 eff. Nov. 3, 2003. ]*  
*Selected Notices to Members: 03-38.*

## **IM-2210-2 Communications with the Public About Variable Life Insurance and Variable Annuities**

The standards governing communications with the public are set forth in Rule 2210. In addition to those standards, the following guidelines must be considered in preparing advertisements and sales literature about variable life insurance and variable annuities. The guidelines are applicable to advertisements and sales literature as defined in Rule 2210, as well as individualized communications such as personalized letters and computer generated illustrations, whether printed or made available on-screen.

### **(a) General Considerations**

#### **(1) Product Identification**

In order to assure that investors understand exactly what security is being discussed, all communications must clearly describe the product as either a variable life insurance policy or a variable annuity, as applicable. Member firms may use proprietary names in addition to this description. In cases where the proprietary name includes a description of the type of security being offered, there is no requirement to include a generalized description. For example, if the material includes a name such as the “XYZ Variable Life Insurance Policy,” it is not necessary to include a statement indicating that the security is a variable life insurance policy. Considering the significant differences between mutual funds and variable products, the presentation must not represent or imply that the product being offered or its underlying account is a mutual fund.

#### **(2) Liquidity**

Considering that variable life insurance and variable annuities frequently involve substantial charges and/or tax penalties for early withdrawals, there must be no representation or implication that these are short-term, liquid investments. Presentations regarding liquidity or ease of access to investment values must be balanced by clear language describing the negative impact of early redemptions. Examples of this negative impact may be the payment of contingent deferred sales loads and tax penalties, and the fact that the investor may receive less than the original invested amount. With respect to variable life insurance, discussions of loans and withdrawals must explain their impact on cash values and death benefits.

#### **(3) Claims About Guarantees**

Insurance companies issuing variable life insurance and variable annuities provide a number of specific guarantees. For example, an insurance company may guarantee a minimum death benefit for a variable life insurance policy or the company may guarantee a schedule of payments to a variable annuity owner. Variable life insurance policies and variable annuities may also offer a fixed investment account which is guaranteed by the insurance company. The relative safety resulting from such a guarantee must not be overemphasized or exaggerated as it depends on the claims-paying ability of the issuing insurance company. There must be no representation or implication that a guarantee applies to the investment return or principal value of the separate account. Similarly, it must not be represented or implied that an insurance company's financial ratings apply to the separate account.

### **(b) Specific Considerations**

#### **(1) Fund Performance Predating Inclusion in the Variable Product**

In order to show how an existing fund would have performed had it been an investment option within a variable life insurance policy or variable annuity, communications may contain the fund's historical performance that predates its inclusion in the policy or annuity. Such performance may only be used provided that no significant changes occurred to the fund at the time or after it became part of the variable product. However, communications may not

include the performance of an existing fund for the purposes of promoting investment in a similar, but new, investment option (i.e., clone fund or model fund) available in a variable contract. The presentation of historical performance must conform to applicable NASD and SEC standards. Particular attention must be given to including all elements of return and deducting applicable charges and expenses.

## **(2) Product Comparisons**

A comparison of investment products may be used provided the comparison complies with applicable requirements set forth under Rule 2210. Particular attention must be paid to the specific standards regarding “comparisons” set forth in Rule 2210(d)(2)(B).

## **(3) Use of Rankings**

A ranking which reflects the relative performance of the separate account or the underlying investment option may be included in advertisements and sales literature provided its use is consistent with the standards contained in IM-2210-3.

## **(4) Discussions Regarding Insurance and Investment Features of Variable Life Insurance**

Communications on behalf of single premium variable life insurance may emphasize the investment features of the product provided an adequate explanation of the life insurance features is given. Sales material for other types of variable life insurance must provide a balanced discussion of these features.

## **(5) Hypothetical Illustrations of Rates of Return in Variable Life Insurance Sales Literature and Personalized Illustrations**

### **(A)**

(i) Hypothetical illustrations using assumed rates of return may be used to demonstrate the way a variable life insurance policy operates. The illustrations show how the performance of the underlying investment accounts could affect the policy cash value and death benefit. These illustrations may not be used to project or predict investment results as such forecasts are strictly prohibited by the Rules. The methodology and format of hypothetical illustrations must be modeled after the required illustrations in the prospectus.

(ii) An illustration may use any combination of assumed investment returns up to and including a gross rate of 12%, provided that one of the returns is a 0% gross rate. Although the maximum assumed rate of 12% may be acceptable, members are urged to assure that the maximum rate illustrated is reasonable considering market conditions and the available investment options. The purpose of the required 0% rate of return is to demonstrate how a lack of growth in the underlying investment accounts may affect policy values and to reinforce the hypothetical nature of the illustration.

(iii) The illustrations must reflect the maximum (guaranteed) mortality and expense charges associated with the policy for each assumed rate of return. Current charges may be illustrated in addition to the maximum charges.

(iv) Preceding any illustration there must be a prominent explanation that the purpose of the illustration is to show how the performance of the underlying investment accounts could affect the policy cash value and death benefit. The explanation must also state that the illustration is hypothetical and may not be used to project or predict investment results.

(B) In sales literature which includes hypothetical illustrations, member firms may provide a personalized illustration which reflects factors relating to the individual customer's circumstances. A personalized illustration may not contain a rate of return greater than 12% and must follow all of the standards set forth in subparagraph (A), above.

(C) In general, it is inappropriate to compare a variable life insurance policy with another product based on hypothetical performance as this type of presentation goes beyond the singular purpose of illustrating how the performance of the underlying investment accounts could affect the policy cash value and death benefit. It is permissible, however, to use a hypothetical illustration in order to compare a variable life insurance policy to a term policy with the difference in cost invested in a side product. The sole purpose of this type of illustration would be to demonstrate the concept of tax-deferred growth as a result of investing in the variable product. The following conditions must be met in order to make this type of comparison balanced and complete:

- (i) the comparative illustration must be accompanied by an illustration which reflects the standards outlined in subparagraph (A), above;
- (ii) the rate of return used in the comparative illustration must be no greater than 12%;
- (iii) the rate of return assumed for the side product and the variable life policy must be the same;
- (iv) the same fees deducted from the required prospectus illustration must be deducted from the comparative illustration;
- (v) the side product must be illustrated using gross values which do not reflect the deduction of any fees; and,
- (vi) the side product must not be identified or characterized as any specific investment or investment type.

*[Amended by SR-NASD-2004-176 eff. Jan. 1, 2005.]*  
*Selected Notice to Members: 03-38.*



## **IM-2210-3 Use of Rankings in Investment Companies Advertisements and Sales Literature**

### **(a) Definition of “Ranking Entity”**

For purposes of the following guidelines, the term “Ranking Entity” refers to any entity that provides general information about investment companies to the public, that is independent of the investment company and its affiliates, and whose services are not procured by the investment company or any of its affiliates to assign the investment company a ranking.

### **(b) General Prohibition**

Members may not use investment company rankings in any advertisement or item of sales literature other than (1) rankings created and published by Ranking Entities or (2) rankings created by an investment company or an investment company affiliate but based on the performance measurements of a Ranking Entity. Rankings in advertisements and sales literature also must conform to the following requirements.

### **(c) Required Disclosures**

#### **(1) Headlines/Prominent Statements**

A headline or other prominent statement must not state or imply that an investment company or investment company family is the best performer in a category unless it is actually ranked first in the category.

#### **(2) Required Prominent Disclosure**

All advertisements and sales literature containing an investment company ranking must disclose prominently:

- (A) the name of the category (e.g., growth);
- (B) the number of investment companies or, if applicable, investment company families, in the category;
- (C) the name of the Ranking Entity and, if applicable, the fact that the investment company or an affiliate created the category or subcategory;
- (D) the length of the period (or the first day of the period) and its ending date; and
- (E) criteria on which the ranking is based (e.g., total return, risk-adjusted performance).

#### **(3) Other Required Disclosure**

All advertisements and sales literature containing an investment company ranking also must disclose:

- (A) the fact that past performance is no guarantee of future results;
- (B) for investment companies that assess front-end sales loads, whether the ranking takes those loads into account;
- (C) if the ranking is based on total return or the current SEC standardized yield, and fees have been waived or expenses advanced during the period on which the ranking is based and the waiver or advancement had a material effect on the total return or yield for that period, a statement to that effect;
- (D) the publisher of the ranking data (e.g., “ABC Magazine, June 2003”); and
- (E) if the ranking consists of a symbol (e.g., a star system) rather than a number, the meaning of the symbol (e.g., a four-star ranking indicates that the fund is in the top 30% of all investment companies).

#### **(d) Time Periods**

##### **(1) Current Rankings**

Any investment company ranking included in an item of sales literature must be, at a minimum, current to the most recent calendar quarter ended prior to use. Any investment company ranking included in an advertisement must be, at minimum, current to the most recent calendar quarter ended prior to the submission for publication. If no ranking that meets this requirement is available from the Ranking Entity, then a member may only use the most current ranking available from the Ranking Entity unless use of the most current ranking would be misleading, in which case no ranking from the Ranking Entity may be used.

##### **(2) Rankings Time Periods; Use of Yield Rankings**

Except for money market mutual funds:

(A) advertisements and sales literature may not present any ranking that covers a period of less than one year, unless the ranking is based on yield;

(B) an investment company ranking based on total return must be accompanied by rankings based on total return for a one year period for investment companies in existence for at least one year; one and five year periods for investment companies in existence for at least five years, and one, five and ten year periods for investment companies in existence for at least ten years supplied by the same Ranking Entity, relating to the same investment category, and based on the same time period; provided that, if rankings for such one, five and ten year time periods are not published by the Ranking Entity, then rankings representing short, medium and long term performance must be provided in place of rankings for the required time periods; and

(C) an investment company ranking based on yield may be based only on the current SEC standardized yield and must be accompanied by total return rankings for the time periods specified in paragraph (d)(2)(B).

#### **(e) Categories**

(1) The choice of category (including a subcategory of a broader category) on which the investment company ranking is based must be one that provides a sound basis for evaluating the performance of the investment company.

(2) An investment company ranking must be based only on (A) a category or subcategory created and published by a Ranking Entity or (B) a category or subcategory created by an investment company or an investment company affiliate but based on the performance measurements of a Ranking Entity.

(3) An advertisement or sales literature may not use any category or subcategory that is based upon the asset size of an investment company or investment company family, whether or not it has been created by a Ranking Entity.

**(f) Multiple Class/Two-Tier Funds**

Investment company rankings for more than one class of investment company with the same portfolio must be accompanied by prominent disclosure of the fact that the investment companies or classes have a common portfolio.

**(g) Investment Company Families**

Advertisements and sales literature may contain rankings of investment company families, provided that these rankings comply with the guidelines above, and further provided that no advertisement or sales literature for an individual investment company may provide a ranking of an investment company family unless it also prominently discloses the various rankings for the individual investment company supplied by the same Ranking Entity, as described in paragraph (d)(2)(B). For purposes of this IM-2210-3, the term “investment company family” means any two or more registered investment companies or series thereof that hold themselves out to investors as related companies for purposes of investment and investor services.

*[Amended by SR-NASD-2000-12 eff. Nov. 3, 2003.]*

*Selected Notices to Members: 86-41, 92-59, 93-18, 93-73, 93-76, 93-85, 93-87, 94-16, 94-25, 94-36, 94-60, 95-49, 95-74, 95-80.*

#### **IM-2210-4 Limitations on Use of FINRA's Name and Any Other Corporate Name Owned by FINRA**

Members may indicate FINRA membership in conformity with Article XV, Section 2 of the FINRA By-Laws in one or more of the following ways:

- (1) in any communication with the public, provided that the communication complies with the applicable standards of Rule 2210 and neither states nor implies that FINRA or any other corporate name or facility owned by FINRA, or any other regulatory organization endorses, indemnifies, or guarantees the member's business practices, selling methods, the class or type of securities offered, or any specific security;
- (2) in a confirmation statement for an over-the-counter transaction that states: "This transaction has been executed in conformity with the NASD Uniform Practice Code."
- (3) on a member's internet Web site provided that the member provides a hyperlink to FINRA's internet home page, [www.finra.org](http://www.finra.org), in close proximity to the member's indication of FINRA membership. A member is not required to provide more than one such hyperlink on its Web site. If the member's Web site contains more than one indication of FINRA membership, the member may elect to provide any one hyperlink in close proximity to any reference reasonably designed to draw the public's attention to FINRA membership. This provision also shall apply to an internet Web site relating to the member's investment banking or securities business maintained by or on behalf of any person associated with a member.

*[Amended by SR-FINRA-2007-014 eff. Nov. 17, 2007.]*  
*Selected Notice to Members: 04-64, 07-02, 07-47.*

## **IM-2210-5 Requirements for the Use of Bond Mutual Fund Volatility Ratings**

### **(a) Definition of Bond Mutual Fund Volatility Ratings**

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

### **(b) Prohibitions on Use**

Members and persons associated with a member may use a bond mutual fund volatility rating only in supplemental sales literature and only when the following requirements are satisfied:

- (1) The rating does not identify or describe volatility as a “risk” rating.
- (2) The supplemental sales literature incorporates the most recently available rating and reflects information that, at a minimum, is current to the most recently completed calendar quarter ended prior to use.
- (3) The criteria and methodology used to determine the rating must be based exclusively on objective, quantifiable factors. The rating and the Disclosure Statement that accompanies the rating must be clear, concise, and understandable.
- (4) The supplemental sales literature conforms to the disclosure requirements described in paragraph (c).
- (5) The entity that issued the rating provides detailed disclosure on its rating methodology to investors through a toll-free telephone number, a web site, or both.

### **(c) Disclosure Requirements**

- (1) Supplemental sales literature containing a bond mutual fund volatility rating shall include a Disclosure Statement containing all the information required by this Rule. The Disclosure Statement may also contain any additional information that is relevant to an investor’s understanding of the rating.
- (2) Supplemental sales literature containing a bond mutual fund volatility rating shall contain all current bond mutual fund volatility ratings that have been issued with respect to the fund. Information concerning multiple ratings may be combined in the Disclosure Statement, provided that the applicability of the information to each rating is clear.
- (3) All bond mutual fund volatility ratings shall be contained within the text of the Disclosure Statement. The following disclosures shall be provided with respect to each such rating:
  - (A) the name of the entity that issued the rating;
  - (B) the most current rating and date of the current rating, with an explanation of the reason for any change in the current rating from the most recent prior rating;

- (C) a description of the rating in narrative form, containing the following disclosures:
- (i) a statement that there is no standard method for assigning ratings;
  - (ii) a description of the criteria and methodologies used to determine the rating;
  - (iii) a statement that not all bond funds have volatility ratings;
  - (iv) whether consideration was paid in connection with obtaining the issuance of the rating;
  - (v) a description of the types of risks the rating measures (e.g., short-term volatility);
  - (vi) a statement that the portfolio may have changed since the date of the rating; and
  - (vii) a statement that there is no guarantee that the fund will continue to have the same rating or perform in the future as rated.

*[Amended by SR-NASD-2005-117 eff. Dec. 27, 2005.]*  
*Selected Notices to Members: 96-84, 00-17, 00-23.*

## IM-2210-6 Requirements for the Use of Investment Analysis Tools

### (a) General Considerations

This Interpretive Material provides a limited exception to NASD Rule 2210(d)(1)(D).[1] No member may imply that NASD endorses or approves the use of any investment analysis tool or any recommendation based on such a tool. A member that offers or intends to offer an investment analysis tool under this Interpretive Material (whether customers use the member's tool independently or with assistance from the member) must, within 10 days of first use, (1) provide NASD's Advertising Regulation Department (Department) access to the investment analysis tool and (2) pursuant to Rule 2210(c)(2)(D), file with the Department any template for written reports produced by, or advertisements and sales literature concerning, the tool.[2] The member also must provide any supplemental information requested by the Department. The Department may require that the member modify the investment analysis tool, written-report template, advertisement or sales literature. The Department also may require that the member not offer or continue to offer or use the tool, written-report template, advertisement or sales literature until all changes specified by the Department have been made by the member.

A member that offers an investment analysis tool exclusively to "institutional investors," as defined in Rule 2211(a)(3), is not subject to the post-use access and filing requirement in this paragraph if the communications relating to or produced by the tool meet the criteria for "institutional sales material," as defined in Rule 2211(a)(2). A member that intends to make the tool available to, or that intends to use the tool with, any person other than an institutional investor (such as an employee benefit plan participant or a retail broker-dealer customer) will be subject to the filing and access requirements, however.

As in all cases, a member's compliance with this Interpretive Material does not mean that the member is acting in conformity with other applicable laws and rules. A member that offers an investment analysis tool under this Interpretive Material (whether customers use the member's tool independently or with assistance from the member) is responsible for ensuring that use of the investment analysis tool and all recommendations based on the investment analysis tool (whether made via the automated tool or a written report) comply, as applicable, with NASD's suitability rule (Rule 2310), the other provisions of Rule 2210 (including, but not limited to, the principles of fair dealing and good faith, the prohibition on exaggerated, unwarranted or misleading statements or claims, and any other applicable filing requirements for advertisements and sales literature), the federal securities laws (including, but not limited to, the antifraud provisions), the Securities and Exchange Commission rules (including, but not limited to, SEC Rule 156 under the Securities Act of 1933) and other NASD rules.

### (b) Definition

For purposes of this Interpretive Material and any interpretation thereof, an "investment analysis tool" is 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 the potential risks and returns of investment choices.

### (c) Use of Investment Analysis Tools and Related Written Reports and Sales Material

A member may provide an investment analysis tool (whether customers use the member's tool independently or with assistance from the member), written reports indicating the results generated by such tool and related advertisements and sales literature<sup>[3]</sup> only if:

- (1) the member describes the criteria and methodology used, including the investment analysis tool's limitations and key assumptions;
- (2) the member explains that results may vary with each use and over time;
- (3) if applicable, the member describes the universe of investments considered in the analysis, explains how the tool determines which securities to select, discloses if the tool favors certain securities and, if so, explains the reason for the selectivity,<sup>[4]</sup> and states that other investments not considered may have characteristics similar or superior to those being analyzed; and
- (4) the member displays the following additional disclosure: "IMPORTANT: The projections or other information generated by [name of investment analysis tool] regarding the likelihood of various investment outcomes are hypothetical in nature, do not reflect actual investment results and are not guarantees of future results."

### (d) Disclosures

The disclosures and other required information discussed in paragraph (c) must be clear and prominent and must be in written or electronic narrative form.

*[Adopted by SR-NASD-2006-105 eff. September 7, 2006.]*  
*Selected Notices to Members: 04-86.*

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### Endnotes

- 1 NASD Rule 2210(d)(1)(D) states that "[c]ommunications with the public may not predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast." This Interpretive Material allows member firms to offer investment analysis tools (whether customers use the member's tool independently or with assistance from the member), written reports indicating the results generated by such tools and related advertisements and sales literature in certain circumstances.  
  
Rule 2210(d)(1)(D) does not prohibit, and this Interpretive Material does not apply to, hypothetical illustrations of mathematical principles that do not predict or project the performance of an investment or investment strategy.
- 2 After the Department has reviewed the investment analysis tool, written-report template, advertisement or sales literature, a member must notify the Department and provide additional access to the tool and re-file any template, advertisement or sales literature if it makes a material change to the presentation of information or disclosures as required by paragraphs (c) and (d).
- 3 An advertisement or sales literature that contains only an incidental reference to an investment analysis tool (e.g., a brochure that merely mentions a member's tool as one of the services offered by the member) need not include the disclosures required by this Interpretive Material and would not need to be filed with the Department, unless otherwise required by the other provisions of Rule 2210.
- 4 This disclosure must indicate, among other things, whether the investment analysis tool searches, analyzes or in any way favors certain securities within the universe of securities considered based on revenue received by the member in connection with the sale of those securities or based on relationships or understandings between the member and the entity that created the investment analysis tool. The disclosure also must indicate whether the investment analysis tool is limited to searching, analyzing or in any way favoring securities in which the member makes a market or has any other direct or indirect interest. Members are not required to provide a "negative" disclosure (i.e., a disclosure indicating that the tool does not favor certain securities).



## **IM-2210-7 Guidelines for Communications with the Public Regarding Security Futures**

### **(a) NASD Approval Requirements and Review Procedures**

- (1) As set forth in paragraph (c)(4) of Rule 2210, all advertisements concerning security futures shall be submitted to the Advertising Regulation Department of NASD at least ten days prior to use for approval and, if changed by NASD, shall be withheld from circulation until any changes specified by NASD have been made or, in the event of disapproval, until the advertisement has been refiled for, or has received, NASD approval.
- (2) The requirements of this paragraph (a) shall not be applicable to:
  - (A) advertisements submitted to another self-regulatory organization having comparable standards pertaining to such advertisements, and
  - (B) advertisements in which the only reference to security futures is contained in a listing of the services of a member organization.

### **(b) Disclosure Statement**

- (1) All communications concerning security futures shall be accompanied or preceded by the security futures risk disclosure statement unless they meet the following requirements:
  - (A) Such communications shall be limited to general descriptions of the security futures being offered.
  - (B) Such communications shall contain contact information for obtaining a copy of the security futures risk disclosure statement.
  - (C) Such communications shall not contain recommendations or past or projected performance figures, including annualized rates of return.
- (2) Communications concerning security futures that meet the requirements of subparagraph (1) may have the following characteristics:
  - (A) the text of the communication may contain a brief description of security futures, including a statement that identifies registered clearing agencies for security futures. The text may also contain a brief description of the general attributes and method of operation of the security exchange or notice-registered securities exchange on which such security futures are traded, including a discussion of how a security future is priced;
  - (B) the communication may include any statement required by any state law or administrative authority; and
  - (C) advertising designs and devices, including borders, scrolls, arrows, pointers, multiple and combined logos and unusual type faces and lettering as well as attention-getting headlines and photographs and other graphics may be used, provided such material is not misleading.

### **(c) Recordkeeping**

Consistent with paragraph (b)(2) of Rule 2210, a member shall keep a separate file of all advertisements and sales literature concerning security futures, including the name(s) of the person(s) who prepared them and approved their use for a period of three years from the date of each use. In addition, members shall meet the same recordkeeping requirements for all correspondence concerning security futures. In the case of sales literature concerning security futures, a member shall record the source of any recommendation contained therein.

#### (d) Specific Standards

- (1) The special risks attendant to security futures transactions and the complexities of certain security futures investment strategies shall be reflected in any communications that discuss the uses or advantages of security futures. Any statement referring to the potential opportunities or advantages presented by security futures shall be balanced by a statement of the corresponding risks. The risk statement shall reflect the same degree of specificity as the statement of opportunities, and broad generalities should be avoided.
- (2) Security futures communications shall include a warning to the effect that security futures are not suitable for all investors and such communications shall not contain suggestions to the contrary.
- (3) Security futures communications shall state that supporting documentation for any claims (including any claims made on behalf of security futures programs or the security futures expertise of sales persons), comparisons, recommendations, statistics or other technical data, will be supplied upon request.
- (4) No cautionary statements or caveats, often called hedge clauses, may be used in communications with the public if they are not legible, are misleading, or are inconsistent with the content of the material.
- (5) Statements suggesting the certain availability of a secondary market for security futures shall not be made.

#### (e) Projections

Notwithstanding the provisions of Rule 2210(d)(1)(D), security futures sales literature and correspondence may contain projected performance figures (including projected annualized rates of return), provided that:

- (1) all such sales literature and correspondence must be accompanied or preceded by the security futures risk disclosure statement;
- (2) no suggestion of certainty of future performance is made;
- (3) parameters relating to such performance figures are clearly established;
- (4) all relevant costs, including commissions, fees, and interest charges (as applicable) are disclosed and reflected in the projections;
- (5) such projections are plausible and are intended as a source of reference or a comparative device to be used in the development of a recommendation;
- (6) all material assumptions made in such calculations are clearly identified;
- (7) the risks involved in the proposed transactions are also disclosed; and
- (8) in communications relating to annualized rates of return, that such returns are not based upon any less than a sixty-day experience; any formulas used in making calculations are clearly displayed; and a statement is included to the effect that the annualized returns cited might be achieved only if the parameters described can be duplicated and that there is no certainty of doing so.

#### **(f) Historical Performance**

Security futures sales literature and correspondence may feature records and statistics that portray the performance of past recommendations or of actual transactions, provided that:

- (1) all such sales literature and correspondence must be accompanied or preceded by the security futures risk disclosure statement;
- (2) any such portrayal is done in a balanced manner, and consists of records or statistics that are confined to a specific “universe” that can be fully isolated and circumscribed and that covers at least the most recent 12-month period;
- (3) such communications include the date of each initial recommendation or transaction, the price of each such recommendation or transaction as of such date, and the date and price of each recommendation or transaction at the end of the period or when liquidation was suggested or effected, whichever was earlier; provided that if the communications are limited to summarized or averaged records or statistics, in lieu of the complete record there may be included the number of items recommended or transacted, the number that advanced and the number that declined, together with an offer to provide the complete record upon request;
- (4) such communications disclose all relevant costs, including commissions, fees, and daily margin obligations (as applicable);
- (5) whenever such communications contain annualized rates of return, such communications shall disclose all material assumptions used in the process of annualization;
- (6) an indication is provided of the general market conditions during the period(s) covered, and any comparison made between such records and statistics and the overall market (e.g., comparison to an index) is valid;
- (7) such communications state that the results presented should not and cannot be viewed as an indicator of future performance; and
- (8) a principal qualified to supervise security futures activities determines that the records or statistics fairly present the status of the recommendations or transactions reported upon and so initials the report.

#### **(g) Security Futures Programs**

In communications regarding a security futures program (i.e., an investment plan employing the systematic use of one or more security futures strategies), the cumulative history or unproven nature of the program and its underlying assumptions shall be disclosed.

#### **(h) Standard Forms of Worksheets**

Such worksheets must be uniform within a member firm. If a member has adopted a standard form of worksheet for a particular security futures strategy, nonstandard worksheets for that strategy may not be used.

#### **(i) Recordkeeping**

Communications that portray performance of past recommendations or actual transactions and completed worksheets shall be kept at a place easily accessible to the sales office for the accounts or customers involved.

*[Amended by SR-NASD-2000-12 eff. Nov. 3, 2003.]*

## IM-2210-8 Communications with the Public About Collateralized Mortgage Obligations (CMOs)

### (a) Definition

For purposes of the following guidelines, the term “collateralized mortgage obligation” (CMO) refers to a multiclass debt instrument backed by a pool of mortgage pass-through securities or mortgage loans, including real estate mortgage investment conduits (REMICs) as defined in the Tax Reform Act of 1986.

### (b) Disclosure Standards and Required Educational Material

#### (1) Disclosure Standards

All advertisements, sales literature and correspondence concerning CMOs:

- (A) must include within the name of the product the term “Collateralized Mortgage Obligation”;
- (B) may not compare CMOs to any other investment vehicle, including a bank certificate of deposit;
- (C) must disclose, as applicable, that a government agency backing applies only to the face value of the CMO and not to any premium paid; and
- (D) must disclose that a CMO’s yield and average life will fluctuate depending on the actual rate at which mortgage holders prepay the mortgages underlying the CMO and changes in current interest rates.

#### (2) Required Educational Material

Before the sale of a CMO to any person other than an institutional investor, a member must offer to the customer educational material that includes the following:

- (A) a discussion of:
  - (i) characteristics and risks of CMOs including credit quality, prepayment rates and average lives, interest rates (including their effect on value and prepayment rates), tax considerations, minimum investments, transaction costs and liquidity;
  - (ii) the structure of a CMO, including the various types of tranches that may be issued and the rights and risks pertaining to each (including the fact that two CMOs with the same underlying collateral may be prepaid at different rates and may have different price volatility); and
  - (iii) the relationship between mortgage loans and mortgage securities;
- (B) questions an investor should ask before investing; and
- (C) a glossary of terms.

### (c) Promotion of Specific CMOs

In addition to the standards set forth above, advertisements, sales literature and correspondence that promote a specific security or contain yield information must conform to the standards set forth below. An example of a compliant communication appears at the end of this section.

**(1) The advertisement, sales literature or correspondence must present the following disclosure sections with equal prominence.** The information in Sections 1 and 2 must be included. The information in Section 3 is optional; therefore, the member may elect to include any, all or none of this information. The information in Section 4 may be tailored to the member’s preferred signature.

### **Section 1 Title - Collateralized Mortgage Obligations**

Coupon Rate  
Anticipated Yield/Average Life  
Specific Tranche - Number & Class  
Final Maturity Date  
Underlying Collateral

### **Section 2 Disclosure Statement:**

“The yield and average life shown above consider prepayment assumptions that may or may not be met. Changes in payments may significantly affect yield and average life. Please contact your representative for information on CMOs and how they react to different market conditions.”

### **Section 3 Product Features (Optional):**

Minimum Denominations  
Rating Disclosure  
Agency/Government Backing  
Income Payment Structure  
Generic Description of Tranche (e.g., PAC, Companion)  
Yield to Maturity of CMOs Offered at Par

### **Section 4 Company Information:**

Name, Memberships  
Address  
Telephone Number  
Representative's Name

### **(2) Additional Conditions**

The following conditions must also be met:

- (A) All figures in Section 1 must be in equal type size.
- (B) The disclosure language in Section 2 may not be altered and must be given equal prominence with the information in Section 1.
- (C) The prepayment assumption used to determine the yield and average life must either be obtained from a nationally recognized service or the member firm must be able to justify the assumption used. A copy of either the service's listing for the CMO or the firm's justification must be attached to the copy of the communication that is maintained in the firm's advertising files in order to verify that the prepayment scenario is reasonable.
- (D) Any sales charge that the member intends to impose must be reflected in the anticipated yield.

(E) The communication must include language stating that the security is “offered subject to prior sale and price change.” This language may be included in any one of the four sections.

(F) If the security is an accrual bond that does not currently distribute principal and interest payments, then Section 1 must include this information.

### **(3) Radio/Television Advertisements**

(A) The following oral disclaimer must precede any radio or television advertisement in lieu of the Title information set forth in Section 1:

“The following is an advertisement for Collateralized Mortgage Obligations. Contact your representative for information on CMOs and how they react to different market conditions.”

(B) Radio or television advertisements must contain the following oral disclosure statement in lieu of the legend set forth in Section 2:

“The yield and average life reflect prepayment assumptions that may or may not be met. Changes in payments may significantly affect yield and average life.”

### **(4) Standardized CMO Communication Example**

Collateralized Mortgage Obligations

7.50% Coupon

7.75% Anticipated Yield to 22-Year Average Life

FNMA 9532X, Final Maturity March 2023

Collateral 100% FNMA 7.50%

The yield and average life shown above reflect prepayment assumptions that may or may not be met. Changes in payments may significantly affect yield and average life. Please contact your representative for information on CMOs and how they react to different market conditions.

\$5,000 Minimum

Income Paid Monthly

Implied Rating/Volatility Rating

Principal and Interest Payments Backed by FNMA

PAC Bond

Offered subject to prior sale and price change.

Call Mary Representative at (800)555-1234

Your Company Securities, Inc., Member SIPC

123 Main Street

Anytown, State 12121

*[Adopted by SR-NASD-2000-12 eff. Nov. 3, 2003.]*

## 2211 Institutional Sales Material and Correspondence

### (a) Definitions

For purposes of Rule 2210, this Rule, and any interpretation thereof:

- (1) “Correspondence” consists of any written letter or electronic mail message and any market letter distributed by a member to:
  - (A) one or more of its existing retail customers; and
  - (B) fewer than 25 prospective retail customers within any 30 calendar-day period.
- (2) “Institutional Sales Material” consists of any communication that is distributed or made available only to institutional investors.
- (3) “Institutional Investor” means any:
  - (A) person described in Rule 3110(c)(4), regardless of whether that person has an account with an NASD member;
  - (B) governmental entity or subdivision thereof;
  - (C) employee benefit plan that meets the requirements of Section 403(b) or Section 457 of the Internal Revenue Code and has at least 100 participants, but does not include any participant of such a plan;
  - (D) qualified plan, as defined in Section 3(a)(12)(C) of the Act, that has at least 100 participants, but does not include any participant of such a plan;
  - (E) NASD member or registered associated person of such a member; and
  - (F) person acting solely on behalf of any such institutional investor.

No member may treat a communication as having been distributed to an institutional investor if the member has reason to believe that the communication or any excerpt thereof will be forwarded or made available to any person other than an institutional investor.
- (4) “Existing Retail Customer” means any person for whom the member or a clearing broker or dealer on behalf of the member carries an account, or who has an account with any registered investment company for which the member serves as principal underwriter, and who is not an institutional investor. “Prospective Retail Customer” means any person who has not opened such an account and is not an institutional investor.
- (5) “Market Letter” means any written communication excepted from the definition of “research report” pursuant to Rule 2711(a)(9)(A).

### (b) Approval and Recordkeeping

#### (1) Registered Principal Approval

- (A) Correspondence. Correspondence need not be approved by a registered principal prior to use, unless such correspondence is distributed to 25 or more existing retail customers within any 30 calendar-day period and makes any financial or investment recommendation or otherwise promotes a product or service of the member. All correspondence is subject to the supervision and review requirements of Rule 3010(d).

(B) Institutional Sales Material. Each member shall establish written procedures that are appropriate to its business, size, structure, and customers for the review by a registered principal of institutional sales material used by the member and its registered representatives. Such procedures should be in writing and be designed to reasonably supervise each registered representative. Where such procedures do not require review of all institutional sales material prior to use or distribution, they must include provision for the education and training of associated persons as to the firm's procedures governing institutional sales material, documentation of such education and training, and surveillance and follow-up to ensure that such procedures are implemented and adhered to. Evidence that these supervisory procedures have been implemented and carried out must be maintained and made available to NASD upon request.

## **(2) Recordkeeping**

(A) Members must maintain all institutional sales material in a file for a period of three years from the date of last use. The file must include the name of the person who prepared each item of institutional sales material.

(B) Members must maintain in a file information concerning the source of any statistical table, chart, graph or other illustration used by the member in communications with the public.

## **(c) Spot-Check Procedures**

Each member's correspondence and institutional sales literature may be subject to a spot-check procedure under Rule 2210. Upon written request from the Advertising Regulation Department (the "Department"), each member must submit the material requested in a spot-check procedure within the time frame specified by the Department.

## **(d) Content Standards Applicable to Institutional Sales Material and Correspondence**

(1) All institutional sales material and correspondence are subject to the content standards of Rule 2210(d)(1) and the applicable Interpretive Materials under Rule 2210, and all correspondence is subject to the content standards of Rule 2210(d)(3).

(2) All correspondence (which for purposes of this provision includes business cards and letterhead) must:

(A) prominently disclose the name of the member and may also include a fictional name by which the member is commonly recognized or which is required by any state or jurisdiction;

(B) reflect any relationship between the member and any non-member or individual who is also named; and

(C) if it includes other names, reflect which products or services are being offered by the member.

(3) Members may not use investment company rankings in any correspondence other than rankings based on (A) a category or subcategory created and published by a Ranking Entity as defined in IM-2210-3(a) or (B) a category or subcategory created by an investment company or an investment company affiliate but based on the performance measurements of a Ranking Entity.



#### **(e) Violation of Other Rules**

Any violation by a member of any rule of the SEC, the Securities Investor Protection Corporation or the Municipal Securities Rulemaking Board applicable to institutional sales material or correspondence will be deemed a violation of this Rule and Rule 2210.

*[Amended by SR-FINRA-2008-044 eff. Feb. 5, 2009.]*

*Selected Notices to Members: 06-45, 06-48, 09-10.*

## 2711 Research Analysts and Research Reports

### (a) Definitions

For purposes of this rule, the following terms shall be defined as provided.

- (1) “Equity security” has the same meaning as defined in Section 3(a)(11) of the Securities Exchange Act of 1934.
- (2) “Investment banking department” means any department or division, whether or not identified as such, that performs any investment banking service on behalf of a member.
- (3) “Investment banking services” include, without limitation, acting as an underwriter or participating in a selling group in an offering for the issuer; acting as a financial adviser in a merger or acquisition; providing venture capital, equity lines of credit, private investment, public equity transactions (PIPEs) or similar investments; or serving as placement agent for the issuer.
- (4) “Member of a research analyst’s household” means any individual whose principal residence is the same as the research analyst’s principal residence. This term does not include an unrelated person who shares the same residence as a research analyst provided that the research analyst and unrelated person are financially independent of one another.
- (5) “Public appearance” means any participation in a conference call, seminar, forum (including an interactive electronic forum) or other public speaking activity before 15 or more persons or before one or more representatives of the media, radio, television or print media interview, or the writing of a print media article, in which a research analyst makes a recommendation or offers an opinion concerning an equity security. This term does not include a password protected Webcast, conference call or similar event with 15 or more existing customers, provided that all of the event participants previously received the most current research report or other documentation that contains the required applicable disclosures, and that the research analyst appearing at the event corrects and updates during the public appearance any disclosures in the research report that are inaccurate, misleading or no longer applicable.
- (6) “Research analyst” means the 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.”
- (7) “Research analyst account” means any account in which a research analyst or member of the research analyst’s household has a financial interest, or over which such analyst has discretion or control, other than an investment company registered under the Investment Company Act of 1940. This term does not include a “blind trust” account that is controlled by a person other than the research analyst or member of the research analyst’s household where neither the research analyst nor a member of the research analyst’s household knows of the account’s investments or investments transactions.
- (8) “Research department” means any department or division, whether or not identified as such, that is principally responsible for preparing the substance of a research report on behalf of a member.
- (9) “Research Report” means any written (including electronic) communication that includes an analysis of equity securities of individual companies or industries, and that provides information reasonably sufficient upon which to base an investment decision. This term does not include:

(A) communications that are limited to the following:

- (i) discussions of broad-based indices;
- (ii) commentaries on economic, political or market conditions;
- (iii) technical analyses concerning the demand and supply for a sector, index or industry based on trading volume and price;
- (iv) statistical summaries of multiple companies' financial data, including listings of current ratings;
- (v) recommendations regarding increasing or decreasing holdings in particular industries or sectors; or
- (vi) notices of ratings or price target changes, provided that the member simultaneously directs the readers of the notice to the most recent research report on the subject company that includes all current applicable disclosures required by this rule and that such research report does not contain materially misleading disclosure, including disclosures that are outdated or no longer applicable;

(B) the following communications, even if they include an analysis of an individual equity security and information reasonably sufficient upon which to base an investment decision:

- (i) any communication distributed to fewer than 15 persons;
- (ii) periodic reports or other communications prepared for investment company shareholders or discretionary investment account clients that discuss individual securities in the context of a fund's or account's past performance or the basis for previously made discretionary investment decisions; or
- (iii) internal communications that are not given to current or prospective customers; and

(C) communications that constitute statutory prospectuses that are filed as part of the registration statement.

(10) "Subject company" means the company whose equity securities are the subject of a research report or a public appearance.

#### **(b) Restrictions on Relationship with Research Department**

(1) No research analyst may be subject to the supervision or control of any employee of the member's investment banking department, and no personnel engaged in investment banking activities may have any influence or control over the compensatory evaluation of a research analyst.

(2) Except as provided in paragraph (b)(3), no employee of the investment banking department or any other employee of the member who is not directly responsible for investment research ("non-research personnel"), other than legal or compliance personnel, may review or approve a research report of the member before its publication.

(3) Non-research personnel may review a research report before its publication as necessary only to verify the factual accuracy of information in the research report or identify any potential conflict of interest, provided that:

(A) any written communication between non-research personnel and research department personnel concerning the content of a research report must be made either through authorized legal or compliance personnel of the member or in a transmission copied to such personnel; and

(B) any oral communication between non-research personnel and research department personnel concerning the content of a research report must be documented and made either through authorized legal or compliance personnel acting as intermediary or in a conversation conducted in the presence of such personnel.

### **(c) Restrictions on Communications with the Subject Company**

(1) Except as provided in paragraphs (c)(2) and (c)(3), a member may not submit a research report to the subject company before its publication.

(2) A member may submit sections of such a research report to the subject company before its publication for review as necessary only to verify the factual accuracy of information in those sections, provided that:

(A) the sections of the research report submitted to the subject company do not contain the research summary, the research rating or the price target;

(B) a complete draft of the research report is provided to legal or compliance personnel before sections of the report are submitted to the subject company; and

(C) if after submitting the sections of the research report to the subject company the research department intends to change the proposed rating or price target, it must first provide written justification to, and receive written authorization from, legal or compliance personnel for the change. The member must retain copies of any draft and the final version of such a research report for three years following its publication.

(3) The member may notify a subject company that the member intends to change its rating of the subject company's securities, provided that the notification occurs on the business day before the member announces the rating change, after the close of trading in the principal market of the subject company's securities.

(4) No research analyst may participate in efforts to solicit investment banking business. Accordingly, no research analyst may, among other things, participate in any "pitches" for investment banking business to prospective investment banking clients, or have other communications with companies for the purpose of soliciting investment banking business.

(5) A research analyst is prohibited from directly or indirectly:

(A) participating in a road show related to an investment banking services transaction; and

(B) engaging in any communication with a current or prospective customer in the presence of investment banking department personnel or company management about an investment banking services transaction.

(6) Investment banking department personnel are prohibited from directly or indirectly:

(A) directing a research analyst to engage in sales or marketing efforts related to an investment banking services transaction; and

(B) directing a research analyst to engage in any communication with a current or prospective customer about an investment banking services transaction.

(7) Any written or oral communication by a research analyst with a current or prospective customer or internal personnel related to an investment banking services transaction must be fair, balanced and not misleading, taking into consideration the overall context in which the communication is made.

**(d) Restrictions on Research Analyst Compensation**

(1) No member may pay any bonus, salary or other form of compensation to a research analyst that is based upon a specific investment banking services transaction.

(2) The compensation of a research analyst who is primarily responsible for the preparation of the substance of a research report must be reviewed and approved at least annually by a committee that reports to the members board of directors, or when the member has no board of directors, to a senior executive officer of the member. This committee may not have representation from the member's investment banking department. The committee must consider the following factors when reviewing such a research analyst's compensation, if applicable:

(A) the research analyst's individual performance, including the analyst's productivity and the quality of the analyst's research;

(B) the correlation between the research analyst's recommendations and the stock price performance; and

(C) the overall ratings received from clients, sales force, and peers independent of the member's investment banking department, and other independent ratings services.

The committee may not consider as a factor in reviewing and approving such a research analyst's compensation his or her contributions to the member's investment banking business. The committee must document the basis upon which each such research analyst's compensation was established. The annual attestation required by Rule 2711(i) must certify that the committee reviewed and approved each such research analyst's compensation and documented the basis upon which this compensation was established.

**(e) Prohibition of Promise of Favorable Research**

No member may directly or indirectly offer favorable research, a specific rating or a specific price target, or threaten to change research, a rating or a price target, to a company as consideration or inducement for the receipt of business or compensation.

**(f) Restrictions on Publishing Research Reports and Public Appearances; Termination of Coverage**

(1) No member may publish or otherwise distribute a research report and no research analyst may make a public appearance regarding a subject company for which the member acted as manager or co-manager of:

(A) an initial public offering, for 40 calendar days following the date of the offering; or

(B) a secondary offering, for 10 calendar days following the date of the offering; provided that:

(i) paragraphs (f)(1)(A) and (f)(1)(B) will not prevent a member from publishing or otherwise distributing a research report, or prevent a research analyst from making a public appearance, concerning the effects of significant news or a significant event on the subject company within such 40- and 10-day periods, and provided further that legal or compliance personnel authorize publication of that research report before it is issued or authorize the public appearance before it is made; and

(ii) paragraph (f)(1)(B) will not prevent a member from publishing or otherwise distributing a research report pursuant to SEC Rule 139 regarding a subject company with “actively-traded securities,” as defined in Regulation M, 17 CFR 242.101(c)(1), and will not prevent a research analyst from making a public appearance concerning such a company.

(2) No member that has agreed to participate or is participating as an underwriter or dealer (other than as manager or co-manager) of an issuer’s initial public offering may publish or otherwise distribute a research report or make a public appearance regarding that issuer for 25 calendar days after the date of the offering.

(3) For purposes of paragraphs (f)(1) and (f)(2), the term “date of the offering” refers to the later of the effective date of the registration statement or the first date on which the security was *bona fide* offered to the public.

(4) No member that has acted as a manager or co-manager of a securities offering may publish or otherwise distribute a research report or make a public appearance concerning a subject company 15 days prior to and after the expiration, waiver or termination of a lock-up agreement or any other agreement that the member has entered into with a subject company or its shareholders that restricts or prohibits the sale of securities held by the subject company or its shareholders after the completion of a securities offering. This paragraph will not prevent a member from publishing or otherwise distributing a research report concerning the effects of significant news or a significant event on the subject company within such period, provided legal or compliance personnel authorize publication of that research report before it is issued. In addition, this paragraph shall not apply to the publication or distribution of a research report pursuant to SEC Rule 139 regarding a subject company with “actively traded securities,” as defined in Regulation M, 17 CFR 242.101(c)(1), or to a public appearance concerning such a subject company.

(5) If a member intends to terminate its research coverage of a subject company, notice of this termination must be made. The member must make available a final research report on the subject company using the means of dissemination equivalent to those it ordinarily uses to provide the customer with its research reports on the subject company. The report must be comparable in scope and detail to prior research reports and must include a final recommendation or rating, unless it is impracticable for the member to produce a comparable report (e.g., if the research analyst covering the subject company or sector has left the member or if the member terminates coverage of the industry or sector). If it is impracticable to produce a final recommendation or rating, the final research report must disclose the member’s rationale for the decision to terminate coverage.

#### **(g) Restrictions on Personal Trading by Research Analysts**

(1) No research analyst account may purchase or receive any securities before the issuer’s initial public offering if the issuer is principally engaged in the same types of business as companies that the research analyst follows.

(2) No research analyst account may purchase or sell any security issued by a company that the research analyst follows, or any option on or derivative of such security, for a period beginning 30 calendar days before and ending five calendar days after the publication of a research report concerning the company or a change in a rating or price target of the company's securities; provided that:

(A) a member may permit a research analyst account to sell securities held by the account that are issued by a company that the research analyst follows, within 30 calendar days after the research analyst began following the company for the member;

(B) a member may permit a research analyst account to purchase or sell any security issued by a subject company within 30 calendar days before the publication of a research report or change in the rating or price target of the subject company's securities due to significant news or a significant event concerning the subject company, provided that the legal or compliance personnel pre-approve the research report and any change in the rating or price target.

(3) No research analyst account may purchase or sell any security or any option on or derivative of such security in a manner inconsistent with the research analyst's recommendation as reflected in the most recent research report published by the member.

(4) Legal or compliance personnel may authorize a transaction otherwise prohibited by paragraphs (g)(2) and (g)(3) based upon an unanticipated significant change in the personal financial circumstances of the beneficial owner of the research analyst account, provided that:

(A) legal or compliance personnel authorize the transaction before it is entered;

(B) each exception is granted in compliance with policies and procedures adopted by the member that are reasonably designed to ensure that these transactions do not create a conflict of interest between the professional responsibilities of the research analyst and the personal trading activities of a research analyst account; and

(C) the member maintains written records concerning each transaction and the justification for permitting the transaction for three years following the date on which the transaction is approved.

(5) The prohibitions in paragraphs (g)(1) through (g)(3) do not apply to a purchase or sale of the securities of:

(A) any registered diversified investment company as defined under Section (5)(b)(1) of the Investment Company Act of 1940; or

(B) any other investment fund over which neither the research analyst nor a member of the research analyst's household has any investment discretion or control, provided that:

(i) the research analyst accounts collectively own interests representing no more than 1% of the assets of the fund;

(ii) the fund invests no more than 20% of its assets in securities of issuers principally engaged in the same types of business as companies that the research analyst follows; and

(iii) if the investment fund distributes securities in kind to the research analyst or household member before the issuer's initial public offering, the research analyst or household member must either divest those securities immediately or the research analyst must refrain from participating in the preparation of research reports concerning that issuer.

(6) Legal or compliance personnel of the member shall pre-approve all transactions of persons who oversee research analysts to the extent such transactions involve equity securities of subject companies covered by the research analysts that they oversee. This pre-approval requirement shall apply to all persons, such as the director of research, supervisory analyst, or member of a committee, who have direct influence or control with respect to the preparation of the substance of research reports or establishing or changing a rating or price target of a subject company's equity securities.

## **(h) Disclosure Requirements**

### **(1) Ownership and Material Conflicts of Interest**

A member must disclose in research reports and a research analyst must disclose in public appearances:

- (A) if the research analyst or a member of the research analyst's household has a financial interest in the securities of the subject company, and the nature of the financial interest (including, without limitation, whether it consists of any option, right, warrant, future, long or short position);
- (B) if, as of the end of the month immediately preceding the date of publication of the research report or the public appearance (or the end of the second most recent month if the publication date is less than 10 calendar days after the end of the most recent month), the member or its affiliates beneficially own 1% or more of any class of common equity securities of the subject company. Computation of beneficial ownership of securities must be based upon the same standards used to compute ownership for purposes of the reporting requirements under Section 13(d) of the Securities Exchange Act of 1934;
- (C) any other actual, material conflict of interest of the research analyst of which the research analyst or member knows or has reason to know at the time of publication of the research report or at the time of the public appearance.

### **(2) Receipt of Compensation**

- (A) A member must disclose in research reports:
  - (i) if the research analyst received compensation:
    - a. based upon (among other factors) the member's investment banking revenues; or
    - b. from the subject company in the past 12 months.
  - (ii) the member or affiliate:
    - a. managed or co-managed a public offering of securities for the subject company in the past 12 months;
    - b. received compensation for investment banking services from the subject company in the past 12 months; or
    - c. expects to receive or intends to seek compensation for investment banking services from the subject company in the next 3 months.



(iii) if (1) as of the end of the month immediately preceding the date of publication of the research report (or the end of the second most recent month if the publication date is less than 30 calendar days after the end of the most recent month) or (2) to the extent the research analyst or an employee of the member with the ability to influence the substance of the research knows:

a. the member received any compensation for products or services other than investment banking services from the subject company in the past 12 months; or

b. the subject company currently is, or during the 12-month period preceding the date of distribution of the research report was, a client of the member. In such cases, the member also must disclose the types of services provided to the subject company. For purposes of this Rule 2711(h)(2), the types of services provided to the subject company shall be described as investment banking services, non-investment banking securities-related services, and non-securities services.

(iv) if, to the extent the research analyst or an employee of the member with the ability to influence the substance of the research report knows an affiliate of the member received any compensation for products or services other than investment banking services from the subject company in the past 12 months.

(v) if, to the extent the research analyst or member has reason to know, an affiliate of the member received any compensation for products or services other than investment banking services from the subject company in the past 12 months.

a. This requirement will be deemed satisfied if such compensation is disclosed in research reports within 30 days after completion of the last calendar quarter, provided that the member has taken steps reasonably designed to identify any such compensation during that calendar quarter. This requirement shall not apply to any subject company as to which the member initiated coverage since the beginning of the current calendar quarter.

b. The research analyst and the member will be presumed not to have reason to know whether an affiliate received any compensation for products or services other than investment banking services from the subject company in the past 12 months if the member maintains and enforces policies and procedures reasonably designed to prevent the research analysts and employees of the member with the ability to influence the substance of research reports from, directly or indirectly, receiving information from the affiliate concerning whether the affiliate received such compensation.

(vi) For the purposes of this Rule 2711(h)(2), an employee of the member with the ability to influence the substance of the research report is an employee who, in the ordinary course of that person's duties, has the authority to review the particular research report and to change that research report prior to publication.

(B) A research analyst must disclose in public appearances:

- (i) if, to the extent the research analyst knows or has reason to know, the member or any affiliate received any compensation from the subject company in the past 12 months;
- (ii) if the research analyst received any compensation from the subject company in the past 12 months; or
- (iii) if, to the extent the research analyst knows or has reason to know, the subject company currently is, or during the 12-month period preceding the date of distribution of the research report, was, a client of the member. In such cases, the research analyst also must disclose the types of services provided to the subject company, if known by the research analyst.

(C) A member or research analyst will not be required to make a disclosure required by paragraphs (h)(2)(A)(ii)(b) and (c), (h)(2)(A)(iii)(b), or (h)(2)(B)(i) and (iii) to the extent such disclosure would reveal material non-public information regarding specific potential future investment banking transactions of the subject company.

### **(3) Position as Officer or Director**

A member must disclose in research reports and a research analyst must disclose in public appearances if the research analyst or a member of the research analyst's household serves as an officer, director or advisory board member of the subject company.

### **(4) Meaning of Ratings**

If a research report contains a rating, the member must define in the research report the meaning of each rating used by the member in its rating system. The definition of each rating must be consistent with its plain meaning.

### **(5) Distribution of Ratings**

(A) Regardless of the rating system that a member employs, a member must disclose in each research report the percentage of all securities rated by the member to which the member would assign a "buy," "hold/neutral," or "sell" rating.

(B) In each research report, the member must disclose the percentage of subject companies within each of these three categories for whom the member has provided investment banking services within the previous twelve months.

(C) The information that is disclosed under paragraphs (h)(5)(A) and (h)(5)(B) must be current as of the end of the most recent calendar quarter (or the second most recent calendar quarter if the publication date is less than 15 calendar days after the most recent calendar quarter) and must reflect the distribution of the most recent ratings issued by the member for all subject companies, unless the most recent rating was issued more than 12 months ago.

(D) The requirements of paragraph (h)(5) shall not apply to any research report that does not contain a rating.

## **(6) Price Chart**

If a research report contains either a rating or a price target and the member has assigned a rating or price target to the subject company's securities for at least one year, the research report must include a line graph of the security's daily closing prices for the period that the member has assigned any rating or price target or for a three-year period, whichever is shorter. The line graph must:

- (A) indicate the dates on which the member assigned or changed each rating or price target;
- (B) depict each rating and price target assigned or changed on those dates; and
- (C) be current as of the end of the most recent calendar quarter (or the second most recent calendar quarter if the publication date is less than 15 calendar days after the most recent calendar quarter).

## **(7) Price Targets**

If a research report contains a price target, the member must disclose in the research report the valuation methods used to determine the price target. Price targets must have a reasonable basis and must be accompanied by a disclosure concerning the risks that may impede achievement of the price target.

## **(8) Market Making**

A member must disclose in research reports if it was making a market in the subject company's securities at the time that the research report was published.

## **(9) Disclosure Required by Other Provisions**

In addition to the disclosure required by this rule, members and research analysts must provide disclosure in research reports and public appearances that is required by applicable law or regulation, including NASD Rule 2210 and the antifraud provisions of the federal securities laws.

## **(10) Prominence of Disclosure**

The disclosures required by this paragraph (h) must be presented on the front page of research reports or the front page must refer to the page on which disclosures are found. Disclosures and references to disclosures must be clear, comprehensive and prominent.

## **(11) Disclosures in Research Reports Covering Six or More Companies**

When a member distributes a research report covering six or more subject companies (a "compendium report"), for purposes of the disclosures required in paragraph (h), the compendium report may direct the reader in a clear manner as to where they may obtain applicable current disclosures. Electronic compendium reports may include a hyperlink to the required disclosures. Paper-based compendium reports must provide either a toll-free number to call or a postal address to write for the required disclosures and may also include a web address of the member where the disclosures can be found.

## **(12) Records of Public Appearances**

Members must maintain records of public appearances by research analysts sufficient to demonstrate compliance by those research analysts with the applicable disclosure requirements under paragraph (h) of this Rule. Such records must be maintained for three years from the date of the public appearance.

### (13) Third-Party Research Reports

(A) Subject to paragraph (h)(13)(B) of this Rule, if a member distributes or makes available any third-party research report, the member must accompany the research report with, or provide a web address that directs the recipient to, the current applicable disclosures, as they pertain to the member, required by paragraphs (h)(1)(B), (h)(1)(C), (h)(2)(A)(ii) and (h)(8) of this Rule. Members must establish written supervisory policies and procedures reasonably designed to ensure the completeness and accuracy of all applicable disclosures.

(B) The requirements of paragraph (h)(13)(A) of this Rule shall not apply to independent third-party research reports made available by a member to its customers:

- (i) upon request;
- (ii) in connection with a solicited order in which a registered representative has informed the customer, during the solicitation, of the availability of independent research on the solicited equity security, and the customer requests such independent research; or
- (iii) through a member-maintained web site.

(C) Subject to paragraph (h)(13)(D) of this Rule, a registered principal (or supervisory analyst approved pursuant to Rule 344 of the New York Stock Exchange) must approve by signature or initial all third-party research reports distributed by a member. The approval of third-party research shall be based on a review by the designated principal (or supervisory analyst approved pursuant to NYSE Rule 344) to determine that the content of the research report, pursuant to Rule 2210(d)(1)(B), contains no untrue statement of material fact or is otherwise not false or misleading. For the purposes of this Rule only, a member's obligation to review a third-party research report pursuant to Rule 2210(d)(1)(B) extends to any untrue statement of material fact or any false or misleading information that:

- a. should be known from reading the report; or
- b. is known based on information otherwise possessed by the member.

(D) The requirements of paragraph (h)(13)(C) of this Rule shall not apply to independent third-party research reports distributed or made available by a member.

(E) For the purposes of this Rule, "third-party research report" shall mean a research report that is produced by a person or entity other than the member and "independent third-party research report" shall mean a third-party research report, in respect of which the person or entity producing the report:

- (i) has no affiliation or business or contractual relationship with the distributing member or that member's affiliates that is reasonably likely to inform the content of its research reports; and
- (ii) makes content determinations without any input from the distributing member or that member's affiliates.

#### **(i) Supervisory Procedures**

Each member subject to this rule must adopt and implement written supervisory procedures reasonably designed to ensure that the member and its employees comply with the provisions of this rule (including the attestation requirements of Rule 2711(d)(2)), and a senior officer of such a member must attest annually to NASD by April 1 of each year that it has adopted and implemented those procedures.

#### **(j) Prohibition of Retaliation Against Research Analysts**

No member and no employee of a member who is involved with the member's investment banking activities may, directly or indirectly, retaliate against or threaten to retaliate against any research analyst employed by the member or its affiliates as a result of an adverse, negative, or otherwise unfavorable research report or public appearance written or made by the research analyst that may adversely affect the member's present or prospective investment banking relationship with the subject company of a research report. This prohibition shall not limit a member's authority to discipline or terminate a research analyst, in accordance with the member's policies and procedures, for any cause other than the writing of such an unfavorable research report or the making of such an unfavorable public appearance.

#### **(k) Exceptions for Small Firms**

The provisions of paragraph (b) shall not apply to members that over the previous three years, on average per year, have participated in 10 or fewer investment banking services transactions as manager or co-manager and generated \$5 million or less in gross investment banking services revenues from those transactions. For purposes of this paragraph (k), the term "investment banking services transactions" includes the underwriting of both corporate debt and equity securities but not municipal securities. Members that qualify for this exemption must maintain records for three years of any communication that, but for this exemption, would be subject to paragraph (b) of this Rule.

*[Amended by SR-FINRA-2007-011 eff. April 7, 2008.]*  
*Selected Notices to Members: 02-39, 03-44, 05-34.*

## 3010 Supervision

### (a) Supervisory System

Each member shall establish and maintain a system to supervise the activities of each registered representative and associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with the Rules of this Association. Final responsibility for proper supervision shall rest with the member. A member's supervisory system shall provide, at a minimum, for the following:

- (1) The establishment and maintenance of written procedures as required by paragraphs (b) and (c) of this Rule.
- (2) The designation, where applicable, of an appropriately registered principal(s) with authority to carry out the supervisory responsibilities of the member for each type of business in which it engages for which registration as a broker/dealer is required.
- (3) The designation as an office of supervisory jurisdiction (OSJ) of each location that meets the definition contained in paragraph (g) of this Rule. Each member shall also designate such other OSJs as it determines to be necessary in order to supervise its registered representatives and associated persons in accordance with the standards set forth in this Rule, taking into consideration the following factors:
  - (A) whether registered persons at the location engage in retail sales or other activities involving regular contact with public customers;
  - (B) whether a substantial number of registered persons conduct securities activities at, or are otherwise supervised from, such location;
  - (C) whether the location is geographically distant from another OSJ of the firm;
  - (D) whether the member's registered persons are geographically dispersed; and
  - (E) whether the securities activities at such location are diverse and/or complex.
- (4) The designation of one or more appropriately registered principals in each OSJ, including the main office, and one or more appropriately registered representatives or principals in each non-OSJ branch office with authority to carry out the supervisory responsibilities assigned to that office by the member.
- (5) The assignment of each registered person to an appropriately registered representative(s) and/or principal(s) who shall be responsible for supervising that person's activities.
- (6) Reasonable efforts to determine that all supervisory personnel are qualified by virtue of experience or training to carry out their assigned responsibilities.
- (7) The participation of each registered representative, either individually or collectively, no less than annually, in an interview or meeting conducted by persons designated by the member at which compliance matters relevant to the activities of the representative(s) are discussed. Such interview or meeting may occur in conjunction with the discussion of other matters and may be conducted at a central or regional location or at the representative's(") place of business.

### (b) Written Procedures

- (1) Each member shall establish, maintain, and enforce written procedures to supervise the types of business in which it engages and to supervise the activities of registered representatives and associated persons that are reasonably designed to achieve compliance with applicable securities laws and regulations, and with the applicable Rules of this Association.

## (2) Tape recording of conversations

(A) Each member that either is notified by NASD Regulation or otherwise has actual knowledge that it meets one of the criteria in paragraph (b)(2)(H) relating to the employment history of its registered persons at a Disciplined Firm as defined in paragraph (b)(2)(J) shall establish, maintain, and enforce special written procedures for supervising the telemarketing activities of all of its registered persons.

(B) The member must establish and implement the supervisory procedures required by this paragraph within 60 days of receiving notice from NASD Regulation or obtaining actual knowledge that it is subject to the provisions of this paragraph.

A member that meets one of the criteria in paragraph (b)(2)(H) for the first time may reduce its staffing levels to fall below the threshold levels within 30 days after receiving notice from NASD Regulation pursuant to the provisions of paragraph (b)(2)(A) or obtaining actual knowledge that it is subject to the provisions of the paragraph, provided the firm promptly notifies the Department of Member Regulation, NASD Regulation, in writing of its becoming subject to the Rule. Once the member has reduced its staffing levels to fall below the threshold levels, it shall not rehire a person terminated to accomplish the staff reduction for a period of 180 days. On or prior to reducing staffing levels pursuant to this paragraph, a member must provide the Department of Member Regulation, NASD Regulation with written notice, identifying the terminated person(s).

(C) The procedures required by this paragraph shall include tape-recording all telephone conversations between the member's registered persons and both existing and potential customers.

(D) The member shall establish reasonable procedures for reviewing the tape recordings made pursuant to the requirements of this paragraph to ensure compliance with applicable securities laws and regulations and applicable rules of the Association. The procedures must be appropriate for the member's business, size, structure, and customers.

(E) All tape recordings made pursuant to the requirements of this paragraph shall be retained for a period of not less than three years from the date the tape was created, the first two years in an easily accessible place. Each member shall catalog the retained tapes by registered person and date.

(F) Such procedures shall be maintained for a period of three years from the date that the member establishes and implements the procedures required by the provisions of this paragraph.

(G) By the 30th day of the month following the end of each calendar quarter, each member firm subject to the requirements of this paragraph shall submit to the Association a report on the member's supervision of the telemarketing activities of its registered persons.

(H) The following members shall be required to adopt special supervisory procedures over the telemarketing activities of their registered persons:

- A firm with at least five but fewer than ten registered persons, where 40% or more of its registered persons have been associated with one or more Disciplined Firms in a registered capacity within the last three years;

- A firm with at least ten but fewer than twenty registered persons, where four or more of its registered persons have been associated with one or more Disciplined Firms in a registered capacity within the last three years;
- A firm with at least twenty registered persons, where 20% or more of its registered persons have been associated with one or more Disciplined Firms in a registered capacity within the last three years.

For purposes of the calculations required in subparagraph (H), firms should not include registered persons who:

- (1) have been registered for an aggregate total of 90 days or less with one or more Disciplined Firms within the past three years; and
- (2) do not have a disciplinary history.

(I) For purposes of this Rule, the term “registered person” means any person registered with the Association as a representative, principal, or assistant representative pursuant to the Rule 1020, 1030, 1040, and 1110 Series or pursuant to Municipal Securities Rulemaking Board (“MSRB”) Rule G-3.

(J) For purposes of this Rule, the term “disciplined firm” means either a member that, in connection with sales practices involving the offer, purchase, or sale of any security, has been expelled from membership or participation in any securities industry self-regulatory organization or is subject to an order of the Securities and Exchange Commission revoking its registration as a broker/dealer; or a futures commission merchant or introducing broker that has been formally charged by either the Commodity Futures Trading Commission or a registered futures association with deceptive telemarketing practices or promotional material relating to security futures, those charges have been resolved, and the futures commission merchant or introducing broker has been closed down and permanently barred from the futures industry as a result of those charges; or a futures commission merchant or introducing broker that, in connection with sales practices involving the offer, purchase, or sale of security futures is subject to an order of the Securities and Exchange Commission revoking its registration as a broker or dealer.

(K) For purposes of this Rule, the term “disciplinary history” means a finding of a violation by a registered person in the past five years by the Securities and Exchange Commission, a self-regulatory organization, or a foreign financial regulatory authority of one or more of the provisions (or comparable foreign provision) listed in IM-1011-1 or rules or regulations thereunder.

(L) Pursuant to the Rule 9600 Series, the Association may in exceptional circumstances, taking into consideration all relevant factors, exempt any member unconditionally or on specified terms and conditions from the requirements of this paragraph. A member seeking an exemption must file a written application pursuant to the Rule 9600 Series within 30 days after receiving notice from NASD or obtaining actual knowledge that it meets one of the criteria in paragraph (b)(2)(H). A member that meets one of the criteria in paragraph (b)(2)(H) for the first time may elect to reduce its staffing levels pursuant to the provisions of paragraph (b)(2)(B) or, alternatively, to seek an exemption pursuant to paragraph (b)(2)(L), as appropriate; such a member may not seek relief from the Rule by both reducing its staffing levels pursuant to paragraph (b)(2)(B) and requesting an exemption.



(3) The member's written supervisory procedures shall set forth the supervisory system established by the member pursuant to paragraph (a) above, and shall include the titles, registration status and locations of the required supervisory personnel and the responsibilities of each supervisory person as these relate to the types of business engaged in, applicable securities laws and regulations, and the Rules of this Association. The member shall maintain on an internal record the names of all persons who are designated as supervisory personnel and the dates for which such designation is or was effective. Such record shall be preserved by the member for a period of not less than three years, the first two years in an easily accessible place.

(4) A copy of a member's written supervisory procedures, or the relevant portions thereof, shall be kept and maintained in each OSJ and at each location where supervisory activities are conducted on behalf of the member. Each member shall amend its written supervisory procedures as appropriate within a reasonable time after changes occur in applicable securities laws and regulations, including the Rules of this Association, and as changes occur in its supervisory system, and each member shall be responsible for communicating amendments through its organization.

### **(c) Internal Inspections**

(1) Each member shall conduct a review, at least annually, of the businesses in which it engages, which review shall be reasonably designed to assist in detecting and preventing violations of, and achieving compliance with, applicable securities laws and regulations, and with applicable NASD rules. Each member shall review the activities of each office, which shall include the periodic examination of customer accounts to detect and prevent irregularities or abuses.

(A) Each member shall inspect at least annually every office of supervisory jurisdiction and any branch office that supervises one or more non-branch locations.

(B) Each member shall inspect at least every three years every branch office that does not supervise one or more non-branch locations. In establishing how often to inspect each non-supervisory branch office, the firm shall consider whether the nature and complexity of the securities activities for which the location is responsible, the volume of business done, and the number of associated persons assigned to the location require the non-supervisory branch office to be inspected more frequently than every three years. If a member establishes a more frequent inspection cycle, the member must ensure that at least every three years, the inspection requirements enumerated in paragraph (c)(2) have been met. The non-supervisory branch office examination cycle, an explanation of the factors the member used in determining the frequency of the examinations in the cycle, and the manner in which a member will comply with paragraph (c)(2) if using more frequent inspections than every three years shall be set forth in the member's written supervisory and inspection procedures.

(C) Each member shall inspect on a regular periodic schedule every non-branch location. In establishing such schedule, the firm shall consider the nature and complexity of the securities activities for which the location is responsible and the nature and extent of contact with customers. The schedule and an explanation regarding how the member determined the frequency of the examination schedule shall be set forth in the member's written supervisory and inspection procedures.

Each member shall retain a written record of the dates upon which each review and inspection is conducted.

(2) An office inspection and review by a member pursuant to paragraph (c)(1) must be reduced to a written report and kept on file by the member for a minimum of three years, unless the inspection is being conducted pursuant to paragraph (c)(1)(C) and the regular periodic schedule is longer than a three-year cycle, in which case the report must be kept on file at least until the next inspection report has been written. The written inspection report must also include, without limitation, the testing and verification of the member's policies and procedures, including supervisory policies and procedures in the following areas:

- (A) Safeguarding of customer funds and securities;
- (B) Maintaining books and records;
- (C) Supervision of customer accounts serviced by branch office managers;
- (D) Transmittal of funds between customers and registered representatives and between customers and third parties;
- (E) Validation of customer address changes; and
- (F) Validation of changes in customer account information.

If a member does not engage in all of the activities enumerated above, the member must identify those activities in which it does not engage in the written inspection report and document in the report that supervisory policies and procedures for such activities must be in place before the member can engage in them.

(3) An office inspection by a member pursuant to paragraph (c)(1) may not be conducted by the branch office manager or any person within that office who has supervisory responsibilities or by any individual who is supervised by such person(s). However, if a member is so limited in size and resources that it cannot comply with this limitation (e.g., a member with only one office or a member has a business model where small or single-person offices report directly to an office of supervisory jurisdiction manager who is also considered the offices' branch office manager), the member may have a principal who has the requisite knowledge to conduct an office inspection perform the inspections. The member, however, must document in the office inspection reports the factors it has relied upon in determining that it is so limited in size and resources that it has no other alternative than to comply in this manner.

A member must have in place procedures that are reasonably designed to provide heightened office inspections if the person conducting the inspection reports to the branch office manager's supervisor or works in an office supervised by the branch manager's supervisor and the branch office manager generates 20% or more of the revenue of the business units supervised by the branch office manager's supervisor. For the purposes of this subsection only, the term "heightened inspection" shall mean those inspection procedures that are designed to avoid conflicts of interest that serve to undermine complete and effective inspection because of the economic, commercial, or financial interests that the branch manager's supervisor holds in the associated persons and businesses being inspected. In addition, for the purpose of this section only, when calculating the 20% threshold, all of the revenue generated by or credited to the branch office or branch office manager shall be attributed as revenue generated by the business units supervised by the branch office manager's supervisor irrespective of a member's internal allocation of such revenue. A member must calculate the 20% threshold on a rolling, twelve-month basis.

## **(d) Review of Transactions and Correspondence**

### **(1) Supervision of Registered Representatives**

Each member shall 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 written and electronic correspondence of its registered representatives with the public relating to the investment banking or securities business of such member. Such procedures should be in writing and be designed to reasonably supervise each registered representative. Evidence that these supervisory procedures have been implemented and carried out must be maintained and made available to the Association upon request.

### **(2) Review of Correspondence**

Each member shall develop written procedures that are appropriate to its business, size, structure, and customers for the review of incoming and outgoing written (i.e., non-electronic) and electronic correspondence with the public relating to its investment banking or securities business, including procedures to review incoming, written correspondence directed to registered representatives and related to the member's investment banking or securities business to properly identify and handle customer complaints and to ensure that customer funds and securities are handled in accordance with firm procedures. Where such procedures for the review of correspondence do not require review of all correspondence prior to use or distribution, they must include provision for the education and training of associated persons as to the firm's procedures governing correspondence, documentation of such education and training, and surveillance and follow-up to ensure that such procedures are implemented and adhered to.

### **(3) Retention of Correspondence**

Each member shall retain correspondence of registered representatives relating to its investment banking or securities business in accordance with Rule 3110. The names of the persons who prepared outgoing correspondence and who reviewed the correspondence shall be ascertainable from the retained records and the retained records shall be readily available to the Association, upon request.

## **(e) Qualifications Investigated**

Each member shall have the responsibility and duty to ascertain by investigation the good character, business repute, qualifications, and experience of any person prior to making such a certification in the application of such person for registration with this Association. Where an applicant for registration has previously been registered with the Association, the member shall review a copy of the Uniform Termination Notice of Securities Industry Registration (Form U-5) filed with the Association by such person's most recent previous NASD member employer, together with any amendments thereto that may have been filed pursuant to Article V, Section 3 of the Association's By-Laws. The member shall review the Form U-5 as required by this Rule no later than sixty (60) days following the filing of the application for registration or demonstrate to the Association that it has made reasonable efforts to comply with the requirement. In conducting its review of the Form U-5 and any amendments thereto, a member shall take such action as may be deemed appropriate.

Where an applicant for registration has been previously registered with a registered futures association ("RFA") member that is or has been registered as a broker/dealer pursuant to Section 15(b)(11) of the Act ("notice-registered broker/dealer") with the SEC to trade security futures, the member shall review a copy of the Notice of Termination of Associated Person (Form 8-T) filed with the RFA by such person's most recent previous RFA member employer, together with any

amendments thereto. The member shall review the Form 8-T as required by this Rule no later than sixty (60) days following the filing of the application for registration or demonstrate to the Association that it has made reasonable efforts to comply with the requirement. In conducting its review of a Form 8-T and any amendments, a member shall take such action as may be deemed appropriate.

#### **(f) Applicant's Responsibility**

Any applicant for registration who receives a request for a copy of his or her Form U-5 from a member pursuant to this Rule shall provide such copy to the member within two (2) business days of the request if the Form U-5 has been provided to such person by his or her former employer. If a former employer has failed to provide the Form U-5 to the applicant for registration, such person shall promptly request the Form U-5, and shall provide it to the requesting member within two (2) business days of receipt thereof. The applicant shall promptly provide any subsequent amendments to a Form U-5 he or she receives to the requesting member.

#### **(g) Definitions**

(1) "Office of Supervisory Jurisdiction" means any office of a member at which any one or more of the following functions take place:

- (A) order execution and/or market making;
- (B) structuring of public offerings or private placements;
- (C) maintaining custody of customers' funds and/or securities;
- (D) final acceptance (approval) of new accounts on behalf of the member;
- (E) review and endorsement of customer orders, pursuant to paragraph (d) above;
- (F) final approval of advertising or sales literature for use by persons associated with the member, pursuant to Rule 2210(b)(1), except for an office that solely conducts final approval of research reports; or
- (G) responsibility for supervising the activities of persons associated with the member at one or more other branch offices of the member.

(2) (A) A "branch office" is any location where one or more associated persons of a member regularly conducts the business of effecting any transactions in, or inducing or attempting to induce the purchase or sale of any security, or is held out as such, excluding:

- (i) Any location that is established solely for customer service and/or back office type functions where no sales activities are conducted and that is not held out to the public as a branch office;
- (ii) Any location that is the associated person's primary residence; provided that
  - a. Only one associated person, or multiple associated persons who reside at that location and are members of the same immediate family, conduct business at the location;
  - b. The location is not held out to the public as an office and the associated person does not meet with customers at the location;
  - c. Neither customer funds nor securities are handled at that location;
  - d. The associated person is assigned to a designated branch office, and such designated branch office is reflected on all business cards, stationery, advertisements and other communications to the public by such associated person;

- e. The associated person's correspondence and communications with the public are subject to the firm's supervision in accordance with Rule 3010;
- f. Electronic communications (e.g., e-mail) are made through the member's electronic system;
- g. All orders are entered through the designated branch office or an electronic system established by the member that is reviewable at the branch office;
- h. Written supervisory procedures pertaining to supervision of sales activities conducted at the residence are maintained by the member; and
- i. A list of the residence locations is maintained by the member;

(iii) Any location, other than a primary residence, that is used for securities business for less than 30 business days in any one calendar year, provided the member complies with the provisions of paragraph (A)(2)(ii)a. through h. above;

(iv) Any office of convenience, where associated persons occasionally and exclusively by appointment meet with customers, which is not held out to the public as an office; \*

(v) Any location that is used primarily to engage in non-securities activities and from which the associated person(s) effects no more than 25 securities transactions in any one calendar year; provided that any advertisement or sales literature identifying such location also sets forth the address and telephone number of the location from which the associated person(s) conducting business at the non-branch locations are directly supervised;

(vi) The Floor of a registered national securities exchange where a member conducts a direct access business with public customers; or

(vii) A temporary location established in response to the implementation of a business continuity plan.

(B) Notwithstanding the exclusions in paragraph (2)(A), any location that is responsible for supervising the activities of persons associated with the member at one or more non-branch locations of the member is considered to be a branch office.

(C) The term "business day" as used in Rule 3010(g)(2)(A) shall not include any partial business day provided that the associated person spends at least four hours on such business day at his or her designated branch office during the hours that such office is normally open for business.

\* Where such office of convenience is located on bank premises, signage necessary to comply with applicable federal and state laws, rules and regulations and applicable rules and regulations of the NYSE, other self-regulatory organizations, and securities and banking regulators may be displayed and shall not be deemed "holding out" for purposes of this section.

*[Amended by SR-FINRA-2007-008 eff. Dec. 19, 2007.]*

*Selected Notices to Members: 86-65, 88-84, 89-34, 89-57, 92-18, 96-33, 96-59, 96-82, 98-11, 98-52, 99-03, 99-45, 04-71, 05-67, 06-13, 07-64.*

# FINRA Rules

## 2010 Standards of Commercial Honor and Principles of Trade

A member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade.

*[Amended by SR-FINRA-2008-028 eff. Dec. 15, 2008.]*

*Selected Notices to Member: 96-44, 08-57.*

## 2220 Options Communications with the Public

### (a) Definitions

For purposes of this Rule and any interpretation thereof:

- (1) “Options communications” consist of:
  - (A) “Advertisement.” Any “Advertisement” as defined in NASD Rule 2210(a)(1) concerning options.
  - (B) “Sales literature.” Any “Sales Literature” as defined in NASD Rule 2210(a)(2) concerning options including worksheet templates.
  - (C) “Correspondence.” Any “Correspondence” as defined in NASD Rule 2211(a)(1) concerning options.
  - (D) “Institutional sales material.” Any “Institutional Sales Material” as defined in NASD Rule 2211(a)(2) concerning options.
  - (E) “Public appearance.” Any participation in a seminar, forum (including an interactive electronic forum), radio, television or print media interview, or other public speaking activity, or the writing of a print media article, concerning options.
  - (F) “Independently prepared reprint.” Any “Independently Prepared Reprint” as defined in NASD Rule 2210(a)(6)(A) concerning options.
- (2) “Existing retail customer” as defined in NASD Rule 2211(a)(4).
- (3) “Standardized option” means any option contract issued, or subject to issuance, by The Options Clearing Corporation, that has standardized terms for the strike price, expiration date, and amount of the underlying security, and is traded on a national securities exchange registered pursuant to Section 6(a) of the Exchange Act.
- (4) “Option” as defined in Rule 2360(a).
- (5) “Options disclosure document” has the same meaning as the term “disclosure document” as defined in Rule 2360(a).

### (b) Approval by a Registered Options Principal and Recordkeeping

- (1) Advertisements, Sales Literature, and Independently Prepared Reprints. All advertisements, sales literature (except completed worksheets), and independently prepared reprints issued by a member concerning options shall be approved in advance by a Registered Options Principal designated by the member’s written supervisory procedures.
- (2) Correspondence. Correspondence need not be approved by a Registered Options Principal prior to use, unless such correspondence is distributed to 25 or more existing retail customers within any 30 calendar-day period and makes any financial or investment recommendation or otherwise promotes a product or service of the member. All correspondence is subject to the supervision and review requirements of NASD Rule 3010(d).
- (3) Institutional Sales Material. Each member shall establish written procedures that are appropriate to its business, size, structure, and customers for the review by a Registered Options Principal of institutional sales material used by the member and its registered representatives as described in NASD Rule 2211(b)(1)(B).

(4) Copies of the options communications shall be retained by the member in accordance with SEA Rule 17a-4. The names of the persons who prepared the options communications, the names of the persons who approved the options communications, and the source of any recommendations contained therein, shall be retained by the member and be kept in the form and for the time period required for options communications by SEA Rule 17a-4.

#### **(c) FINRA Approval Requirements and Review Procedures**

(1) In addition to the approval required by paragraph (b) of this Rule, all advertisements, sales literature, and independently prepared reprints issued by a member concerning standardized options used prior to delivery of the applicable current options disclosure document or prospectus shall be submitted to the Advertising Regulation Department of FINRA (the “Department”) at least ten calendar days prior to use (or such shorter period as the Department may allow in particular instances) for approval and, if changed or expressly disapproved by the Department, shall be withheld from circulation until any changes specified by the Department have been made or, in the event of disapproval, until such options communication has been resubmitted for, and has received, Department approval.

(2) (A) Notwithstanding the foregoing provision, the Department, upon review of a member’s options communications, and after determining that the member has departed from the standards of this Rule, may require that such member file some or all options communications or the portions of such member’s communications that are related to options with the Department, at least ten calendar days prior to use.

(B) The Department shall notify the member in writing of the types of options communications to be filed and the length of time such requirement is to be in effect. The requirement shall not exceed one year, however, and shall not take effect until 21 calendar days after service of the written notice, during which time the member may request a hearing under Rules 9551 and 9559.

(3) In addition to the foregoing requirements, every member’s options communications shall be subject to a routine spot-check procedure. Upon written request from the Department, each member shall promptly submit the communications requested. Members will not be required to submit communications under this procedure that have been previously submitted pursuant to one of the foregoing requirements.

(4) The requirements of this paragraph (c) shall not be applicable to:

(A) options communications submitted to another self-regulatory organization having comparable standards pertaining to such communications;

(B) communications in which the only reference to options is contained in a listing of the services of the member;

(C) the options disclosure document; and

(D) the prospectus.

#### **(d) Standards Applicable to Communications**

##### **(1) Communications Regarding Standardized Options used Prior to Delivery of Options Disclosure Document**



(A) Options communications regarding standardized options exempted under Securities Act Rule 238 used prior to options disclosure document delivery:

- (i) must be limited to general descriptions of the options being discussed. The text may also contain a brief description of options, including a statement that identifies registered clearing agencies for options and a brief description of the general attributes and method of operation of the exchanges on which such options are traded, including a discussion of how an option is priced;
- (ii) must contain contact information for obtaining a copy of the options disclosure document;
- (iii) must not contain recommendations or past or projected performance figures, including annualized rates of return, or names of specific securities;
- (iv) may include any statement required by any state law or administrative authority; and
- (v) may include advertising designs and devices, including borders, scrolls, arrows, pointers, multiple and combined logos and unusual typefaces and lettering as well as attention-getting headlines and photographs and other graphics, provided such material is not misleading.

(B) Options communications regarding options not exempted under Securities Act Rule 238 used prior to delivery of a prospectus that meets the requirements of Section 10(a) of the Securities Act must conform to Securities Act Rule 134 or 134a, as applicable.

## **(2) General Standards**

(A) No member or associated person of the member shall use any options communications which:

- (i) contains any untrue statement or omission of a material fact or is otherwise false or misleading;
- (ii) contains promises of specific results, exaggerated or unwarranted claims, opinions for which there is no reasonable basis or forecasts of future events which are unwarranted or which are not clearly labeled as forecasts;
- (iii) contains cautionary statements or caveats that are not legible, are misleading, or are inconsistent with the content of the material;
- (iv) would constitute a prospectus as that term is defined in the Securities Act, unless it meets the requirements of Section 10 of the Securities Act;
- (v) contains statements suggesting the certain availability of a secondary market for options;
- (vi) fails to reflect the risks attendant to options transactions and the complexities of certain options investment strategies;
- (vii) fails to include a warning to the effect that options are not suitable for all investors or contains suggestions to the contrary; or
- (viii) fails to include a statement that supporting documentation for any claims (including any claims made on behalf of options programs or the options expertise of sales persons), comparison, recommendations, statistics, or other technical data, will be supplied upon request.

(B) Subparagraphs (vii) and (viii) above shall not apply to institutional sales material as defined in paragraph (a) of this Rule.

(C) Any statement in any options communications referring to the potential opportunities or advantages presented by options shall be balanced by a statement of the corresponding risks. The risk statement shall reflect the same degree of specificity as the statement of opportunities, and broad generalities must be avoided.

### **(3) Projections**

Options communications may contain projected performance figures (including projected annualized rates of return) provided that:

(A) all such communications regarding standardized options are accompanied or preceded by the options disclosure document;

(B) no suggestion of certainty of future performance is made;

(C) parameters relating to such performance figures are clearly established (e.g., to indicate exercise price of option, purchase price of the underlying stock and its market price, option premium, anticipated dividends, etc.);

(D) all relevant costs, including commissions, fees, and interest charges (as applicable ) are disclosed and reflected in the projections;

(E) such projections are plausible and are intended as a source of reference or a comparative device to be used in the development of a recommendation;

(F) all material assumptions made in such calculations are clearly identified (e.g., “assume option expires,” “assume option unexercised,” “assume option exercised,” etc.);

(G) the risks involved in the proposed transactions are also disclosed; and

(H) in communications relating to annualized rates of return, that such returns are not based upon any less than a 60-day experience; any formulas used in making calculations are clearly displayed; and a statement is included to the effect that the annualized returns cited might be achieved only if the parameters described can be duplicated and that there is no certainty of doing so.

### **(4) Historical Performance**

Options communications may feature records and statistics that portray the performance of past recommendations or of actual transactions, provided that:

(A) all such communications regarding standardized options are accompanied or preceded by the options disclosure document;

(B) any such portrayal is done in a balanced manner, and consists of records or statistics that are confined to a specific “universe” that can be fully isolated and circumscribed and that covers at least the most recent 12-month period;

(C) such communications include the date of each initial recommendation or transaction, the price of each such recommendation or transaction as of such date, and the date and price of each recommendation or transaction at the end of the period or when liquidation was suggested or effected, whichever was earlier; provided that if the communications are limited to summarized or averaged records or statistics, in lieu of the complete record there may be included the number of items recommended or transacted, the number that advanced and the number that declined, together with an offer to provide the complete record upon request;

- (D) all relevant costs, including commissions, fees, and daily margin obligations (as applicable) are disclosed and reflected in the performance;
- (E) whenever such communications contain annualized rates of return, all material assumptions used in the process of annualization are disclosed;
- (F) an indication is provided of the general market conditions during the period(s) covered, and any comparison made between such records and statistics and the overall market (e.g., comparison to an index) is valid;
- (G) such communications state that the results presented should not and cannot be viewed as an indicator of future performance; and
- (H) a Registered Options Principal determines that the records or statistics fairly present the status of the recommendations or transactions reported upon and so initials the report.

#### **(5) Options Programs**

In communications regarding an options program (i.e., an investment plan employing the systematic use of one or more options strategies), the cumulative history or unproven nature of the program and its underlying assumptions shall be disclosed.

#### **(6) Violation of Other Rules**

Any violation by a member or associated person of any rule or requirement of the SEC or any rule of the Securities Investor Protection Corporation applicable to member communications concerning options will be deemed a violation of this Rule 2220.

*[Amended by SR-FINRA-2009-036 eff. Dec. 14, 2009]*

*Selected Notices to Members: 85-69, 86-68, 87-24, 87-43, 88-20, 88-52, 88-65, 89-11, 91-26, 91-62, 92-56, 99-16, 04-36, 08-28, 08-73, 09-60.*

## 2264 Margin Disclosure Statement

(a) No member shall open a margin account, as specified in Regulation T of the Board of Governors of the Federal Reserve System, for or on behalf of a non-institutional customer, unless, prior to or at the time of opening the account, the member has furnished to the customer, individually, in paper or electronic form, and in a separate document (or contained by itself on a separate page as part of another document), the margin disclosure statement specified in this paragraph (a). In addition, any member that permits non-institutional customers either to open accounts online or to engage in transactions in securities online must post such margin disclosure statement on the member's Web site in a clear and conspicuous manner.

### Margin Disclosure Statement

Your brokerage firm is furnishing this document to you to provide some basic facts about purchasing securities on margin, and to alert you to the risks involved with trading securities in a margin account. Before trading stocks in a margin account, you should carefully review the margin agreement provided by your firm. Consult your firm regarding any questions or concerns you may have with your margin accounts.

When you purchase securities, you may pay for the securities in full or you may borrow part of the purchase price from your brokerage firm. If you choose to borrow funds from your firm, you will open a margin account with the firm. The securities purchased are the firm's collateral for the loan to you. If the securities in your account decline in value, so does the value of the collateral supporting your loan, and, as a result, the firm can take action, such as issue a margin call and/or sell securities or other assets in any of your accounts held with the member, in order to maintain the required equity in the account.

It is important that you fully understand the risks involved in trading securities on margin. These risks include the following:

**You can lose more funds than you deposit in the margin account.** A decline in the value of securities that are purchased on margin may require you to provide additional funds to the firm that has made the loan to avoid the forced sale of those securities or other securities or assets in your account(s).

**The firm can force the sale of securities or other assets in your account(s).** If the equity in your account falls below the maintenance margin requirements, or the firm's higher "house" requirements, the firm can sell the securities or other assets in any of your accounts held at the firm to cover the margin deficiency. You also will be responsible for any short fall in the account after such a sale.

**The firm can sell your securities or other assets without contacting you.** Some investors mistakenly believe that a firm must contact them for a margin call to be valid, and that the firm cannot liquidate securities or other assets in their accounts to meet the call unless the firm has contacted them first. This is not the case. Most firms will attempt to notify their customers of margin calls, but they are not required to do so. However, even if a firm has contacted a customer and provided a specific date by which the customer can meet a margin call, the firm can still take necessary steps to protect its financial interests, including immediately selling the securities without notice to the customer.

**You are not entitled to choose which securities or other assets in your account(s) are liquidated or sold to meet a margin call.** Because the securities are collateral for the margin loan, the firm has the right to decide which security to sell in order to protect its interests.

**The firm can increase its “house” maintenance margin requirements at any time and is not required to provide you advance written notice.** These changes in firm policy often take effect immediately and may result in the issuance of a maintenance margin call. Your failure to satisfy the call may cause the member to liquidate or sell securities in your account(s).

**You are not entitled to an extension of time on a margin call.** While an extension of time to meet margin requirements may be available to customers under certain conditions, a customer does not have a right to the extension.

(b) Members shall, with a frequency of not less than once a calendar year, deliver individually, in paper or electronic form, the disclosure statement described in paragraph (a) or the following bolded disclosures to all non-institutional customers with margin accounts:

Securities purchased on margin are the firm’s collateral for the loan to you. If the securities in your account decline in value, so does the value of the collateral supporting your loan, and, as a result, the firm can take action, such as issue a margin call and/or sell securities or other assets in any of your accounts held with the member, in order to maintain the required equity in the account. It is important that you fully understand the risks involved in trading securities on margin. These risks include the following:

- **You can lose more funds than you deposit in the margin account.**
- **The firm can force the sale of securities or other assets in your account(s).**
- **The firm can sell your securities or other assets without contacting you.**
- **You are not entitled to choose which securities or other assets in your account(s) are liquidated or sold to meet a margin call.**
- **The firm can increase its “house” maintenance margin requirements at any time and is not required to provide you advance written notice.**
- **You are not entitled to an extension of time on a margin call.**

The annual disclosure statement required pursuant to this paragraph (b) may be delivered within or as part of other account documentation, and is not required to be provided in a separate document or on a separate page.

(c) In lieu of providing the disclosures specified in paragraphs (a) and (b), a member may provide to the customer and, to the extent required under paragraph (a) post on its Web site, an alternative disclosure statement, provided that the alternative disclosures shall be substantially similar to the disclosures specified in paragraphs (a) and (b).

(d) For purposes of this Rule, the term “non-institutional customer” means a customer that does not qualify as an “institutional account” under NASD Rule 3110(c)(4).

*[Amended by SR-FINRA-2009-52 eff. Dec. 14, 2009.]*

*Selected Notices: 01-31, 02-35, 09-60.*

## 2270 Day-Trading Risk Disclosure Statement

(a) Except as provided in paragraph (b), no member that is promoting a day-trading strategy, directly or indirectly, shall open an account for or on behalf of a non-institutional customer unless, prior to opening the account, the member has furnished to each customer, individually, in paper or electronic form, the disclosure statement specified in this paragraph (a). In addition, any member that is promoting a day-trading strategy, directly or indirectly, must post such disclosure statement on the member's Web site in a clear and conspicuous manner.

### Day-Trading Risk Disclosure Statement

You should consider the following points before engaging in a day-trading strategy. For purposes of this notice, a "day-trading strategy" means an overall trading strategy characterized by the regular transmission by a customer of intra-day orders to effect both purchase and sale transactions in the same security or securities.

**Day trading can be extremely risky.** Day trading generally is not appropriate for someone of limited resources and limited investment or trading experience and low risk tolerance. You should be prepared to lose all of the funds that you use for day trading. In particular, you should not fund day-trading activities with retirement savings, student loans, second mortgages, emergency funds, funds set aside for purposes such as education or home ownership, or funds required to meet your living expenses. Further, certain evidence indicates that an investment of less than \$50,000 will significantly impair the ability of a day trader to make a profit. Of course, an investment of \$50,000 or more will in no way guarantee success.

**Be cautious of claims of large profits from day trading.** You should be wary of advertisements or other statements that emphasize the potential for large profits in day trading. Day trading can also lead to large and immediate financial losses.

**Day trading requires knowledge of securities markets.** Day trading requires in-depth knowledge of the securities markets and trading techniques and strategies. In attempting to profit through day trading, you must compete with professional, licensed traders employed by securities firms. You should have appropriate experience before engaging in day trading.

**Day trading requires knowledge of a firm's operations.** You should be familiar with a securities firm's business practices, including the operation of the firm's order execution systems and procedures. Under certain market conditions, you may find it difficult or impossible to liquidate a position quickly at a reasonable price. This can occur, for example, when the market for a stock suddenly drops, or if trading is halted due to recent news events or unusual trading activity. The more volatile a stock is, the greater the likelihood that problems may be encountered in executing a transaction. In addition to normal market risks, you may experience losses due to system failures.

**Day trading will generate substantial commissions, even if the per trade cost is low.** Day trading involves aggressive trading, and generally you will pay commissions on each trade. The total daily commissions that you pay on your trades will add to your losses or significantly reduce your earnings. For instance, assuming that a trade costs \$16 and an average of 29 transactions are conducted per day, an investor would need to generate an annual profit of \$111,360 just to cover commission expenses.

**Day trading on margin or short selling may result in losses beyond your initial investment.**

When you day trade with funds borrowed from a firm or someone else, you can lose more than the funds you originally placed at risk. A decline in the value of the securities that are purchased may require you to provide additional funds to the firm to avoid the forced sale of those securities or other securities in your account. Short selling as part of your day-trading strategy also may lead to extraordinary losses, because you may have to purchase a stock at a very high price in order to cover a short position.

**Potential Registration Requirements.** Persons providing investment advice for others or managing securities accounts for others may need to register as either an “Investment Adviser” under the Investment Advisers Act of 1940 or as a “Broker” or “Dealer” under the Securities Exchange Act of 1934. Such activities may also trigger state registration requirements.

(b) In lieu of providing the disclosure statement specified in paragraph (a), a member that is promoting a day-trading strategy may provide to the customer, individually, in paper or electronic form, prior to opening the account, and post on its Web site, an alternative disclosure statement, provided that:

(1) The alternative disclosure statement shall be substantially similar to the disclosure statement specified in paragraph (a); and

(2) The alternative disclosure statement shall be filed with FINRA’s Advertising Department (Department) for review at least 10 days prior to use (or such shorter period as the Department may allow in particular circumstances) for approval and, if changes are recommended by FINRA, shall be withheld from use until any changes specified by FINRA have been made or, if expressly disapproved, until the alternative disclosure statement has been refiled for, and has received, FINRA approval. The member must provide with each filing the anticipated date of first use.

(c) For purposes of this Rule, the following terms shall have the meanings specified below:

(1) “Day-trading strategy” shall have the meaning provided in Rule 2130(e).

(2) “Non-institutional customer” means a customer that does not qualify as an “institutional account” under NASD Rule 3110(c)(4).

(3) “Promoting a day-trading strategy” shall have the meaning provided in Rule 2130.01.

**Supplementary Material:**

**.01 Review by FINRA’s Advertising Department.** A member may submit its advertisements to FINRA’s Advertising Department for review and guidance on whether the content of the advertisement constitutes “promoting a day-trading strategy” for purposes of this Rule.

**.02 Additional Rules Regarding Day Trading.** Members should be aware that, in addition to general rules that may apply, FINRA has additional rules that specifically address day trading. See, e.g., Rule 2130 (Approval Procedures for Day-Trading Accounts); Rule 4210(f)(8)(B) (Margin Requirements) regarding special margin requirements for day trading.

*[Amended by SR-FINRA-2010-060 eff. Dec. 15, 2010.]*  
*Selected Notices: 00-62, 02-35, 09-72.*

## 3160 Networking Arrangements between Members and Financial Institutions

### (a) Standards for Member Conduct

Except as otherwise provided in this Rule, a member that is a party to a networking arrangement under which the member conducts broker-dealer services on or off the premises of a financial institution is subject to the following requirements:

#### (1) Setting

A member that conducts broker-dealer services on the premises of a financial institution shall:

- (A) be clearly identified as the person providing broker-dealer services and shall distinguish its broker-dealer services from the services of the financial institution;
- (B) conduct its broker-dealer services in an area that displays clearly the member's name; and
- (C) to the extent practicable, maintain its broker-dealer services in a location physically separate from the routine retail deposit-taking activities of the financial institution.

#### (2) Networking Agreements

- (A) Networking arrangements between a member and a financial institution shall be governed by a written agreement that sets forth the responsibilities of the parties and the compensation arrangements and include all broker-dealer obligations, as applicable, set forth in Rule 701 of SEC Regulation R. Independent of their contractual obligations, members shall comply with all broker-dealer obligations, as applicable, under Rule 701 of SEC Regulation R.
- (B) The member shall ensure that the written agreement stipulates that supervisory personnel of the member and representatives of the SEC and FINRA will be permitted access to the financial institution's premises where the member conducts broker-dealer services, as applicable, in order to inspect the books and records and other relevant information maintained by the member with respect to its broker-dealer services.

#### (3) Customer Disclosure

- (A) At or prior to the time that a customer account is opened by a member that is a party to a networking arrangement, the member shall disclose in writing to each customer that the broker-dealer services are being provided by the member and not by the financial institution, and that the securities products purchased or sold in a transaction are:
  - (i) not insured by the Federal Deposit Insurance Corporation ("FDIC");
  - (ii) not deposits or other obligations of the financial institution and are not guaranteed by the financial institution; and
  - (iii) subject to investment risks, including possible loss of the principal invested.
- (B) The disclosures required by paragraph (a)(3)(A) of this Rule also shall be made orally by a member that is a party to a networking arrangement for any customer account opened on the premises of a financial institution.



#### **(4) Communications with the Public**

(A) All member confirmations and account statements shall indicate clearly that the broker-dealer services are being provided by the member.

(B) Advertisements and sales literature, including material published, or designed for use, in radio or television broadcasts, Automated Teller Machine (“ATM”) screens, billboards, signs, posters and brochures, that announce the location of a financial institution where broker-dealer services are provided by the member or promote the name or services of the financial institution or that are distributed by the member on the premises of a financial institution or at such other location where the financial institution is present or represented shall include the disclosures required by paragraph (a)(3) of this Rule. The following legend may be used to provide these disclosures in advertisements and sales literature, provided that such disclosures are displayed in a conspicuous manner:

- Not FDIC Insured
- No Bank Guarantee
- May Lose Value

(C) As long as the omission of the disclosures required by paragraph (a)(4)(B) of this Rule would not cause the advertisement or sales literature to be misleading in light of the context in which the material is presented, such disclosures are not required with respect to messages contained in:

- (i) radio broadcasts of 30 seconds or less;
- (ii) electronic signs, including billboard-type signs that are electronic, time and temperature signs and ticker tape signs, but excluding messages contained in such media as television, online services or ATMs; and
- (iii) signs, such as banners and posters, when used only as location indicators.

#### **(5) Notifications of Terminations**

A member shall promptly notify the financial institution if any associated person of the member who is employed by the financial institution is terminated for cause by the member.

#### **(b) Definitions**

For purposes of this Rule, the following terms shall have the meanings specified below:

- (1) “Financial institution” shall mean federal and state-chartered banks, savings and loan associations, savings banks, credit unions, and the service corporations of such institutions required by law.
- (2) “Networking arrangement” shall mean a contractual or other written agreement between a member and a financial institution under which the member offers broker-dealer services on or off the premises of the financial institution.
- (3) “Broker-dealer services” shall mean investment banking or securities business as defined in Article I of the FINRA By-Laws.

*[Amended by SR-FINRA-2010-023 eff. June 14, 2010.]*  
*Selected Notices: 94-94, 96-3, 97-26, 97-89, 10-21.*

## 3230 Telemarketing

### (a) General Telemarketing Requirements

No member or person associated with a member shall initiate any outbound telephone call to:

#### (1) Time of Day Restriction

Any residence of a person before the hour of 8 a.m. or after 9 p.m. (local time at the called party's location), unless

- (A) the member has an established business relationship with the person pursuant to paragraph (m)(12)(A),
- (B) the member has received that person's prior express invitation or permission, or
- (C) the person called is a broker or dealer;

#### (2) Firm-Specific Do-Not-Call List

Any person that previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the member; or

#### (3) National Do-Not-Call List

Any person who has registered his or her telephone number on the Federal Trade Commission's national do-not-call registry.

### (b) National Do-Not-Call List Exceptions

A member making outbound telephone calls will not be liable for violating paragraph (a)(3) if:

#### (1) Established Business Relationship Exception

The member has an established business relationship with the recipient of the call. A person's request to be placed on the firm-specific do-not-call list terminates the established business relationship exception to that national do-not-call list provision for that member even if the person continues to do business with the member;

#### (2) Prior Express Written Consent Exception

The member has obtained the person's prior express invitation or permission. Such permission must be evidenced by a signed, written agreement (which may be obtained electronically under the E-Sign Act) between the person and member which states that the person agrees to be contacted by the member and includes the telephone number to which the calls may be placed; or

#### (3) Personal Relationship Exception

The associated person making the call has a personal relationship with the recipient of the call.

### (c) Safe Harbor Provision

A member or person associated with a member making outbound telephone calls will not be liable for violating paragraph (a)(3) if the member or person associated with a member demonstrates that the violation is the result of an error and that as part of the member's routine business practice, it meets the following standards:

- (1) Written procedures. The member has established and implemented written procedures to comply with the national do-not-call rules;

- (2) Training of personnel. The member has trained its personnel, and any entity assisting in its compliance, in procedures established pursuant to the national do-not-call rules;
- (3) Recording. The member has maintained and recorded a list of telephone numbers that it may not contact; and
- (4) Accessing the national do-not-call database. The member uses a process to prevent outbound telephone calls to any telephone number on any list established pursuant to the do-not-call rules, employing a version of the national do-not-call registry obtained from the administrator of the registry no more than 31 days prior to the date any call is made, and maintains records documenting this process.

#### **(d) Procedures**

Prior to engaging in telemarketing, a member must institute procedures to comply with paragraph

(a). Such procedures must meet the following minimum standards:

- (1) Written policy. Members must have a written policy for maintaining a do-not-call list.
- (2) Training of personnel engaged in telemarketing. Personnel engaged in any aspect of telemarketing must be informed and trained in the existence and use of the do-not-call list.
- (3) Recording, disclosure of do-not-call requests. If a member receives a request from a person not to receive calls from that member, the member must record the request and place the person's name, if provided, and telephone number on the firm's do-not-call list at the time the request is made. Members must honor a person's do-not-call request within a reasonable time from the date such request is made. This period may not exceed 30 days from the date of such request. If such requests are recorded or maintained by a party other than the member on whose behalf the outbound telephone call is made, the member on whose behalf the outbound telephone call is made will be liable for any failures to honor the do-not-call request.
- (4) Identification of sellers and telemarketers. A member or person associated with a member making an outbound telephone call must provide the called party with the name of the individual caller, the name of the member, an address or telephone number at which the member may be contacted, and that the purpose of the call is to solicit the purchase of securities or related service. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges.
- (5) Affiliated persons or entities. In the absence of a specific request by the person to the contrary, a person's do-not-call request shall apply to the member making the call, and will not apply to affiliated entities unless the consumer reasonably would expect them to be included given the identification of the caller and the product being advertised.
- (6) Maintenance of do-not-call lists. A member making outbound telephone calls must maintain a record of a person's request not to receive further calls.

#### **(e) Wireless Communications**

The provisions set forth in this Rule are applicable to members and persons associated with a member making outbound telephone calls to wireless telephone numbers.

#### **(f) Outsourcing Telemarketing**

If a member uses another appropriately registered or licensed entity or person to perform telemarketing services on its behalf, the member remains responsible for ensuring compliance with all provisions contained in this Rule.

#### **(g) Caller Identification Information**

- (1) Any member that engages in telemarketing, as defined in paragraph (m)(20) of this Rule, must transmit or cause to be transmitted the telephone number, and, when made available by the member's telephone carrier, the name of the member, to any caller identification service in use by a recipient of an outbound telephone call.
- (2) The telephone number so provided must permit any person to make a do-not-call request during regular business hours.
- (3) Any member that engages in telemarketing, as defined in paragraph (m)(20) of this Rule, is prohibited from blocking the transmission of caller identification information.

#### **(h) Unencrypted Consumer Account Numbers**

No member or person associated with a member shall disclose or receive, for consideration, unencrypted consumer account numbers for use in telemarketing. The term "unencrypted" means not only complete, visible account numbers, whether provided in lists or singly, but also encrypted information with a key to its decryption. This paragraph shall not apply to the disclosure or receipt of a customer's billing information to process a payment pursuant to a telemarketing transaction.

#### **(i) Submission of Billing Information**

For any telemarketing transaction, a member or person associated with a member must obtain the express informed consent of the person to be charged and to be charged using the identified account.

- (1) In any telemarketing transaction involving preacquired account information and a free-to-pay conversion feature, the member or person associated with a member must:
  - (A) obtain from the customer, at a minimum, the last four digits of the account number to be charged;
  - (B) obtain from the customer an express agreement to be charged and to be charged using the account number pursuant to paragraph (i)(1)(A); and
  - (C) make and maintain an audio recording of the entire telemarketing transaction.
- (2) In any other telemarketing transaction involving preacquired account information not described in paragraph (i)(1), the member or person associated with a member must:
  - (A) identify the account to be charged with sufficient specificity for the customer to understand what account will be charged; and
  - (B) obtain from the customer an express agreement to be charged and to be charged using the account number identified pursuant to paragraph (i)(2)(A).

#### **(j) Abandoned Calls**

- (1) No member or person associated with a member shall "abandon" any outbound telemarketing call. An outbound call is "abandoned" if a person answers it and the call is not connected to a person associated with a member within two seconds of the person's completed greeting.
- (2) A member or person associated with a member shall not be liable for violating paragraph (j)

(1) if:

- (A) the member or person associated with a member employs technology that ensures abandonment of no more than three percent of all telemarketing calls answered by a person, measured over the duration of a single calling campaign, if less than 30 days, or separately over each successive 30-day period or portion thereof that the campaign continues;
- (B) the member or person associated with a member, for each telemarketing call placed, allows the telephone to ring for at least 15 seconds or four rings before disconnecting an unanswered call;
- (C) whenever a person associated with a member is not available to speak with the person answering the telemarketing call within two seconds after the person's completed greeting, the member or person associated with a member promptly plays a recorded message that states the name and telephone number of the member or person associated with the member on whose behalf the call was placed; and
- (D) the member retains records establishing compliance with paragraph (j)(2).

#### **(k) Prerecorded Messages**

(1) No member or person associated with a member shall initiate any outbound telemarketing call that delivers a prerecorded message other than a prerecorded message permitted for compliance with the call abandonment safe harbor in paragraph (j)(2)(C) unless:

- (A) the member has obtained from the recipient of the call an express agreement, in writing, that:
  - (i) the member obtained only after a clear and conspicuous disclosure that the purpose of the agreement is to authorize the member to place prerecorded calls to such person;
  - (ii) the member obtained without requiring, directly or indirectly, that the agreement be executed as a condition of opening an account or purchasing any good or service;
  - (iii) evidences the willingness of the recipient of the call to receive calls that deliver prerecorded messages by or on behalf of a specific member; and
  - (iv) includes such person's telephone number and signature (which may be obtained electronically under the E-Sign Act);
- (B) the member or person associated with a member allows the telephone to ring for at least 15 seconds or four rings before disconnecting an unanswered call; and within two seconds after the completed greeting of the person called, plays a prerecorded message that promptly provides the disclosures in paragraph (d)(4), followed immediately by a disclosure of one or both of the following:
  - (i) for a call that could be answered by a person, that the person called can use an automated interactive voice and/or keypress-activated opt-out mechanism to assert a firm-specific do-not-call request pursuant to the member's procedures instituted under paragraph (d)(3) at any time during the message. The mechanism must:
    - a. automatically add the number called to the member's firm-specific do-not-call list;

- b. once invoked, immediately disconnect the call; and
- c. be available for use at any time during the message;

(ii) for a call that could be answered by an answering machine or voicemail service, that the person called can use a toll-free telephone number to assert a firm-specific do-not-call request pursuant to the member's procedures instituted under paragraph (d)(3). The number provided must connect directly to an automated interactive voice or keypress-activated opt-out mechanism that:

- a. automatically adds the number called to the member's firm-specific do-not-call list;
- b. immediately thereafter disconnects the call; and
- c. is accessible at any time throughout the duration of the telemarketing campaign; and

(C) the member complies with all other requirements of this Rule and other applicable federal and state laws.

(2) Any call that complies with all applicable requirements of paragraph (k) shall not be deemed to violate paragraph (j).

#### **(l) Credit Card Laundering**

Except as expressly permitted by the applicable credit card system, no member or person associated with a member shall:

- (1) present to or deposit into, the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the member;
- (2) employ, solicit, or otherwise cause a merchant, or an employee, representative or agent of the merchant, to present to or to deposit into the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant; or
- (3) obtain access to the credit card system through the use of a business relationship or an affiliation with a merchant, when such access is not authorized by the merchant agreement or the applicable credit card system.

#### **(m) Definitions**

For purposes of this Rule:

- (1) The term "account activity" shall include, but not be limited to, purchases, sales, interest credits or debits, charges or credits, dividend payments, transfer activity, securities receipts or deliveries, and/or journal entries relating to securities or funds in the possession or control of the member.
- (2) The term "acquirer" means a business organization, financial institution, or an agent of a business organization or financial institution that has authority from an organization that operates or licenses a credit card system to authorize merchants to accept, transmit, or process payment by credit card through the credit card system for money, goods or services, or anything else of value.
- (3) The term "billing information" means any data that enables any person to access a customer's or donor's account, for example a credit or debit card number, a brokerage, checking, or savings account number, or a mortgage loan account number.

- (4) The term “broker-dealer of record” refers to the broker-dealer identified on a customer’s account application for accounts held directly at a mutual fund or variable insurance product issuer.
- (5) The term “caller identification service” means a service that allows a telephone subscriber to have the telephone number, and, where available, name of the calling party transmitted contemporaneously with the telephone call, and displayed on a device in or connected to the subscriber’s telephone.
- (6) The term “cardholder” means a person to whom a credit card is issued or who is authorized to use a credit card on behalf of or in addition to the person to whom the credit card is issued.
- (7) The term “credit” means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.
- (8) The term “credit card” means any card, plate, coupon book, or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.
- (9) The term “credit card sales draft” means any record or evidence of a credit card transaction.
- (10) The term “credit card system” means any method or procedure used to process credit card transactions involving credit cards issued or licensed by the operator of that system.
- (11) The term “customer” means any person who is or may be required to pay for goods or services offered through telemarketing.
- (12) The term “established business relationship” means a relationship between a member and a person if:
- (A) the person has made a financial transaction or has a security position, a money balance, or account activity with the member or at a clearing firm that provides clearing services to such member within the previous 18 months immediately preceding the date of the telemarketing call;
  - (B) the member is the broker-dealer of record for an account of the person within the previous 18 months immediately preceding the date of the telemarketing call; or
  - (C) the person has contacted the member to inquire about a product or service offered by the member within the previous three months immediately preceding the date of the telemarketing call.

A person’s established business relationship with a member does not extend to the member’s affiliated entities unless the person would reasonably expect them to be included. Similarly, a person’s established business relationship with a member’s affiliate does not extend to the member unless the person would reasonably expect the member to be included.

- (13) The term “free-to-pay conversion” means, in an offer or agreement to sell or provide any goods or services, a provision under which a customer receives a product or service for free for an initial period and will incur an obligation to pay for the product or service if he or she does not take affirmative action to cancel before the end of that period.
- (14) The term “merchant” means a person who is authorized under a written contract with an acquirer to honor or accept credit cards, or to transmit or process for payment credit card payments, for the purchase of goods or services or a charitable contribution. A “charitable contribution” means any donation or gift of money or any other thing of value, for example a transfer to a pooled income fund.

(15) The term “merchant agreement” means a written contract between a merchant and an acquirer to honor or accept credit cards, or to transmit or process for payment credit card payments, for the purchase of goods or services or a charitable contribution.

(16) The term “outbound telephone call” means a telephone call initiated by a telemarketer to induce the purchase of goods or services or to solicit a charitable contribution from a donor. A “donor” means any person solicited to make a charitable contribution.

(17) The term “person” means any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.

(18) The term “personal relationship” means any family member, friend, or acquaintance of the person associated with a member making an outbound telephone call.

(19) The term “preacquired account information” means any information that enables a seller or telemarketer to cause a charge to be placed against a customer’s or donor’s account without obtaining the account number directly from the customer or donor during the telemarketing transaction pursuant to which the account will be charged.

(20) The term “telemarketing” means consisting of or relating to a plan, program, or campaign involving at least one outbound telephone call, for example cold-calling. The term does not include the solicitation of sales through the mailing of written marketing materials, when the person making the solicitation does not solicit customers by telephone but only receives calls initiated by customers in response to the marketing materials and during those calls takes orders only without further solicitation. For purposes of the previous sentence, the term “further solicitation” does not include providing the customer with information about, or attempting to sell, anything promoted in the same marketing materials that prompted the customer’s call.

## Supplementary Material

**.01 Compliance with Other Requirements.** This Rule does not affect the obligation of any member or person associated with a member that engages in telemarketing to comply with relevant state and federal laws and rules, including but not limited to the Telemarketing and Consumer Fraud and Abuse Prevention Act codified at 15 U.S.C. 6101–6108, as amended, the Telephone Consumer Protection Act codified at 47 U.S.C. 227, and the rules of the Federal Communications Commission relating to telemarketing practices and the rights of telephone consumers codified at 47 CFR 64.1200.

*[Amended by SR-FINRA-2012-027 eff. July 9, 2012.]*

*Selected Notices: 04-15, 05-07, 12-17.*



## **8210 Provision of Information and Testimony and Inspection and Copying of Books**

### **(a) Authority of Adjudicator and FINRA Staff**

For the purpose of an investigation, complaint, examination, or proceeding authorized by the FINRA By-Laws or rules, an Adjudicator or FINRA staff shall have the right to:

- (1) require a member, person associated with a member, or person subject to FINRA's jurisdiction to provide information orally, in writing, or electronically (if the requested information is, or is required to be, maintained in electronic form) and to testify at a location specified by FINRA staff, under oath or affirmation administered by a court reporter or a notary public if requested, with respect to any matter involved in the investigation, complaint, examination, or proceeding; and
- (2) inspect and copy the books, records, and accounts of such member or person with respect to any matter involved in the investigation, complaint, examination, or proceeding.

### **(b) Other SROs and Regulators**

- (1) FINRA staff may enter into an agreement with a domestic federal agency, or subdivision thereof, or foreign regulator to share any information in FINRA's possession for any regulatory purpose set forth in such agreement, provided that the agreement must require the other regulator, in accordance with the terms of the agreement, to treat any shared information confidentially and to assert such confidentiality and other applicable privileges in response to any requests for such information from third parties.

Any such agreement with a foreign regulator must also meet the following conditions:

- (A) the other regulator party to the agreement must have jurisdiction over common regulatory matters; and
  - (B) the agreement must require the other regulator to reciprocate and share with FINRA information of regulatory interest or concern to FINRA.
- (2) FINRA staff may exercise the authority set forth in paragraph (a) for the purpose of an investigation, complaint, examination, or proceeding conducted by another domestic or foreign self-regulatory organization, association, securities or contract market, or regulator of such markets with which FINRA has entered into an agreement providing for the exchange of information and other forms of material assistance solely for market surveillance, investigative, enforcement, or other regulatory purposes.

### **(c) Requirement to Comply**

No member or person shall fail to provide information or testimony or to permit an inspection and copying of books, records, or accounts pursuant to this Rule.

### **(d) Notice**

A notice under this Rule shall be deemed received by the member or person to whom it is directed by mailing or otherwise transmitting the notice to the last known business address of the member or the last known residential address of the person as reflected in the Central Registration Depository. If the Adjudicator or FINRA staff responsible for mailing or otherwise transmitting the notice to the member or person has actual knowledge that the address in the Central Registration Depository is out of date or inaccurate, then a copy of the notice shall be mailed or otherwise transmitted to:

- (1) the last known business address of the member or the last known residential address of the person as reflected in the Central Registration Depository; and
- (2) any other more current address of the member or the person known to the Adjudicator or FINRA staff who is responsible for mailing or otherwise transmitting the notice.

**(e) Electronic Interface**

In carrying out its responsibilities under this Rule, FINRA may, as appropriate, establish programs for the submission of information to FINRA on a regular basis through a direct or indirect electronic interface between FINRA and members.

**(f) Inspection and Copying**

A witness, upon proper identification, may inspect the official transcript of the witness' own testimony. Upon written request, a person who has submitted documentary evidence or testimony in a FINRA investigation may procure a copy of the person's documentary evidence or the transcript of the person's testimony upon payment of the appropriate fees, except that prior to the issuance of a complaint arising from the investigation, FINRA staff may for good cause deny such request.

**(g) Encryption of Information Provided in Electronic Form**

- (1) Any member or person who, in response to a request pursuant to this Rule, provides the requested information on a portable media device must ensure that such information is encrypted.
- (2) For purposes of this Rule, a "portable media device" is a storage device for electronic information, including but not limited to a flash drive, CD-ROM, DVD, portable hard drive, laptop computer, disc, diskette, or any other portable device for storing and transporting electronic information.
- (3) For purposes of this Rule, "encrypted" means the transformation of data into a form in which meaning cannot be assigned without the use of a confidential process or key. To ensure that encrypted information is secure, a member or person providing encrypted information to FINRA staff pursuant to this Rule shall (a) use an encryption method that meets industry standards for strong encryption, and (b) provide the confidential process or key regarding the encryption to FINRA staff in a communication separate from the encrypted information itself.

*[Amended by SR-FINRA-2010-021 eff. Dec. 29, 2010.]*  
*Selected Notices: 86-36, 92-19, 96-58, 99-16, 08-57, 10-59.*

# Securities Act of 1933

## 230.134 Communications Not Deemed a Prospectus

Except as provided in paragraphs (e) and (g) of this section, the terms “prospectus” as defined in section 2(a)(10) of the Act or “free writing prospectus” as defined in Rule 405 (§230.405) shall not include a communication limited to the statements required or permitted by this section, provided that the communication is published or transmitted to any person only after a registration statement relating to the offering that includes a prospectus satisfying the requirements of section 10 of the Act (except as otherwise permitted in paragraph (a) of this section) has been filed.

(a) Such communication may include any one or more of the following items of information, which need not follow the numerical sequence of this paragraph, provided that, except as to paragraphs (a)(4), (a)(5), (a)(6), and (a)(17), the prospectus included in the filed registration statement does not have to include a price range otherwise required by rule:

(1) Factual information about the legal identity and business location of the issuer limited to the following: the name of the issuer of the security, the address, phone number, and e-mail address of the issuer’s principal offices and contact for investors, the issuer’s country of organization, and the geographic areas in which it conducts business;

(2) The title of the security or securities and the amount or amounts being offered, which title may include a designation as to whether the securities are convertible, exercisable, or exchangeable, and as to the ranking of the securities;

(3) A brief indication of the general type of business of the issuer, limited to the following:

(i) In the case of a manufacturing company, the general type of manufacturing, the principal products or classes of products manufactured, and the segments in which the company conducts business;

(ii) In the case of a public utility company, the general type of services rendered, a brief indication of the area served, and the segments in which the company conducts business;

(iii) In the case of an asset-backed issuer, the identity of key parties, such as sponsor, depositor, issuing entity, servicer or servicers, and trustee, the asset class of the transaction, and the identity of any credit enhancement or other support; and

(iv) In the case of any other type of company, a corresponding statement;

(4) The price of the security, or if the price is not known, the method of its determination or the *bona fide* estimate of the price range as specified by the issuer or the managing underwriter or underwriters;

(5) In the case of a fixed income security, the final maturity and interest rate provisions or, if the final maturity or interest rate provisions are not known, the probable final maturity or interest rate provisions, as specified by the issuer or the managing underwriter or underwriters;

(6) In the case of a fixed income security with a fixed (non-contingent) interest rate provision, the yield or, if the yield is not known, the probable yield range, as specified by the issuer or the managing underwriter or underwriters and the yield of fixed income securities with comparable maturity and security rating as referred to in paragraph (a)(17) of this section;

(7) A brief description of the intended use of proceeds of the offering, if then disclosed in the prospectus that is part of the filed registration statement;

(8) The name, address, phone number, and e-mail address of the sender of the communication and the fact that it is participating, or expects to participate, in the distribution of the security;

- (9) The type of underwriting, if then included in the disclosure in the prospectus that is part of the filed registration statement;
- (10) The names of underwriters participating in the offering of the securities, and their additional roles, if any, within the underwriting syndicate;
- (11) The anticipated schedule for the offering (including the approximate date upon which the proposed sale to the public will begin) and a description of marketing events (including the dates, times, locations, and procedures for attending or otherwise accessing them);
- (12) A description of the procedures by which the underwriters will conduct the offering and the procedures for transactions in connection with the offering with the issuer or an underwriter or participating dealer (including procedures regarding account opening and submitting indications of interest and conditional offers to buy), and procedures regarding directed share plans and other participation in offerings by officers, directors, and employees of the issuer;
- (13) Whether, in the opinion of counsel, the security is a legal investment for savings banks, fiduciaries, insurance companies, or similar investors under the laws of any State or Territory or the District of Columbia, and the permissibility or status of the investment under the Employee Retirement Income Security Act of 1974 [29 U.S.C. 1001 et seq.];
- (14) Whether, in the opinion of counsel, the security is exempt from specified taxes, or the extent to which the issuer has agreed to pay any tax with respect to the security or measured by the income therefrom;
- (15) Whether the security is being offered through rights issued to security holders, and, if so, the class of securities the holders of which will be entitled to subscribe, the subscription ratio, the actual or proposed record date, the date upon which the rights were issued or are expected to be issued, the actual or anticipated date upon which they will expire, and the approximate subscription price, or any of the foregoing;
- (16) Any statement or legend required by any state law or administrative authority;
- (17) With respect to the securities being offered:
- (i) Any security rating assigned, or reasonably expected to be assigned, by a nationally recognized statistical rating organization as defined in Rule 15c3-1(c)(2)(vi)(F) of the Securities Exchange Act of 1934 (§240.15c3-1(c)(2)(vi)(F) of this chapter) and the name or names of the nationally recognized statistical rating organization(s) that assigned or is or are reasonably expected to assign the rating(s); and
  - (ii) If registered on Form F-9 (§239.39 of this chapter), any security rating assigned, or reasonably expected to be assigned, by any other rating organization specified in the Instruction to paragraph A.(2) of General Instruction I of Form F-9;
- (18) The names of selling security holders, if then disclosed in the prospectus that is part of the filed registration statement;
- (19) The names of securities exchanges or other securities markets where any class of the issuer's securities are, or will be, listed;
- (20) The ticker symbols, or proposed ticker symbols, of the issuer's securities;
- (21) The CUSIP number as defined in Rule 17Ad-19(a)(5) of the Securities Exchange Act of 1934 (§240.17Ad-19(a)(5) of this chapter) assigned to the securities being offered; and

(22) Information disclosed in order to correct inaccuracies previously contained in a communication permissibly made pursuant to this section.

(b) Except as provided in paragraph (c) of this section, every communication used pursuant to this section shall contain the following:

(1) If the registration statement has not yet become effective, the following statement:

A registration statement relating to these securities has been filed with the Securities and Exchange Commission but has not yet become effective. These securities may not be sold nor may offers to buy be accepted prior to the time the registration statement becomes effective; and

(2) The name and address of a person or persons from whom a written prospectus for the offering meeting the requirements of section 10 of the Act (other than a free writing prospectus as defined in Rule 405) including as to the identified paragraphs above a price range where required by rule, may be obtained.

(c) Any of the statements or information specified in paragraph (b) of this section may, but need not, be contained in a communication which:

(1) Does no more than state from whom and include the uniform resource locator (URL) where a written prospectus meeting the requirements of section 10 of the Act (other than a free writing prospectus as defined in Rule 405) may be obtained, identify the security, state the price thereof and state by whom orders will be executed; or

(2) Is accompanied or preceded by a prospectus or a summary prospectus, other than a free writing prospectus as defined in Rule 405, which meets the requirements of section 10 of the Act, including a price range where required by rule, at the date of such preliminary communication.

(d) A communication sent or delivered to any person pursuant to this rule which is accompanied or preceded by a prospectus which meets the requirements of section 10 of the Act (other than a free writing prospectus as defined in Rule 405), including a price range where required by rule, at the date of such communication, may solicit from the recipient of the communication an offer to buy the security or request the recipient to indicate whether he or she might be interested in the security, if the communication contains substantially the following statement:

No offer to buy the securities can be accepted and no part of the purchase price can be received until the registration statement has become effective, and any such offer may be withdrawn or revoked, without obligation or commitment of any kind, at any time prior to notice of its acceptance given after the effective date.

Provided, that such statement need not be included in such a communication to a dealer.

(e) A section 10 prospectus included in any communication pursuant to this section shall remain a prospectus for all purposes under the Act.

(f) The provision in paragraphs (c)(2) and (d) of this section that a prospectus that meets the requirements of section 10 of the Act precede or accompany a communication will be satisfied if such communication is an electronic communication containing an active hyperlink to such prospectus.

(g) This section does not apply to a communication relating to an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.) or a business development company as defined in section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(48)).

[ 70 FR 44800, Aug. 3, 2005]

## 230.135a Generic Advertising

(a) For the purposes only of section 5 of the Act, a notice, circular, advertisement, letter, sign, or other communication, published or transmitted to any person which does not specifically refer by name to the securities of a particular investment company, to the investment company itself, or to any other securities not exempt under section 3(a) of the Act, will not be deemed to offer any security for sale, provided:

(1) Such communication is limited to any one or more of the following:

- (i) Explanatory information relating to securities of investment companies generally or to the nature of investment companies, or to services offered in connection with the ownership of such securities,
- (ii) The mention or explanation of investment companies of different generic types or having various investment objectives, such as balanced funds, growth funds, income funds, leveraged funds, specialty funds, variable annuities, bond funds, and no-load funds,”
- (iii) Offers, descriptions, and explanation of various products and services not constituting a security subject to registration under the Act: Provided, That such offers, descriptions, and explanations do not relate directly to the desirability of owning or purchasing a security issued by a registered investment company,
- (iv) Invitation to inquire for further information, and

(2) Such communication contains the name and address of a registered broker or dealer or other person sponsoring the communication.

(b) If such communication contains a solicitation of inquiries and prospectuses for investment company securities are to be sent or delivered in response to such inquiries, the number of such investment companies and, if applicable, the fact that the sponsor of the communication is the principal underwriter or investment adviser in respect to such investment companies shall be stated.

(c) With respect to any communication describing any type of security, service, or product, the broker, dealer, or other person sponsoring such communication must offer for sale a security, service, or product of the type described in such communication.

*[37 FR 10073, May 19, 1972, as amended at 37 FR 10931, June 1, 1972]*

## 230.156 Investment Company Sales Literature

(a) Under the federal securities laws, including section 17(a) of the Securities Act of 1933 (15 U.S.C. 77q(a)) and section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b)) and Rule 10b-5 thereunder (17 CFR part 240), it is unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, to use sales literature which is materially misleading in connection with the offer or sale of securities issued by an investment company. Under these provisions, sales literature is materially misleading if it: (1) Contains an untrue statement of a material fact or (2) omits to state a material fact necessary in order to make a statement made, in the light of the circumstances of its use, not misleading.

(b) Whether or not a particular description, representation, illustration, or other statement involving a material fact is misleading depends on evaluation of the context in which it is made. In considering whether a particular statement involving a material fact is or might be misleading, weight should be given to all pertinent factors, including, but not limited to, those listed below.

(1) A Statement could be misleading because of:

- (i) Other statements being made in connection with the offer of sale or sale of the securities in question;
- (ii) The absence of explanations, qualifications, limitations or other statements necessary or appropriate to make such statement not misleading; or
- (iii) General economic or financial conditions or circumstances.

(2) Representations about past or future investment performance could be misleading because of statements or omissions made involving a material fact, including situations where:

- (i) Portrayals of past income, gain, or growth of assets convey an impression of the net investment results achieved by an actual or hypothetical investment which would not be justified under the circumstances, including portrayals that omit explanations, qualifications, limitations, or other statements necessary or appropriate to make the portrayals not misleading; and
- (ii) Representations, whether express or implied, about future investment performance, including:
  - (A) Representations, as to security of capital, possible future gains or income, or expenses associated with an investment;
  - (B) Representations implying that future gain or income may be inferred from or predicted based on past investment performance; or
  - (C) Portrayals of past performance, made in a manner which would imply that gains or income realized in the past would be repeated in the future.

(3) A statement involving a material fact about the characteristics or attributes of an investment company could be misleading because of:

- (i) Statements about possible benefits connected with or resulting from services to be provided or methods of operation which do not give equal prominence to discussion of any risks or limitations associated therewith;
- (ii) Exaggerated or unsubstantiated claims about management skill or techniques, characteristics of the investment company or an investment in securities issued by such company, services, security of investment or funds, effects of government supervision, or other attributes; and

(iii) Unwarranted or incompletely explained comparisons to other investment vehicles or to indexes.

(c) For purposes of this section, the term *sales literature* shall be deemed to include any communication (whether in writing, by radio, or by television) used by any person to offer to sell or induce the sale of securities of any investment company. Communications between issuers, underwriters and dealers are included in this definition of *sales literature* if such communications, or the information contained therein, can be reasonably expected to be communicated to prospective investors in the offer or sale of securities or are designed to be employed in either written or oral form in the offer or sale of securities.

[44 FR 64072, Nov. 6, 1979, as amended at 68 FR 57777, Oct. 6, 2003]



## 230.433 Conditions to Permissible Post-Filing Free Writing Prospectuses

**(a) Scope of section.** This section applies to any free writing prospectus with respect to securities of any issuer (except as set forth in Rule 164 (§230.164)) that are the subject of a registration statement that has been filed under the Act. Such a free writing prospectus that satisfies the conditions of this section may include information the substance of which is not included in the registration statement. Such a free writing prospectus that satisfies the conditions of this section will be a prospectus permitted under section 10(b) of the Act for purposes of sections 2(a)(10), 5(b)(1), and 5(b)(2) of the Act and will, for purposes of considering it a prospectus, be deemed to be public, without regard to its method of use or distribution, because it is related to the public offering of securities that are the subject of a filed registration statement.

**(b) Permitted use of free writing prospectus.** Subject to the conditions of this paragraph (b) and satisfaction of the conditions set forth in paragraphs (c) through (g) of this section, a free writing prospectus may be used under this section and Rule 164 in connection with a registered offering of securities:

(1) Eligibility and prospectus conditions for seasoned issuers and well-known seasoned issuers. Subject to the provisions of Rule 164(e), (f), and (g), the issuer or any other offering participant may use a free writing prospectus in the following offerings after a registration statement relating to the offering has been filed that includes a prospectus that, other than by reason of this section or Rule 431, satisfies the requirements of section 10 of the Act:

- (i) Offerings of securities registered on Form S-3 (§239.33 of this chapter) pursuant to General Instruction I.B.1, I.B.2, I.B.5, I.C., or I.D. thereof;
- (ii) Offerings of securities registered on Form F-3 (§239.13 of this chapter) pursuant to General Instruction I.A.5, I.B.1, I.B.2, or I.C. thereof;
- (iii) Any other offering not excluded from reliance on this section and Rule 164 of securities of a well-known seasoned issuer; and
- (iv) Any other offering not excluded from reliance on this section and Rule 164 of securities of an issuer eligible to use Form S-3 or Form F-3 for primary offerings pursuant to General Instruction I.B.1 of such Forms.

(2) Eligibility and prospectus conditions for non-reporting and unseasoned issuers. If the issuer does not fall within the provisions of paragraph (b)(1) of this section, then, subject to the provisions of Rule 164(e), (f), and (g), any person participating in the offer or sale of the securities may use a free writing prospectus as follows:

- (i) If the free writing prospectus is or was prepared by or on behalf of or used or referred to by an issuer or any other offering participant, if consideration has been or will be given by the issuer or other offering participant for the dissemination (in any format) of any free writing prospectus (including any published article, publication, or advertisement), or if section 17(b) of the Act requires disclosure that consideration has been or will be given by the issuer or other offering participant for any activity described therein in connection with the free writing prospectus, then a registration statement relating to the offering must have been filed that includes a prospectus that, other than by reason of this section or Rule 431, satisfies the requirements of section 10 of the Act, including a price range where required by rule, and the free writing prospectus shall be accompanied or preceded by the most recent such prospectus; *provided, however*, that use of the free writing prospectus is not conditioned on providing the most recent such prospectus if a prior such prospectus has been provided and there is no material change from the prior prospectus reflected in the most recent prospectus; *provided further*, that

after effectiveness and availability of a final prospectus meeting the requirements of section 10(a) of the Act, no such earlier prospectus may be provided in satisfaction of this condition, and such final prospectus must precede or accompany any free writing prospectus provided after such availability, whether or not an earlier prospectus had been previously provided.

NOTES TO PARAGRAPH (b)(2)(i): 1. The condition that a free writing prospectus shall be accompanied or preceded by the most recent prospectus satisfying the requirements of section 10 of the Act would be satisfied if a free writing prospectus that is an electronic communication contained an active hyperlink to such most recent prospectus; and 2. A communication for which disclosure would be required under section 17(b) of the Act as a result of consideration given or to be given, directly or indirectly, by or on behalf of an issuer or other offering participant is an offer by the issuer or such other offering participant as the case may be and is, if written, a free writing prospectus of the issuer or other offering participant.

(ii) Where paragraph (b)(2)(i) of this section does not apply, a registration statement relating to the offering has been filed that includes a prospectus that, other than by reason of this section or Rule 431 satisfies the requirements of section 10 of the Act, including a price range where required by rule. For purposes of paragraph (f) of this section, the prospectus included in the registration statement relating to the offering that has been filed does not have to include a price range otherwise required by rule.

(3) Successors. A successor issuer will be considered to satisfy the applicable provisions of this paragraph (b) if:

- (i) Its predecessor and it, taken together, satisfy the conditions, provided that the succession was primarily for the purpose of changing the state or other jurisdiction of incorporation of the predecessor or forming a holding company and the assets and liabilities of the successor at the time of succession were substantially the same as those of the predecessor; or
- (ii) All predecessors met the conditions at the time of succession and the issuer has continued to do so since the succession.

**(c) Information in a free writing prospectus.**

(1) A free writing prospectus used in reliance on this section may include information the substance of which is not included in the registration statement but such information shall not conflict with:

- (i) Information contained in the filed registration statement, including any prospectus or prospectus supplement that is part of the registration statement (including pursuant to Rule 430B or Rule 430C) (§230.430B or §230.430C) and not superseded or modified; or
- (ii) Information contained in the issuer's periodic and current reports filed or furnished to the Commission pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)) that are incorporated by reference into the registration statement and not superseded or modified.

(2) (i) A free writing prospectus used in reliance on this section shall contain substantially the following legend:

The issuer has filed a registration statement (including a prospectus) with the SEC for the offering to which this communication relates. Before you invest, you should read the prospectus in that registration statement and other documents the issuer has filed with the SEC for more complete information about the issuer and this offering. You may get these documents for free by visiting EDGAR on the SEC Web site at [www.sec.gov](http://www.sec.gov).

Alternatively, the issuer, any underwriter or any dealer participating in the offering will arrange to send you the prospectus if you request it by calling toll-free 1-8[xx-xxx-xxxx].

(ii) The legend also may provide an e-mail address at which the documents can be requested and may indicate that the documents also are available by accessing the issuer's Web site and provide the Internet address and the particular location of the documents on the Web site.

**(d) Filing conditions.**

(1) Except as provided in paragraphs (d)(3), (d)(4), (d)(5), (d)(6), (d)(7), (d)(8), and (f) of this section, the following shall be filed with the Commission under this section by a means reasonably calculated to result in filing no later than the date of first use. The free writing prospectus filed for purposes of this section will not be filed as part of the registration statement:

(i) The issuer shall file:

(A) Any issuer free writing prospectus, as defined in paragraph (h) of this section;

(B) Any issuer information that is contained in a free writing prospectus prepared by or on behalf of or used by any other offering participant (but not information prepared by or on behalf of a person other than the issuer on the basis of or derived from that issuer information); and

(C) A description of the final terms of the issuer's securities in the offering or of the offering contained in a free writing prospectus or portion thereof prepared by or on behalf of the issuer or any offering participant, after such terms have been established for all classes in the offering; and

(ii) Any offering participant, other than the issuer, shall file any free writing prospectus that is used or referred to by such offering participant and distributed by or on behalf of such person in a manner reasonably designed to lead to its broad unrestricted dissemination.

(2) Each free writing prospectus or issuer information contained in a free writing prospectus filed under this section shall identify in the filing the Commission file number for the related registration statement or, if that file number is unknown, a description sufficient to identify the related registration statement.

(3) The condition to file a free writing prospectus under paragraph (d)(1) of this section shall not apply if the free writing prospectus does not contain substantive changes from or additions to a free writing prospectus previously filed with the Commission.

(4) The condition to file issuer information contained in a free writing prospectus of an offering participant other than the issuer shall not apply if such information is included (including through incorporation by reference) in a prospectus or free writing prospectus previously filed that relates to the offering.

(5) Notwithstanding the provisions of paragraph (d)(1) of this section:

(i) To the extent a free writing prospectus or portion thereof otherwise required to be filed contains a description of terms of the issuer's securities in the offering or of the offering that does not reflect the final terms, such free writing prospectus or portion thereof is not required to be filed; and

- (ii) A free writing prospectus or portion thereof that contains only a description of the final terms of the issuer's securities in the offering or of the offerings shall be filed by the issuer within two days of the later of the date such final terms have been established for all classes of the offering and the date of first use.
- (6)
  - (i) Notwithstanding the provisions of paragraph (d) of this section, in an offering of asset-backed securities, a free writing prospectus or portion thereof required to be filed that contains only ABS informational and computational materials as defined in Item 1101(a) of Regulation AB (§229.1101 of this chapter), may be filed under this section within the timeframe permitted by Rule 426(b) (§230.426(b)) and such filing will satisfy the filing conditions under this section.
  - (ii) In the event that a free writing prospectus is used in reliance on this section and Rule 164 and the conditions of this section and Rule 164 (which may include the conditions of paragraph (d)(6)(i) of this section) are satisfied with respect thereto, then the use of that free writing prospectus shall not be conditioned on satisfaction of the provisions, including without limitation the filing conditions, of Rule 167 and Rule 426 (§§230.167 and 230.426). In the event that ABS informational and computational materials are used in reliance on Rule 167 and Rule 426 and the conditions of those rules are satisfied with respect thereto, then the use of those materials shall not be conditioned on the satisfaction of the conditions of Rule 164 and this section.
  - (iii) If a free writing prospectus used in an offering of asset-backed securities in reliance on this section and Rule 164 includes the specific address of or a hyperlink to an Internet Web site containing static pool information and is filed in accordance with this paragraph (d), the static pool information relating to the asset-backed securities offering at that specific address is included in the free writing prospectus, and the filing including such address or hyperlink satisfies the filing conditions under this section.
- (7) The condition to file a free writing prospectus or issuer information pursuant to this paragraph (d) for a free writing prospectus used at the same time as a communication in a business combination transaction subject to Rule 425 (§230.425) shall be satisfied if:
  - (i) The free writing prospectus or issuer information is filed in accordance with the provisions of Rule 425, including the filing timeframe of Rule 425;
  - (ii) The filed material pursuant to Rule 425 indicates on the cover page that it also is being filed pursuant to Rule 433; and
  - (iii) The filed material pursuant to Rule 425 contains the information specified in paragraph (c)(2) of this section.
- (8) Notwithstanding any other provision of this paragraph (d):
  - (i) A road show for an offering that is a written communication is a free writing prospectus, provided that, except as provided in paragraph (d)(8)(ii) of this section, a written communication that is a road show shall not be required to be filed; and
  - (ii) In the case of a road show that is a written communication for an offering of common equity or convertible equity securities by an issuer that is, at the time of the filing of the registration statement for the offering, not required to file reports with the Commission pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934, such a road show is required to be filed pursuant to this section unless the issuer of the securities makes at least one version of a bona fide electronic road show available without restriction by means of graphic communication to any person, including any

potential investor in the securities (and if there is more than one version of a road show for the offering that is a written communication, the version available without restriction is made available no later than the other versions).

NOTE TO PARAGRAPH (d)(8): A communication that is provided or transmitted simultaneously with a road show and is provided or transmitted in a manner designed to make the communication available only as part of the road show and not separately is deemed to be part of the road show. Therefore, if the road show is not a written communication, such a simultaneous communication (even if it would otherwise be a graphic communication or other written communication) is also deemed not to be written. If the road show is written and not required to be filed, such a simultaneous communication is also not required to be filed. Otherwise, a written communication that is an offer contained in a separate file from a road show, whether or not the road show is a written communication, or otherwise transmitted separately from a road show, will be a free writing prospectus subject to any applicable filing conditions of paragraph (d) of this section.

**(e) Treatment of information on, or hyperlinked from, an issuer's Web site.**

(1) An offer of an issuer's securities that is contained on an issuer's Web site or hyperlinked by the issuer from the issuer's Web site to a third party's Web site is a written offer of such securities by the issuer and, unless otherwise exempt or excluded from the requirements of section 5(b)(1) of the Act, the filing conditions of paragraph (d) of this section apply to such offer.

(2) Notwithstanding paragraph (e)(1) of this section, historical issuer information that is identified as such and located in a separate section of the issuer's Web site containing historical issuer information, that has not been incorporated by reference into or otherwise included in a prospectus of the issuer for the offering and that has not otherwise been used or referred to in connection with the offering, will not be considered a current offer of the issuer's securities and therefore will not be a free writing prospectus.

**(f) Free writing prospectuses published or distributed by media.** Any written offer for which an issuer or any other offering participant or any person acting on its behalf provided, authorized, or approved information that is prepared and published or disseminated by a person unaffiliated with the issuer or any other offering participant that is in the business of publishing, radio or television broadcasting or otherwise disseminating written communications would be considered at the time of publication or dissemination to be a free writing prospectus prepared by or on behalf of the issuer or such other offering participant for purposes of this section subject to the following:

(1) The conditions of paragraph (b)(2)(i) of this section will not apply and the conditions of paragraphs (c)(2) and (d) of this section will be deemed to be satisfied if:

(i) No payment is made or consideration given by or on behalf of the issuer or other offering participant for the written communication or its dissemination; and

(ii) The issuer or other offering participant in question files the written communication with the Commission, and includes in the filing the legend required by paragraph (c)(2) of this section, within four business days after the issuer or other offering participant becomes aware of the publication, radio or television broadcast, or other dissemination of the written communication.

(2) The filing obligation under paragraph (f)(1)(ii) of this section shall be subject to the following:

(i) The issuer or other offering participant shall not be required to file a free writing prospectus if the substance of that free writing prospectus has previously been filed with the Commission;

- (ii) Any filing made pursuant to paragraph (f)(1)(ii) of this section may include information that the issuer or offering participant in question reasonably believes is necessary or appropriate to correct information included in the communication; and
- (iii) In lieu of filing the actual written communication as published or disseminated as required by paragraph (f)(1)(ii) of this section, the issuer or offering participant in question may file a copy of the materials provided to the media, including transcripts of interviews or similar materials, provided the copy or transcripts contain all the information provided to the media.

(3) For purposes of this paragraph (f) of this section, an issuer that is in the business of publishing or radio or television broadcasting may rely on this paragraph (f) as to any publication or radio or television broadcast that is a free writing prospectus in respect of an offering of securities of the issuer if the issuer or an affiliate:

- (i) Is the publisher of a *bona fide* newspaper, magazine, or business or financial publication of general and regular circulation or *bona fide* broadcaster of news including business and financial news;
- (ii) Has established policies and procedures for the independence of the content of the publications or broadcasts from the offering activities of the issuer; and
- (iii) Publishes or broadcasts the communication in the ordinary course.

**(g) Record retention.** Issuers and offering participants shall retain all free writing prospectuses they have used, and that have not been filed pursuant to paragraph (d) or (f) of this section, for 3 years following the initial *bona fide* offering of the securities in question.

NOTE TO PARAGRAPH (g): To the extent that the record retention requirements of Rule 17a–4 of the Securities Exchange Act of 1934 (§240.17a–4 of this chapter) apply to free writing prospectuses required to be retained by a broker-dealer under this section, such free writing prospectuses are required to be retained in accordance with such requirements.

**(h) Definitions.** For purposes of this section:

- (1) An *issuer free writing prospectus* means a free writing prospectus prepared by or on behalf of the issuer or used or referred to by the issuer and, in the case of an asset-backed issuer, prepared by or on behalf of a depositor, sponsor, or servicer (as defined in Item 1101 of Regulation AB) or affiliated depositor or used or referred to by any such person.
- (2) *Issuer information* means material information about the issuer or its securities that has been provided by or on behalf of the issuer.
- (3) A written communication or information is prepared or provided by or on behalf of a person if the person or an agent or representative of the person authorizes the communication or information or approves the communication or information before it is used. An offering participant other than the issuer shall not be an agent or representative of the issuer solely by virtue of its acting as an offering participant.
- (4) A *road show* means an offer (other than a statutory prospectus or a portion of a statutory prospectus filed as part of a registration statement) that contains a presentation regarding an offering by one or more members of the issuer's management (and in the case of an offering of asset-backed securities, management involved in the securitization or servicing function of one or more of the depositors, sponsors, or servicers (as such terms are defined in Item 1101 of Regulation AB) or an affiliated depositor) and includes discussion of one or more of the issuer, such management, and the securities being offered; and

(5) A *bona fide electronic road show* means a road show that is a written communication transmitted by graphic means that contains a presentation by one or more officers of an issuer or other persons in an issuer's management (and in the case of an offering of asset-backed securities, management involved in the securitization or servicing function of one or more of the depositors, sponsors, or servicers (as such terms are defined in Item 1101 of Regulation AB) or an affiliated depositor) and, if more than one road show that is a written communication is being used, includes discussion of the same general areas of information regarding the issuer, such management, and the securities being offered as such other issuer road show or shows for the same offering that are written communications.

NOTE: This section does not affect the operation of the provisions of clause (a) of section 2(a)(10) of the Act providing an exception from the definition of "prospectus."

[70 FR 44815, Aug. 3, 2005, as amended at 71 FR 7413, Feb. 13, 2006]



## 230.482 Advertising by an Investment Company as Satisfying Requirements of Section 10

**(a) Scope of rule.** This section applies to an advertisement or other sales material (advertisement) with respect to securities of an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.) (1940 Act), or a business development company, that is selling or proposing to sell its securities pursuant to a registration statement that has been filed under the Act. This section does not apply to an advertisement that is excepted from the definition of prospectus by section 2(a)(10) of the Act (15 U.S.C. 77b(a)(10)), or to a summary prospectus under §230.498. An advertisement that complies with this section, which may include information the substance of which is not included in the prospectus specified in section 10(a) of the Act (15 U.S.C. 77j(a)), will be deemed to be a prospectus under section 10(b) of the Act (15 U.S.C. 77j(b)) for the purpose of section 5(b)(1) of the Act (15 U.S.C. 77e(b)(1)).

NOTE TO PARAGRAPH (a): The fact that an advertisement complies with this section does not relieve the investment company, underwriter, or dealer of any obligations with respect to the advertisement under the antifraud provisions of the federal securities laws. For guidance about factors to be weighed in determining whether statements, representations, illustrations, and descriptions contained in investment company advertisements are misleading, see §230.156. In addition, an advertisement that complies with this section is subject to the legibility requirements of §230.420.

**(b) Required disclosure.** This paragraph describes information that is required to be included in an advertisement in order to comply with this section.

**(1) Availability of additional information.** An advertisement must include a statement that advises an investor to consider the investment objectives, risks, and charges and expenses of the investment company carefully before investing; explains that the prospectus and, if available, the summary prospectus contain this and other information about the investment company; identifies a source from which an investor may obtain a prospectus and, if available, a summary prospectus; and states that the prospectus and, if available, the summary prospectus should be read carefully before investing.

**(2) Advertisements used prior to effectiveness of registration statement.** An advertisement that is used prior to effectiveness of the investment company's registration statement or the determination of the public offering price (in the case of a registration statement that becomes effective omitting information from the prospectus contained in the registration statement in reliance upon § 230.430A) must include the "Subject to Completion" legend required by §230.481(b)(2).

**(3) Advertisements including performance data.** An advertisement that includes performance data of an open-end management investment company or a separate account registered under the 1940 Act as a unit investment trust offering variable annuity contracts (trust account) must include the following

(i) A legend disclosing that the performance data quoted represents past performance; that past performance does not guarantee future results; that the investment return and principal value of an investment will fluctuate so that an investor's shares, when redeemed, may be worth more or less than their original cost; and that current performance may be lower or higher than the performance data quoted. The legend should also identify either a toll-free (or collect) telephone number or a Web site where an investor may obtain performance data current to the most recent month-end unless the advertisement includes total return quotations current to the most recent month ended seven business days prior to the date of use. An advertisement for a money market fund may omit the disclosure about principal value fluctuation; and



NOTE TO PARAGRAPH (b)(3)(i): The date of use refers to the date or dates when an advertisement is used by investors, not the date on which an advertisement is published or submitted for publication. The date of use refers to the entire period of use by investors and not simply the first date on which an advertisement is used.

(ii) If a sales load or any other nonrecurring fee is charged, the maximum amount of the load or fee, and if the sales load or fee is not reflected, a statement that the performance data does not reflect the deduction of the sales load or fee, and that, if reflected, the load or fee would reduce the performance quoted.

**(4) Money market funds.** An advertisement for an investment company that holds itself out to be a money market fund must include the following statement:

An investment in the Fund is not insured or guaranteed by the Federal Deposit Insurance Corporation or any other government agency. Although the Fund seeks to preserve the value of your investment at \$1.00 per share, it is possible to lose money by investing in the Fund.

A money market fund that does not hold itself out as maintaining a stable net asset value may omit the second sentence of this statement.

**(5) Presentation.** In a print advertisement, the statements required by paragraphs (b)(1) through (b)(4) of this section must be presented in a type size at least as large as and of a style different from, but at least as prominent as, that used in the major portion of the advertisement, provided that when performance data is presented in a type size smaller than that of the major portion of the advertisement, the statements required by paragraph (b)(3) of this section may appear in a type size no smaller than that of the performance data. If an advertisement is delivered through an electronic medium, the legibility requirements for the statements required by paragraph (b)(1) through (b)(4) of this section relating to type size and style may be satisfied by presenting the statements in any manner reasonably calculated to draw investor attention to them. In a radio or television advertisement, the statements required by paragraph (b)(1) through (b)(4) of this section must be given emphasis equal to that used in the major portion of the advertisement. The statements required by paragraph (b)(3) of this section must be presented in close proximity to the performance data, and, in a print advertisement, must be presented in the body of the advertisement and not in a footnote.

**(6) Commission legend.** An advertisement that complies with this section need not contain the Commission legend required by §230.481(b)(1).

**(c) Use of applications.** An advertisement that complies with this section may not contain or be accompanied by any application by which a prospective investor may invest in the investment company, except that a prospectus meeting the requirements of section 10(a) of the Act (15 U.S.C. 77j(a)) by which a unit investment trust offers variable annuity or variable life insurance contracts may contain a contract application although the prospectus includes, or is accompanied by, information about an investment company in which the unit investment trust invests that, pursuant to this section, is deemed a prospectus under section 10(b) of the Act (15 U.S.C. 77j(b)).

**(d) Performance data for non-money market funds.** In the case of an open-end management investment company or a trust account (other than a money market fund referred to in paragraph (e) of this section), any quotation of the company's performance contained in an advertisement shall be limited to quotations of:

**(1) Current yield.** A current yield that:

- (i) Is based on the methods of computation prescribed in Form N-1A (§ §239.15A and 274.11A of this chapter), N-3 (§§239.17a and 274.11b of this chapter), or N-4 (§ §239.17b and 274.11c of this chapter);
- (ii) Is accompanied by quotations of total return as provided for in paragraph (d)(3) of this section;
- (iii) Is set out in no greater prominence than the required quotations of total return; and
- (iv) Adjacent to the quotation and with no less prominence than the quotation, identifies the length of and the date of the last day in the base period used in computing the quotation.

**(2) Tax-equivalent yield.** A tax-equivalent yield that:

- (i) Is based on the methods of computation prescribed in Form N-1A (§ §239.15A and 274.11A of this chapter), N-3 (§§239.17a and 274.11b of this chapter), or N-4 (§§239.17b and 274.11c of this chapter);
- (ii) Is accompanied by quotations of yield as provided for in paragraph (d)(1) of this section and total return as provided for in paragraph (d)(3) of this section;
- (iii) Is set out in no greater prominence than the required quotations of yield and total return;
- (iv) Relates to the same base period as the required quotation of yield; and
- (v) Adjacent to the quotation and with no less prominence than the quotation, identifies the length of and the date of the last day in the base period used in computing the quotation.

**(3) Average annual total return.** Average annual total return for one, five, and ten year periods, except that if the company's registration statement under the Act (15 U.S.C. 77a et seq.) has been in effect for less than one, five, or ten years, the time period during which the registration statement was in effect is substituted for the period(s) otherwise prescribed. The quotations must:

- (i) Be based on the methods of computation prescribed in Form N-1A (§ §239.15A and 274.11A of this chapter), N-3 (§ §239.17a and 274.11b of this chapter), or N-4 (§ §239.17b and 274.11c of this chapter);
- (ii) Be current to the most recent calendar quarter ended prior to the submission of the advertisement for publication;
- (iii) Be set out with equal prominence; and
- (iv) Adjacent to the quotation and with no less prominence than the quotation, identify the length of and the last day of the one, five, and ten year periods.

**(4) After-tax return.** For an open-end management investment company, average annual total return (after taxes on distributions) and average annual total return (after taxes on distributions and redemption) for one, five, and ten year periods, except that if the company's registration statement under the Act (15 U.S.C. 77a et seq.) has been in effect for less than one, five, or ten years, the time period during which the registration statement was in effect is substituted for the period(s) otherwise prescribed. The quotations must:

- (i) Be based on the methods of computation prescribed in Form N-1A (§ §239.15A and 274.11A of this chapter);
- (ii) Be current to the most recent calendar quarter ended prior to the submission of the advertisement for publication;
- (iii) Be accompanied by quotations of total return as provided for in paragraph (d)(3) of this section;
- (iv) Include both average annual total return (after taxes on distributions) and average annual total return (after taxes on distributions and redemption);
- (v) Be set out with equal prominence and be set out in no greater prominence than the required quotations of total return; and
- (vi) Adjacent to the quotations and with no less prominence than the quotations, identify the length of and the last day of the one, five, and ten year periods.

**(5) Other performance measures.** Any other historical measure of company performance (not subject to any prescribed method of computation) if such measurement:

- (i) Reflects all elements of return;
- (ii) Is accompanied by quotations of total return as provided for in paragraph (d)(3) of this section;
- (iii) In the case of any measure of performance adjusted to reflect the effect of taxes, is accompanied by quotations of total return as provided for in paragraph (d)(4) of this section;
- (iv) Is set out in no greater prominence than the required quotations of total return; and
- (v) Adjacent to the measurement and with no less prominence than the measurement, identifies the length of and the last day of the period for which performance is measured.

**(e) Performance data for money market funds.** In the case of a money market fund:

**(1) Yield.** Any quotation of the money market fund's yield in an advertisement shall be based on the methods of computation prescribed in Form N-1A (§ §239.15A and 274.11A of this chapter), N-3 (§ §239.17a and 274.11b of this chapter), or N-4 (§ §239.17b and 274.11c of this chapter) and may include:

- (i) A quotation of current yield that, adjacent to the quotation and with no less prominence than the quotation, identifies the length of and the date of the last day in the base period used in computing that quotation;
- (ii) A quotation of effective yield if it appears in the same advertisement as a quotation of current yield and each quotation relates to an identical base period and is presented with equal prominence; or

(iii) A quotation or quotations of tax-equivalent yield or tax-equivalent effective yield if it appears in the same advertisement as a quotation of current yield and each quotation relates to the same base period as the quotation of current yield, is presented with equal prominence, and states the income tax rate used in the calculation.

**(2) Total return.** Accompany any quotation of the money market fund's total return in an advertisement with a quotation of the money market fund's current yield under paragraph (e)(1)(i) of this section. Place the quotations of total return and current yield next to each other, in the same size print, and if there is a material difference between the quoted total return and the quoted current yield, include a statement that the yield quotation more closely reflects the current earnings of the money market fund than the total return quotation.

**(f) Advertisements that make tax representations.** An advertisement for an open-end management investment company (other than a company that is permitted under Sec.270.35d-1(a)(4) of this chapter to use a name suggesting that the company's distributions are exempt from federal income tax or from both federal and state income tax) that represents or implies that the company is managed to limit or control the effect of taxes on company performance must accompany any quotation of the company's performance permitted by paragraph (d) of this section with quotations of total return as provided for in paragraph (d)(4) of this section.

**(g) Timeliness of performance data.** All performance data contained in any advertisement must be as of the most recent practicable date considering the type of investment company and the media through which the data will be conveyed, except that any advertisement containing total return quotations will be considered to have complied with this paragraph provided that:

(1)

(i) The total return quotations are current to the most recent calendar quarter ended prior to the submission of the advertisement for publication; and

(ii) Total return quotations current to the most recent month ended seven business days prior to the date of use are provided at the toll-free (or collect) telephone number or Web site identified pursuant to paragraph (b)(3)(i) of this section; or

(2) The total return quotations are current to the most recent month ended seven business days prior to the date of use of the advertisement.

NOTE TO PARAGRAPH (g): The date of use refers to the date or dates when an advertisement is used by investors, not the date on which an advertisement is published or submitted for publication. The date of use refers to the entire period of use by investors and not simply the first date on which an advertisement is used.

**(h) Filing.** An advertisement that complies with this section need not be filed as part of the registration statement filed under the Act.

NOTE TO PARAGRAPH (h): These advertisements, unless filed with NASD Regulation, Inc., are required to be filed in accordance with the requirements of §230.497.

*[68 FR 57777, Oct. 6, 2003, as amended at 74 FR 4584, Jan. 26, 2009]*

# Investment Company Act of 1940

## 270.34b-1 Sales Literature Deemed to be Misleading

Any advertisement, pamphlet, circular, form letter, or other sales literature addressed to or intended for distribution to prospective investors that is required to be filed with the Commission by section 24(b) of the Act [15 U.S.C. 80a-24(b)] ("sales literature") shall have omitted to state a fact necessary in order to make the statements made therein not materially misleading unless the sales literature includes the information specified in paragraphs (a) and (b) of this section.

NOTE: The fact that the sales literature includes the information specified in paragraphs (a) and (b) of this section does not relieve the investment company, underwriter, or dealer of any obligations with respect to the sales literature under the antifraud provisions of the federal securities laws. For guidance about factors to be weighed in determining whether statements, representations, illustrations, and descriptions contained in investment company sales literature are misleading, see Sec. 230.156 of this chapter.

(a) Sales literature for a money market fund shall contain the information required by paragraph (b)(4) of Sec. 230.482 of this chapter, presented in the manner required by paragraph (b)(5) of Sec. 230.482 of this chapter.

(b)

(1) Except as provided in paragraph (b)(3) of this section:

(i) In any sales literature that contains performance data for an investment company, include the disclosure required by paragraph (b)(3) of Sec. 230.482 of this chapter, presented in the manner required by paragraph (b)(5) of Sec. 230.482 of this chapter.

(ii) In any sales literature for a money market fund:

(A) Accompany any quotation of yield or similar quotation purporting to demonstrate the income earned or distributions made by the money market fund with a quotation of current yield specified by paragraph (e)(1)(i) of Sec. 230.482 of this chapter;

(B) Accompany any quotation of the money market fund's tax equivalent yield or tax equivalent effective yield with a quotation of current yield as specified in Sec. 230.482(e)(1)(iii) of this chapter; and

(C) Accompany any quotation of the money market fund's total return with a quotation of the money market fund's current yield specified in paragraph (e)(1)(i) of Sec. 230.482 of this chapter. Place the quotations of total return and current yield next to each other, in the same size print, and if there is a material difference between the quoted total return and the quoted current yield, include a statement that the yield quotation more closely reflects the current earnings of the money market fund than the total return quotation.

(iii) In any sales literature for an investment company other than a money market fund that contains performance data:

(A) Include the total return information required by paragraph (d)(3) of Sec. 230.482 of this chapter;

(B) Accompany any quotation of performance adjusted to reflect the effect of taxes (not including a quotation of tax equivalent yield or other similar quotation purporting to demonstrate the tax equivalent yield earned or distributions made by the company) with the quotations of total return specified by paragraph (d)(4) of Sec. 230.482 of this chapter;

(C) If the sales literature (other than sales literature for a company that is permitted under Sec. 270.35d-1(a)(4) to use a name suggesting that the company's distributions are exempt from federal income tax or from both federal and state income tax) represents or implies that the company is managed to limit or control the effect of taxes on company performance, include the quotations of total return specified by paragraph (d)(4) of Sec.230.482 of this chapter;

(D) Accompany any quotation of yield or similar quotation purporting to demonstrate the income earned or distributions made by the company with a quotation of current yield specified by paragraph (d)(1) of Sec. 230.482 of this chapter; and

(E) Accompany any quotation of tax equivalent yield or other similar quotation purporting to demonstrate the tax equivalent yield earned or distributions made by the company with a quotation of tax equivalent yield specified in paragraph (d)(2) and current yield specified by paragraph (d)(1) of Sec. 230.482 of this chapter.

(2) Any performance data included in sales literature under paragraphs (b)(1)(ii) or (iii) of this section must meet the currentness requirements of paragraph (g) of Sec. 230.482 of this chapter.

(3) The requirements specified in paragraph (b)(1) of this section shall not apply to any quarterly, semi-annual, or annual report to shareholders under Section 30 of the Act (15 U.S.C. 80a-29) containing performance data for a period commencing no earlier than the first day of the period covered by the report; nor shall the requirements of paragraphs (d)(3)(ii), (d)(4)(ii), and (g) of Sec. 230.482 of this chapter apply to any such periodic report containing any other performance data.

NOTE: Sales literature (except that of a money market fund) containing a quotation of yield or tax equivalent yield must also contain the total return information. In the case of sales literature, the currentness provisions apply from the date of distribution and not the date of submission for publication.

*[68 FR 57779, Oct. 6, 2003.]*

# Municipal Securities Rulemaking Board

## MSRB Rule G-21 Advertising

### (a) General Provisions.

(i) Definition of “Advertisement.” For purposes of this rule, the term “advertisement” means any material (other than listings of offerings) published or used in any electronic or other public media, or any written or electronic promotional literature distributed or made generally available to customers or the public, including any notice, circular, report, market letter, form letter, telemarketing script, seminar text, press release concerning the products or services of the broker, dealer or municipal securities dealer, or reprint, or any excerpt of the foregoing or of a published article. The term does not apply to preliminary official statements or official statements, but does apply to abstracts or summaries of official statements, offering circulars and other such similar documents prepared by brokers, dealers or municipal securities dealers.

(ii) Definition of “Form Letter.” For purposes of this rule, the term “form letter” means any written letter or electronic mail message distributed to 25 or more persons within any period of 90 consecutive days.

(iii) General Standard for Advertisements. Subject to the further requirements of this rule relating to professional advertisements and product advertisements, no broker, dealer or municipal securities dealer shall publish or disseminate, or cause to be published or disseminated, any advertisement relating to municipal securities that such broker, dealer or municipal securities dealer knows or has reason to know is materially false or misleading.

### (b) Professional Advertisements.

(i) Definition of “Professional Advertisement.” The term “professional advertisement” means any advertisement concerning the facilities, services or skills with respect to municipal securities of such broker, dealer or municipal securities dealer or of another broker, dealer, or municipal securities dealer.

(ii) Standard for Professional Advertisements. No broker, dealer or municipal securities dealer shall publish or disseminate, or cause to be published or disseminated, any professional advertisement that is materially false or misleading.

### (c) Product Advertisements.

(i) Definition of “Product Advertisement.” The term “product advertisement” means any advertisement concerning one or more specific municipal securities, one or more specific issues of municipal securities, the municipal securities of one or more specific issuers, or the specific features of municipal securities.

(ii) Standard for Product Advertisements. No broker, dealer or municipal securities dealer shall publish or disseminate, or cause to be published or disseminated, any product advertisement that such broker, dealer, or municipal securities dealer knows or has reason to know is materially false or misleading and, to the extent applicable, that is not in compliance with section (d) or (e) hereof.

**(d) New Issue Product Advertisements.** In addition to the requirements of section (c), all product advertisements for new issue municipal securities (other than municipal fund securities) shall be subject to the following requirements:

(i) **Accuracy at Time of Sale.** A syndicate or syndicate member which publishes or causes to be published any advertisement regarding the offering by the syndicate of a new issue of municipal securities, or any part thereof, may show the initial reoffering prices or yields for the securities, even if the price or yield for a maturity or maturities may have changed, provided that the advertisement contains the date of sale of the securities by the issuer to the syndicate. In the event that the prices or yields shown in a new issue advertisement are other than the initial reoffering prices or yields, such an advertisement must show the prices or yields of the securities as of the time the advertisement is submitted for publication. For purposes of this rule, the date of sale shall be deemed to be, in the case of competitive sales, the date on which bids are required to be submitted to an issuer and, in the case of negotiated sales, the date on which a contract to purchase securities from an issuer is executed

(ii) **Accuracy at Time of Publication.** Each advertisement relating to a new issue of municipal securities shall also indicate, if applicable, that the securities shown as available from the syndicate may no longer be available from the syndicate at the time of publication or may be available from the syndicate at a price or yield different from that shown in the advertisement.

**(e) Municipal Fund Security Product Advertisements.** In addition to the requirements of section (c), all product advertisements for municipal fund securities shall be subject to the following requirements:

**(i) Required Disclosures.**

**(A) Substance and Format of Disclosure.** Except as described in paragraph (B) of this subsection (i), each product advertisement for municipal fund securities:

**(1) basic disclosure – must include a statement to the effect that:**

- (a) an investor should consider the investment objectives, risks, and charges and expenses associated with municipal fund securities before investing;
- (b) more information about municipal fund securities is available in the issuer's official statement;
- (c) if the advertisement identifies a source from which an investor may obtain an official statement and the broker, dealer or municipal securities dealer that publishes the advertisement is the underwriter for one or more of the issues of municipal fund securities for which any such official statement may be supplied, such broker, dealer or municipal securities dealer is the underwriter for one or more issues (as appropriate) of such municipal fund securities; and
- (d) the official statement should be read carefully before investing.

**(2) additional disclosures for identified products –** that refers by name (including marketing name) to any municipal fund security, issuer of municipal fund securities, state or other governmental entity that sponsors the issuance of municipal fund securities, or to any securities held as assets of municipal fund securities or to any issuer thereof, must include the following disclosures, as applicable:

- (a) unless the offer of such municipal fund securities is exempt from Exchange Act Rule 15c2-12 and the issuer thereof has not produced an official statement, a source from which an investor may obtain an official statement;



(b) if the advertisement relates to municipal fund securities issued by a qualified tuition program under Internal Revenue Code Section 529, a statement to the effect that an investor should consider, before investing, whether the investor's or designated beneficiary's home state offers any state tax or other benefits that are only available for investments in such state's qualified tuition program; provided, however, that this statement shall not be required for any advertisement relating to municipal fund securities of a specific state if such advertisement is sent to, or is otherwise distributed through means that are reasonably likely to result in the advertisement being received by, only residents of such state and is not otherwise published or disseminated by the broker, dealer or municipal securities dealer, or made available by the broker, dealer or municipal securities dealer to any of its affiliates, the issuer or any of the issuer's agents with the expectation or understanding that such other parties will otherwise publish or disseminate such advertisement; and

(c) if the advertisement is for a municipal fund security that the issuer holds out as having the characteristics of a money market fund, statements to the effect that an investment in the security is not insured or guaranteed by the Federal Deposit Insurance Corporation or any other government agency (unless such guarantee is provided by or on behalf of such issuer) and, if the security is held out as maintaining a stable net asset value, that although the issuer seeks to preserve the value of the investment at \$1.00 per share or such other applicable fixed share price, it is possible to lose money by investing in the security.

**(3) additional disclosures concerning performance – that includes performance data must include:**

(a) a legend disclosing that the performance data included in the advertisement represents past performance; that past performance does not guarantee future results; that the investment return and the value of the investment will fluctuate so that an investor's shares, when redeemed, may be worth more or less than their original cost; and that current performance may be lower or higher than the performance data included in the advertisement. Unless the advertisement includes total return quotations current to the most recent month ended seven business days prior to the date of any use of the advertisement, the legend must also identify either a toll-free (or collect) telephone number or a website where an investor may obtain total return quotations current to the most recent month-end for which such total return, or all information required for the calculation of such total return, is available;

(b) if a sales load or any other nonrecurring fee is charged, the maximum amount of the load or fee (current as of the date such advertisement is submitted for publication or otherwise disseminated) and, if the sales load or fee is not reflected in the performance data included in the advertisement, a statement that the performance data does not reflect the deduction of the sales load or fee and that the performance data would be lower if such load or fee were included; and

(c) to the extent that such performance data relates to municipal fund securities that are not held out as having the characteristics of a money market fund and to the extent applicable, the total annual operating expense ratio of such municipal fund securities (calculated in the same manner as the total annual fund operating expenses required to be included in the registration statement for a registered investment company, subject to paragraph (e)(ii)(A) hereof), gross of any fee waivers or expense reimbursements.

**(4) format of disclosure – must meet the following requirements:**

**(a) for a print advertisement:**

- (i) the statements required by subparagraphs (1), (2) and (3) of this paragraph (A) must be presented in a type size at least as large as and of a style different from, but at least as prominent as, that used in the major portion of the advertisement, provided that when performance data is presented in a type size smaller than that of the major portion of the advertisement, the statements required by subparagraph (3) of this paragraph may appear in a type size no smaller than that of the performance data;
- (ii) the statements required by subparagraph (3) of this paragraph must be presented in close proximity to the performance data; provided that such statements must be presented in the body of the advertisement and not in a footnote unless the performance data appears only in such footnote; and
- (iii) the maximum amount of the sales load required to be disclosed pursuant to clause (3)(b) and the information required to be disclosed pursuant to clause (3)(c), along with the standardized performance information mandated by Securities Act Rule 482 as applicable by virtue of subsection (e)(ii) of this rule, must be presented in a prominent text box that contains only such information but which may also contain comparative performance and fee data and disclosures required under this section (e).

**(b) for an advertisement delivered through an electronic medium:**

- (i) the legibility requirements for the statements required by subparagraphs (1), (2) and (3) of this paragraph relating to type size and style may be satisfied by presenting the statements in any manner reasonably calculated to draw investor attention to them;
- (ii) if such advertisement is a radio or television advertisement, the statements required by subparagraphs (1), (2) and (3) of this paragraph must be given emphasis equal to that used in the major portion of the advertisement; and
- (iii) the statements required by subparagraph (3) of this paragraph must be presented in close proximity to the performance data.

**(B) Exceptions from Certain Disclosure Requirements.** Notwithstanding any other provision of this rule, the following advertisements relating to municipal fund securities shall not be subject to the provisions of subparagraphs (1) and (2) of paragraph (e)(i)(A):

**(1) generic advertisements** – any advertisement that does not refer by name to any specific investment option or portfolio offered by an issuer of municipal fund securities, but includes the name and address of the broker, dealer or municipal securities dealer or other person sponsoring the advertisement, and that is limited to any one or more of the following:

- (a) explanatory information relating to municipal fund securities generally or the nature of the issuers thereof or of the programs through which they are issued, or to services offered in connection with the ownership of such securities; or
- (b) the mention or explanation of municipal fund securities of different generic types or having various investment objectives; or
- (c) offers, descriptions, and explanations of various products and services not constituting a municipal fund security, provided that such offers, descriptions, and explanations do not relate directly to the desirability of owning or purchasing a municipal fund security; or
- (d) invitation to inquire for further information; provided that if an official statement for municipal fund securities is to be sent or delivered in response to such inquiries and if the sponsor of the advertisement is the underwriter for one or more of the issues of municipal fund securities for which such official statement may be supplied, the advertisement must state that such broker, dealer or municipal securities dealer is the underwriter for one or more issues (as appropriate) of such municipal fund securities.

**(2) certain blind advertisements** – any advertisement that does not identify a broker, dealer or municipal securities dealer or any affiliate of a broker, dealer or municipal securities dealer and that is limited to any one or more of the following:

- (a) the name of an issuer of municipal fund securities; or
- (b) contact information for an issuer of municipal fund securities or for any agent of such issuer to obtain an official statement or other information; provided that, if any such agent of the issuer is a broker, dealer or municipal securities dealer or an affiliate of a broker, dealer or municipal securities dealer, no orders for municipal fund securities shall be accepted through such source unless initiated by the customer; or
- (c) a logo or other graphic design of an issuer of municipal fund securities that does not directly or indirectly identify the broker, dealer or municipal securities dealer or any affiliate of the broker, dealer or municipal securities dealer; or
- (d) a service mark, trademark or short slogan of the issuer's general objectives that does not constitute a call to invest in municipal fund securities.

**(3) certain form letters to existing customers** – any form letter relating to municipal fund securities distributed solely to existing customers of the broker, dealer or municipal securities dealer to whom the broker, dealer or municipal securities dealer has previously sent or caused to be sent an official statement for:

- (a) any municipal fund securities of the issuer of such municipal fund securities; or
- (b) any municipal fund securities of a different issuer of municipal fund securities, provided that the advertisement includes the applicable disclosures under clause (e)(i)(A)(1)(c) and subparagraph (e)(i)(A)(2) of this rule.

**(ii) Performance Data.** Each product advertisement that includes performance data relating to municipal fund securities must present performance data in the format, and calculated pursuant to the methods, prescribed in paragraph (d) of Securities Act Rule 482 (or, in the case of a municipal fund security that the issuer holds out as having the characteristics of a money market fund, paragraph (e) of Securities Act Rule 482) and, to the extent applicable, subparagraph (e)(i)(A)(4) of this rule, provided that:

**(A) source of data** – to the extent that information necessary to calculate performance data or to determine loads, fees and expenses for purposes of clause (e)(i)(A)(3)(b) or (c) is not available from an applicable balance sheet included in a registration statement, or from a prospectus, the broker, dealer or municipal securities dealer shall use information derived from the issuer's official statement, otherwise made available by the issuer or its agents, or (when unavailable from the official statement, the issuer or the issuer's agents) derived from such other sources which the broker, dealer or municipal securities dealer reasonably believes are reliable;

**(B) period of calculation** – if the issuer first began issuing the municipal fund securities fewer than one, five, or ten years prior to the date of the submission of the advertisement for publication, such shorter period shall be substituted for any otherwise prescribed longer period in connection with the calculation of average annual total return or any similar returns;

**(C) currentness of calculation** – performance data and total annual operating expense ratio shall be calculated as of the most recent practicable date considering the type of municipal fund securities and the media through which data will be conveyed, except that any advertisement containing total return quotations will be considered to have complied with this paragraph provided that:

- (1) (a) the total return quotations are current to the most recent calendar quarter ended prior to the submission of the advertisement for publication for which such performance data, or all information required for the calculation of such performance data, is available to the broker, dealer or municipal securities dealer as described in paragraph (A) of this subsection (e)(ii); and
- (b) total return quotations (current to the most recent month ended seven business days prior to the date of any use of the advertisement for which such total return, or all information required for the calculation of such total return, is available to the broker, dealer or municipal securities dealer as described in paragraph (A) of this subsection (e)(ii)) are provided at the toll-free (or collect) telephone number or website identified pursuant to clause (i)(A)(3)(a) of this section (e) and the month to which such information is current is identified; or
- (2) the total return quotations are current to the most recent month ended seven business days prior to the date of any use of the advertisement for which such total return, or all information required for the calculation of such total return, is available to the broker, dealer or municipal securities dealer and the month to which such information is current is identified.

**(D) 12b-1-type plans** – where such calculation is required to include expenses accrued under a plan adopted under Investment Company Act Rule 12b-1, the broker, dealer or municipal securities dealer shall include all such expenses as well as any expenses having the same characteristics as expenses under such a plan where such a plan is not required to be adopted under said Rule 12b-1 as a result of Section 2(b) of the Investment Company Act of 1940;

**(E) tax-adjusted calculations** – in calculating tax-equivalent yields or after-tax returns, the broker, dealer or municipal securities dealer shall assume that any unreinvested distributions are used in the manner intended with respect to such municipal fund securities in order to qualify for any federal tax-exemption or other federally tax-advantaged treatment with respect to such distributions, provided that the advertisement must also provide a general description of how federal law intends that such distributions be used and disclose that such yield or return would be lower if distributions are not used in this manner.

**(F) applicability with respect to underlying assets** – notwithstanding any of the foregoing, this subsection (e)(ii) shall apply solely to the calculation of performance relating to municipal fund securities and does not apply to, or limit the applicability of any rule of the Commission, NASD or any other regulatory body relating to, the calculation of performance for any security held as an underlying asset of the municipal fund securities.

**(iii) Nature of Issuer and Security.** An advertisement for a specific municipal fund security must provide sufficient information to identify such specific security in a manner that is not false or misleading. An advertisement that identifies a specific municipal fund security must include the name of the issuer (or the issuer's marketing name for its issuance of municipal fund securities, together with the state of the issuer), presented in a manner no less prominent than any other entity identified in the advertisement, and must not imply that a different entity is the issuer of the municipal fund security. An advertisement must not raise an inference that, because municipal fund securities are issued under a government-sponsored plan, investors are guaranteed against investment losses if no such guarantee exists. If an advertisement concerns a specific class or category of an issuer's municipal fund securities (*e.g.*, A shares versus B shares; direct sale shares versus advisor shares; in-state shares versus national shares; etc.), this must clearly be disclosed in a manner no less prominent than the information provided with respect to such class or category.

**(iv) Capacity of Dealer and Other Parties.** An advertisement that relates to or describes services provided with respect to municipal fund securities must clearly indicate the entity providing those services. If any person or entity other than the broker, dealer or municipal securities dealer is named in the advertisement, the advertisement must reflect any relationship between the broker, dealer or municipal securities dealer and such other person or entity. An advertisement soliciting purchases of municipal fund securities that would be effected by a broker, dealer or municipal securities dealer or any other entity other than the broker, dealer or municipal securities dealer that publishes the advertisement must identify which entity would effect the transaction, provided that the advertisement may identify one or more such entities in general descriptive terms but must specifically name any such other entity if it is the issuer, an affiliate of the issuer, or an affiliate of the broker, dealer or municipal securities dealer that publishes the advertisement. This subsection (iv) shall not apply to any advertisement described in subparagraph (e)(i)(B)(2) of this rule.

**(v) Tax Consequences and Other Features.** Any discussion of tax implications or other benefits or features of investments in municipal fund securities included in an advertisement must not be false or misleading. In the case of an advertisement that includes generalized statements regarding tax or other benefits offered in connection with such municipal fund securities or otherwise offered under state or federal law, the advertisement also must include a generalized statement that the availability of such tax or other benefits may be conditioned on meeting certain requirements. If the advertisement describes the nature of specific benefits, such advertisement must also briefly list the substantive factors that may materially limit the availability of such benefits (such as residency, purpose for or timing of distributions, or other factors, as applicable). Such statements of conditions or limitations must be presented in close proximity to, and in a manner no less prominent than, the description of such benefits.

**(vi) Underlying Registered Securities.** If an advertisement for a municipal fund security provides specific details of a security held as an underlying asset of the municipal fund security, the details included in the advertisement relating to such underlying security must be presented in a manner that would be in compliance with any Commission or NASD advertising rules that would be applicable if the advertisement related solely to such underlying security; provided that details of the underlying security must be accompanied by any further statements relating to such details as are necessary to ensure that the inclusion of such details does not cause the advertisement to be false or misleading with respect to the municipal fund securities advertised. This subsection does not limit the applicability of any rule of the Commission, NASD or any other regulatory body relating to advertisements of securities other than municipal fund securities, including advertisements that contain information about such other securities together with information about municipal securities.

**(vii) Correspondence Presenting Performance Data.** Notwithstanding any other provision of this rule, all correspondence with the public that includes performance data relating to municipal fund securities must comply with the provisions of subparagraph (e)(i)(A)(3) (presented in the manner provided in subparagraph (e)(i)(A)(4)) and subsection (e)(ii) as if such correspondence were a product advertisement under this rule.

**(f) Approval by Principal.** Each advertisement subject to the requirements of this rule must be approved in writing by a municipal securities principal or general securities principal prior to first use. Each broker, dealer and municipal securities dealer shall make and keep current in a separate file records of all such advertisements.

## Interpretive Letters to MSRB Rule G-21

**529 College Savings Plan Advertisements.** Thank you for your letter of April 21, 2006 in which you request interpretive guidance on the application of Rule G-21, on advertising, with respect to advertisements of 529 college savings plans. Rule G-21 was amended in 2005 by adding new section (e) relating to advertisements by brokers, dealers and municipal securities dealers (“dealers”) of interests in 529 college savings plans and other municipal fund securities (collectively referred to as “municipal fund securities”). These new provisions were modeled after the provisions of Securities Act Rules 482 and 135a relating to mutual fund advertisements, with certain modifications.

The Board expects to undertake a detailed review of issues relating to the implementation of section (e) of its advertising rule in the coming months and your views will be instrumental in that review. We appreciate your interest in the operation of the rule and the commitment of your organization and your individual members to assure that investors receive appropriate disclosures. As you are aware, MSRB rules apply solely to dealers, not to issuers or other parties. The MSRB has previously stated that Rule G-21 does not govern advertisements published by issuers but that an advertisement produced by a dealer as agent for an issuer must comply with Rule G-21. Similarly, a dealer cannot avoid application of Rule G-21 merely by hiring a third party to produce and publish advertisements on its behalf.<sup>[1]</sup> Pending our detailed review of section (e) of Rule G-21, I would like to address certain basic principles under the current rule language and existing interpretive guidance that may prove helpful in the context of some of the issues you raise in your letter.<sup>[2]</sup>

Section (a) of the rule provides a broad definition of “advertisement.”<sup>[3]</sup> Sections (b) through (e) of the rule establish requirements with respect to specific types of advertisements. Section (b) establishes standards for professional advertisements, which are advertisements concerning the dealer’s facilities, services or skills with respect to municipal securities. Section (c) establishes general standards for product advertisements, with additional specific standards relating to advertisements for new issue debt securities set forth in Section (d) and specific standards relating to advertisements for municipal fund securities set forth in Section (e). In addition, all advertisements are subject to the MSRB’s basic fair dealing rule, Rule G-17,<sup>[4]</sup> and are subject to approval by a principal pursuant to Section (f) of Rule G-21.

Where an advertisement does not identify specific securities, specific issuers of securities or specific features of securities, but merely refers to one or more broad categories of securities with respect to which the dealer provides services, the MSRB would generally view such advertisement as a professional advertisement under Section (b) rather than as a product advertisement. For example, if an advertisement simply states that the dealer provides investment services with respect to 529 college savings plans – without identifying any specific 529 college savings plan, specific municipal fund securities issued through a 529 college savings plan, or specific features of any such municipal fund securities – the advertisement would be subject to Section (b) of Rule G-21, rather than to Sections (c) and (e).

On the other hand, advertisements that identify specific securities, specific issuers of securities or specific features of securities generally are viewed as product advertisements under Rule G-21 and therefore would be subject to Section (c), as well as Section (d) or (e), if applicable. However, in some circumstances, an advertisement that identifies an issuer of securities without identifying its securities or specific features of such securities effectively may not constitute an advertisement of such issuer’s securities and therefore would not be treated as a product advertisement under the rule, particularly if the dealer or any of its affiliates is not identified. For example, if an advertisement identifies the state or other governmental entity that operates a 529 college savings plan without identifying its municipal fund securities, the specific features of such securities or the dealer and its affiliates that may participate in the marketing of its municipal fund securities, the MSRB generally would not view such advertisement as a product advertisement subject to Sections (c) and (e) of Rule G-21.<sup>[5]</sup> *MSRB Interpretation of May 12, 2006.*

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## Endnotes

- 1 The MSRB expresses no opinion at this time as to the applicability of MSRB rules to advertisements relating to municipal fund securities produced and published by issuers with funds provided directly or indirectly by a dealer.
- 2 Other issues you raise in your letter will be considered during the upcoming review of Rule G-21.
- 3 An advertisement is defined as any material (other than listings of offerings) published or designed for use in the public, including electronic, media, or any promotional literature designed for dissemination to the public, including any notice, circular, report, market letter, form letter, telemarketing script or reprint or excerpt of the foregoing. The term does not apply to preliminary official statements or official statements (including program disclosure documents), but does apply to abstracts or summaries of official statements, offering circulars and other such similar documents prepared by dealers. The MSRB expresses no opinion at this time as to whether the specific communications or promotional materials described in your letter would constitute advertisements under this definition.
- 4 Rule G-17 requires each dealer, in the conduct of its municipal securities activities, to deal fairly with all persons and prohibits the dealer from engaging in any deceptive, dishonest or unfair practice.
- 5 The advertisement may, in addition to or instead of identifying the state or other governmental entity that operates the 529 college savings plan, include the state's marketing name for such plan so long as such name does not identify the dealer or any dealer affiliates that may participate in the marketing of its municipal fund securities. Further, any contact information (such as a telephone number or Internet address) included in the advertisement should be for the state or other governmental entity and must not be for the dealer or its affiliates.



**Disclosure obligations.** This is in response to your letters dated March 18, 1998 and March 31, 1998 in which you present an example where a dealer advertises a specific municipal security which it knows, or has reason to know, is subject to a material adverse circumstance such as a technical default. You ask whether a dealer is obligated to include disclosure information indicating that a bond is subject to additional risk in order to avoid publishing a false or misleading advertisement as prohibited by rule G-21(c). The Board reviewed your letters and has authorized this response.

Section (c) of rule G-21 provides, among other things, that no dealer shall publish any advertisement<sup>[1]</sup> concerning municipal securities which such dealer knows or has reason to know is materially false or misleading. The Board has previously interpreted the rule as not requiring that any specific statements or information be included in an advertisement but that any statement or information that is included must not be materially false or misleading. Thus, if a dealer makes a statement in an advertisement that explicitly or implicitly refers to the soundness or safety of an investment in the municipal securities described in the advertisement, such dealer must include any information necessary to ensure that the advertisement is not materially false or misleading with respect to the soundness or safety of such investment. The rule establishes a general ethical standard that provides the enforcement agencies with the flexibility that is needed to evaluate advertisements in light of what information is printed and how the information physically is presented. Thus, the enforcement agencies should continue to evaluate advertisements on a case-by-case basis to make a determination whether any such advertisements, in fact, are misleading.

You also ask whether the relative specificity of any such disclosure obligation that may exist depends on the level of detail provided about the municipal security. As stated above, rule G-21 does not require that any specific statements or information be included in an advertisement but that any statement or information that is included must not be materially false or misleading. Thus, the nature and extent of any disclosures or other explanatory statements that must be included in an advertisement is dependent upon the substance and form of the information presented in the advertisement.

The Board wishes to emphasize that the enforcement agencies should remain cognizant of certain other rules of the Board that may be relevant in evaluating whether a dealer's advertisement and such dealer's interactions with customers or potential customers that arise as a result of such advertisement are in conformity with Board rules. Thus, depending upon the facts and circumstances, an advertisement for a particular municipal security that on its face conforms with the requirements of rule G-21 may nonetheless be violative of rule G-17, the Board's fair dealing rule,<sup>[2]</sup> if, for example, the advertisement is designed as a "bait-and-switch" mechanism that attracts potential customers interested in an advertised security that the dealer is not in a legitimate position to sell (because of its unavailability, unsuitability or otherwise) for the primary purpose of creating a captive audience for the offering of other securities. In addition, a dealer that in fact sells the municipal securities that are described in its advertisement must fulfill its obligations under rule G-19, on suitability, and rule G-30, on pricing. *MSRB interpretation of May 21, 1998.*

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## Endnotes

1. "Advertisement" is defined in rule G-21 as any material (other than listings of offerings) published or designed for use in the public, including electronic, media, or any promotional literature designed for dissemination to the public, including any notice, circular, report, market letter, form letter, telemarketing script or reprint or excerpt of the foregoing. The term does not apply to preliminary official statements or official statements, but does apply to abstracts or summaries of official statements, offering circulars and other such similar documents prepared by dealers.
2. Rule G-17 requires each dealer, in the conduct of its municipal securities business, to deal fairly with all persons and prohibits the dealer from engaging in any deceptive, dishonest or unfair practice.

**Advertisements on behalf of issuer.** You ask whether a certain advertisement is subject to approval by a principal pursuant to rule G-21, on advertising. You state that an issuer asked the bank to act as its agent in producing the advertisement. Rule G-21 defines an advertisement as any material (other than listings of offerings) published or designed for use in the public media, or any promotional literature designed for dissemination to the public, including any notice, circular, report, market letter, form letter or reprint or excerpt of the foregoing. The term does not apply to preliminary official statements or official statements, but does apply to abstracts or summaries of official statements, offering circulars and other such similar documents prepared by dealers. Each advertisement subject to the requirements of rule G-21 must be approved in writing by a municipal securities principal or general securities principal prior to first use. The fact that a bank dealer is acting as an agent of an issuer in the production of an advertisement meeting the definition contained in rule G-21 does not relieve a bank from complying with the requirements of the rule. *MSRB interpretation of June 20, 1994.*

**Advertisements showing current yield.** This is in response to your letter concerning the application of rule G-21, on advertising, to advertisements that include information on current yield of municipal securities.[1] You have asked for the Board's views whether including current yield information in advertisements for municipal securities, alone or with other yield information, would be materially misleading. You also ask if a dealer may advertise current yield if other yield information is included but is in smaller print. The Board has considered this issue and authorized this reply.

Rule G-21 prohibits a dealer from publishing an advertisement concerning a municipal security that the dealer knows or has reason to know is materially false or misleading. The Board has stated that an advertisement showing a percentage rate of return must specify whether it is the coupon rate or the yield. The Board noted that, if a yield is presented, the advertisement must indicate the basis on which the yield is calculated.[2]

The Board frequently has stated that the yield to call or yield to maturity is the most important factor in determining the fairness and reasonableness of the price of any given transaction in municipal securities. Such yields typically are used as a basis for dealers and customers to evaluate an investment in municipal securities. The disclosure of yield to call or yield to maturity is the longstanding practice of the municipal securities industry and this practice is reflected in rule G-15(a) which requires dealers to disclose yield to call or yield to maturity on customer confirmations.[3] A customer who purchases a municipal security relying only on the current yield information disclosed in an advertisement would be confused upon receipt of the confirmation when the yield to call or yield to maturity of the security is different. Moreover, a customer would not be able to compare municipal securities advertised at a current yield with those advertised at a yield to call or yield to maturity.[4]

The Board has determined that the use of current yield information in municipal securities advertisements without other yield information would be materially misleading under rule G-21. Thus, dealers may not show only current yield in municipal securities advertisements.

The Board also has determined that, while showing only current yield information in advertisements is materially misleading, if advertisements also include, at a minimum, the lowest of yield to call or yield to maturity, current yield may be used if all the information is clearly presented as discussed below. The Board notes that including yield to call or yield to maturity in municipal securities advertisements would give customers a more realistic view of the yield they can expect to receive on the investment and would enable them to compare the security advertised with other municipal securities. In addition, the yield to call or yield to maturity information would be consistent with the yield information disclosed on customer confirmations. If the yield to call is used, the call date and price also should be noted.

The Board is concerned that, even if dealers comply with this interpretation of rule G-21 and include current yield and other yield information in municipal securities advertisements, such advertisements still could be misleading due to the size of type used and the placement of the information. For example, it would not be appropriate for the type size of the current yield to be larger than other yield information. Thus, whether a particular advertisement is materially misleading requires the appropriate regulatory body, for example, an NASD District Business Conduct Committee, to consider a number of objective and subjective factors. The Board urges the regulatory authorities to continue to review advertisements on a case-by-case basis to make a determination whether any such advertisements, in fact, are misleading. *MSRB interpretation of April 22, 1988.*

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## Endnotes

1. Current yield is a calculation of current income on a bond. It is the ratio of the annual dollar amount of interest paid on a security to the purchase price of the security, stated as a percentage. If the securities are sold at par, the current yield equals the coupon rate on the securities. Current yield, however, does not take into account the time value of money. Thus, generally, if a bond is selling at a discount, the current yield would be less than the yield to maturity and, if the bond is selling at a premium, the current yield would be greater than the yield to maturity.
2. Frequently Asked Questions Concerning Advertising, MSRB Reports, Vol. 3, No. 2 (Apr. 1983), at 21-23.
3. Rule G-15(a)(i)(1) [currently codified at rule G-15(a)(i)(A)(5)] requires that the yield or dollar price at which the transaction was effected be disclosed on customer confirmations, with the resulting dollar price (if the transaction is done on a yield basis) or yield (if the transaction is done on a dollar basis) calculated to the lowest of dollar price or yield to call, to par option or to maturity. In cases in which the resulting dollar price or yield shown on the confirmation is calculated to call or par option, this must be stated and the call or option date and price used in the calculation must be shown.
4. The Board also notes that some dealers have used current yield in municipal securities advertisements in an attempt to compete with municipal securities mutual funds, which often use a “current yield” in their advertisements. However, a mutual fund “yield” is not directly comparable to a municipal securities yield because a mutual fund “yield” represents historical information, while the yield on a municipal security represents a future rate of return.

**Advertising of securities subject to alternative minimum tax.** This is in response to your letter concerning the application of rule G-21, on advertising, to advertisements for municipal securities subject to the alternative minimum tax (AMT). You state that advertisements for municipal securities usually note that the securities are “free from federal and state taxes.” You ask whether an advertisement for municipal securities subject to AMT should note the applicability of AMT if such advertisements describe the securities as “tax exempt.” The Board has considered the issue and authorized this reply.

Rule G-21(c) prohibits a broker, dealer or municipal securities dealer from publishing any advertisement concerning municipal securities which the broker, dealer or municipal securities dealer knows or has reason to know is materially false or misleading. The Board has stated that the use of the term “tax exempt” in advertisements for municipal securities connotes that the securities are exempt from all federal, state and local income taxes. If this is not true of the security being advertised, the Board has required that the use of the term “tax exempt” in an advertisement must be explained, *e.g.*, by footnote. In regard to municipal securities subject to AMT, the Board has determined that advertisements for such securities that describe the securities as being exempt from federal income tax also must describe the securities as subject to AMT. *MSRB Interpretation of February 23, 1988.*

**Advertisements of securities not owned.** This is in response to your letter of May 5, 1982 concerning a dealer bank’s advertising practices. Your letter states that the dealer bank has recently published newspaper advertisements which list specific municipal securities as “Current Offerings,” and that your review of the dealer’s inventory positions has disclosed that “on the date the advertisement was published the dealer held no position in four of the issues advertised and a nominal position in the fifth advertised issue.” Your letter reports that the dealer stated that it was his intention to obtain the advertised issues from other dealers when customer orders were received. Your first question is whether “it is misleading and thus in violation of rule G-21, to advertise securities which the dealer does not own...”

The Board has recently considered this advertising practice and concluded that it would not violate Board rules provided that: (1) the advertisement indicates that the securities are advertised “subject to availability;” (2) the dealer placing the advertisement is not aware that the bonds are no longer available in the market; and (3) the dealer would attempt to acquire the bonds advertised if contacted by a potential customer.

Your letter also expresses concern that this type of advertising might be seriously misleading to customers since the advertisement must be prepared and the printer’s proof copy approved five days in advance of the date of publication. You note that “significant changes in the market can occur over a five, or even three-day period” and that, if such market changes had occurred between submission and publication of the advertisement, the customer could be seriously misled. The Board is aware that delays occur between the time an advertisement is composed and approved for publication by a municipal securities dealer and the time it is actually published. The Board believes that inclusion in the advertisement of a statement indicating that the securities are advertised subject to change in price provides adequate notice to a potential customer that the prices and yields quoted in the advertisement may not represent market yields and prices at the time the customer contacts the dealer. *MSRB interpretation of July 1, 1982.*

**Contents of advertisement: put options.** Your letter dated June 15, 1981, has been referred to me for response. In your letter you mention our previous conversation regarding the appropriate definition of “put bonds”, which definition your firm would like to use in advertisements offering such securities for sale. You request confirmation of the Board’s views concerning the aspects of the “put option” feature on these securities that would be appropriate to cover in such a definition.

The type of “put option” issue with which the Board is familiar, and which we discussed, has a provision in the indenture which permits the holder of the securities to tender or “put” the securities back to the issuer on specified dates at par. This feature typically commences six (or more) years after the date of issuance, is exercisable only once annually (on an interest payment date), and is exercisable only upon the provision of irrevocable prior notice to the issuer (typically three or more months before the exercise date).

If I remember our conversation correctly, you indicated that the firm wished to describe a security of this type in an advertisement as having a “put option” feature, available once annually, permitting redemption of the securities at par. I suggested that, while the items of information you detailed were appropriate, it might also be advisable to mention in the advertisement the “prior notice” requirement under the option exercise procedure. It would also be helpful to make clear the irrevocable nature of such notice.

If the content of your definition of the “put option” feature goes beyond the items we discussed (for example, by indicating that the “put option” is secured by a bank letter of credit, additional disclosures might also be appropriate. *MSRB interpretation of July 13, 1981.*

**Legend satisfying requirement.** I refer to your letter of June 29, 1979 in which you request advice regarding rule G-21(c) on product advertisements. As you noted in your letter, the notice of approval of rule G-34 [prior rule on advertising] stated that the Board believes that the advertisements may be misleading if they show:

only a percentage rate without specifying whether it is the coupon rate or yield and, if yield, the basis on which calculated (for example, discount, par or premium securities and if discount securities, whether before-tax or after-tax yield).

You have requested advice as whether the following legend, to be used in connection with the sale of discount bonds, would be satisfactory for purposes of the rule:

“Discount bonds may be subject to capital gains tax. Rates of such tax vary for individual taxpayers. Discount yields shown herein are gross yields to maturity.”

As I previously indicated to you in our telephone conversation, the proposed legend would satisfy the requirements of rule G-21(c). *MSRB interpretation of August 28, 1979.*

## Interpretive Notices to MSRB Rule G-21

### Interpretation on General Advertising Disclosures, Blind Advertisements and Annual Reports Relating to Municipal Fund Securities Under Rule G-21

June 5, 2007

Rule G-21, on advertising, establishes specific requirements for advertisements by brokers, dealers and municipal securities dealers (“dealers”) of municipal fund securities, including but not limited to advertisements for 529 college savings plans (“529 plans”). This notice sets forth interpretive guidance under Rule G-21 with respect to time-limited broadcast advertisements, blind advertisements, and annual reports or other similar information required to be distributed under state mandates.

#### General Disclosures in Time-Limited Broadcast Advertisements.

Rule G-21(e)(i)(A) requires certain basic disclosures to be provided in product advertisements for municipal fund securities. These disclosures are not legends requiring the inclusion of specific language. Rather, these disclosure requirements may be complied with if the substance of such information is effectively conveyed, regardless of the specific language used in the advertisement. In general, the context in which the information is provided is an important factor in determining whether the information is effectively conveyed.

These required disclosures may present challenges in the context of broadcast advertisements, such as traditional television or radio commercials with 30-second run-times or public service announcements with shorter run-times. In the context of time-limited broadcast advertisements, dealers should provide such disclosures in a manner that appropriately balances the intended message with the required disclosures. Given the unique nature of broadcast advertisements, where the oral presentation of more information can often result in a decreased likelihood that the central message of such information will be understood and retained, somewhat abbreviated forms of the required disclosures may be appropriate for such time-limited broadcast advertisements, particularly if the disclosures are made with close attention paid to ensuring that they are presented with equal prominence to the remainder of the message.

Thus, for example, in a time-limited broadcast advertisement for a non-money market 529 plan, the following language, spoken in a manner consistent with the remaining oral presentation of information, generally would satisfy the disclosure requirements of Rule G-21(e)(i)(A): “To learn about [529 plan name], its investment objectives, risks and costs, read the official statement available from [source]. Check with your home state to learn if it offers tax or other benefits for investing in its own 529 plan.” Further, in a time-limited television advertisement, the source for the official statement, together with a contact telephone number or web address, generally could be displayed on screen while other portions of the disclosures are spoken. This example is intended to be illustrative and is not intended to be exclusive or to necessarily establish a baseline for disclosure.

**Blind Advertisements.** Under Rule G-21(e)(i)(B)(2), certain product advertisements for municipal fund securities that promote an issuer and its public purpose without promoting specific municipal fund securities or identifying a dealer or its affiliates may omit the general disclosures otherwise required under Rule G-21(e)(i)(A). Among other things, such a blind advertisement may include contact information for the issuer or an agent of the issuer to obtain an official statement or other information, provided that if such issuer’s agent is a dealer or dealer affiliate, no orders may be accepted through such source unless initiated by the customer. Although the contact information may direct a potential customer to a dealer or its affiliate acting as agent of the issuer, the face of the advertisement may not identify such dealer or affiliate.

For example, a blind advertisement may say “call 1-800-xxx-xxxx for more information” or “go to www.[state-name]-529plan.com for more information” but may not say “call [dealer name] at 1-800-xxx-xxxx for more information” or “go to www.[dealer-name]-529plan.com for more information.” This provision does not preclude the person who answers a phone inquiry, or the website to which the URL links, from identifying the dealer or its affiliate, so long as such dealer or affiliate is clearly disclosed to be acting on behalf of the issuer identified in the advertisement.

If a potential customer initiates an order through the source identified in the advertisement, a distinct barrier between the providing of information and the seeking of orders must be maintained to qualify as a blind advertisement. For example, solely for purposes of Rule G-21(e)(i)(B)(2), a dealer may establish that the customer initiated the order by requiring, in the case of a telephone inquiry, that the customer be transferred from the initial dealer contact person to a different person before the customer provides any information used in connection with an order or, in the case of a web-based inquiry, that the customer navigate from the initial webpage referred to in the advertisement to another page on the same or different web site before entering any information used in connection with an order.[1] Of course, the dealer must be mindful of its obligation under Rule G-17, on fair practice, to provide to the customer, at or prior to the time of trade, all material facts about the transaction known by the dealer as well as material facts about the security that are reasonably accessible to the market, regardless of whether the transaction was recommended or whether an order may be characterized as unsolicited.[2] In addition, if the transaction is recommended, the dealer must fulfill its obligations with respect to suitability under Rule G-19, on suitability of recommendations and transactions.[3]

**Required Annual Reports Excluded from Definition of Advertisement.** In some cases, a dealer may be required, by state law or the rules and regulations adopted by the state or an instrumentality thereof governing a particular 529 plan or other municipal fund security program, to prepare or distribute an annual financial report or other similar information regarding such plan or program. So long as a dealer provides any such required report or information with respect to a 529 plan or other municipal fund securities program solely in the manner required by such state law or rules and regulations, such report or information will not be treated as an advertisement for purposes of Rule G-21.[4] However, the dealer would remain subject to Rule G-17, which requires that the dealer deal fairly with all persons, prohibits the dealer from engaging in any deceptive, dishonest or unfair practice and requires the dealer to provide to its customer, at or prior to the time of trade, all material facts about a transaction known by the dealer or that are reasonably accessible to the market. In addition, if such information is used in any manner beyond what is narrowly required by such law, rules or regulation, such use of the information would become subject to Rule G-21 as an advertisement.[5]

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## Endnotes

1. These methods are not intended to be the exclusive means by which a dealer could establish that the customer initiated the order.
2. See Rule G-17 Interpretation – Interpretive Notice Regarding Rule G-17, on Disclosure of Material Facts, March 20, 2002, reprinted in MSRB Rule Book.
3. See Rule G-17 Interpretation – Interpretation on Customer Protection Obligations Relating to the Marketing of 529 College Savings Plans, August 7, 2006, reprinted in MSRB Rule Book.
4. If such information is distributed through the official statement, then it would not be considered an advertisement by virtue of the exclusion of official statements from the definition of “advertisement” in Rule G-21(a)(i).
5. This guidance is consistent with similar guidance provided by NASD with respect to its advertising rule, Rule 2210, as applied to certain performance information and hypothetical illustrations required by state laws to be provided by dealers in connection with retirement investments and variable annuity contracts. See letter dated November 29, 2004, to Therese Squillacote, Chief Compliance Officer, ING Financial Advisers, LLC, from Philip A. Shaikun, Assistant General Counsel, NASD; letter dated September 30, 2002, to Sally Krawczyk, Esq., Sutherland, Asbill & Brennan, LLP, from Mr. Shaikun; and letter dated February 5, 1999, to W. Thomas Conner, Vice President, Regulatory Affairs, National Association of Variable Annuities, from Robert J. Smith, Office of General Counsel, NASD Regulation, Inc.



# Securities Investor Protection Corporation

## SIPC Advertising Bylaw As Amended Through November 4, 2010

### Article 11, Section 4, ADVERTISEMENT OF MEMBERSHIP.

Pursuant to Section 15(d) of the Act, as amended, this Section provides for the official symbol, the official advertising statement, and the official explanatory statement of SIPC. In addition, it sets forth certain requirements, prohibitions, and other guidelines for the use of these official devices by members.

#### a. Definitions.

1. **Advertising** – The term “advertising” as used in this Section shall mean promotional material used in or on any newspaper, magazine, or other periodical, radio, television, telephone or tape recording, videotape display, motion picture, slide presentation, telephone directory, sign or billboard, electronic or other public media.
2. **Branch Office** – The term “branch office” as used in this Section shall mean any office of a member which is registered with or designated as a branch office with any self-regulatory organization.
3. **Official Brochure** – The term “official brochure” as used in this Section shall mean any publication so designated by the Corporation which explains the purposes of the Corporation and the protections it affords and which is authorized for public distribution.
4. **Official Advertising Statement** – The term “official advertising statement” as used in this Section shall be “Member of the Securities Investor Protection Corporation.” The word “the” or the words “of the” may be omitted. The words “This firm is a” may be added before the word “member.” The short title “Member of SIPC” or “Member SIPC” may be used by members at their option as the official advertising statement. When the official advertising statement is used on the Internet, the words “Securities Investor Protection Corporation” and “SIPC” shall contain a hyperlink to SIPC’s website.
5. **Official Explanatory Statement** – The term “official explanatory statement” as used in this Section shall be either: (1) “Member of SIPC, which protects securities customers of its members up to \$500,000 (including \$250,000 for claims for cash). Explanatory brochure available upon request or at [www.sipc.org](http://www.sipc.org).” or (2) “Member of SIPC. Securities in your account protected up to \$500,000. For details, please see [www.sipc.org](http://www.sipc.org).” The words “Member of SIPC” may be omitted if the official explanatory statement is used in conjunction with the official symbol. When the official explanatory statement is used on the Internet, “SIPC” and “[www.sipc.org](http://www.sipc.org)” shall contain a hyperlink to SIPC’s website.
6. **Official Symbol** – The term “official symbol,” which may be displayed in a variety of sizes, colors or materials, shall be of the following design:



When the symbol is so reduced in size that the words “member” and “Securities Investor Protection Corporation” are illegible, these words may be omitted. When the official symbol is used on the Internet, “SIPC” shall contain a hyperlink to SIPC’s website.



**b. Mandatory Display by Members.**

Except as provided in (d) below, effective January 1, 1979, each member of SIPC shall continuously display in a prominent place the official symbol (as prescribed in (a)(6) above) at its principal place of business and at each branch office.

**c. Mandatory Inclusion of Member Advertising.**

Except as provided in (d), (e), and (g)(2) below, effective January 1, 1979, members of SIPC shall include in all advertising (as defined in (a)(1) above) a reproduction of the official symbol or the official advertising statement or the official explanatory statement (as defined in (a)(6), (a)(4), (a)(5), respectively).

**d. Exemptions.**

1. No member shall be required to display the official symbol until thirty (30) days after its first day of operation as a member.
2. No member shall be required to display the official symbol at any office where such display would be misleading to the public in that none of the business transacted in such office appears likely to give rise to claims of public customers which might be protected with SIPC funds in the event the member should be liquidated under the provisions of the Act as amended.
3. A member may exhaust supplies of advertising materials which do not include the official symbol, advertising statement or explanatory statement so long as such materials were on hand or on order on the date this Section 4 was adopted. Radio, telephone or television advertisement which were produced, recorded or contracted for on the date this Section 4 was adopted may be used even if they do not contain the official symbol, advertising statement or explanatory statement.
4. Upon written application by a member, the Corporation may grant an exemption from the requirements of (b) or (c) above, if it finds that (1) compliance with the requirement may be misleading to the public or result in undue hardship to the member and (2) an exemption from the requirement is consistent with the purposes of this Section 4.

**e. Optional Inclusion in Member Advertising.**

The following is an enumeration of the types of advertising which may, but need not, include the official symbol, advertising statement or explanatory statement:

1. Signs or plates in the office or attached to the building or buildings in which the member's offices are located;
2. Listings in directories;
3. Classified or display advertisements relating to the recruitment of personnel;
4. Advertisements not setting forth the name of the member;
5. Printed advertisements which do not exceed 10 square inches in space;
6. Advertisements by radio or telephone recording which do not exceed 30 seconds in time;
7. Advertisements by television which do not exceed 15 seconds in time;
8. Advertisements relating to underwriting offerings, investment banking activities, mergers and acquisitions, and personnel announcements; and
9. Internal news wires.

**f. Other Optional Inclusion by Members.**

The official symbol, advertising statement, or explanatory statement may also, but need not, be included in communications media other than those defined as advertising in paragraph (a)(1) above, including, but not limited to, the following:

1. Supplies, such as trade confirmations, stationery, envelopes, checks, statements;
2. Customers' statements;
3. Promotional items, such as calendars, matchbooks, pens, paperweights;
4. Telephone market reports;
5. Research reports;
6. Annual reports; and
7. Direct mail brochures, market letters, and similar communications.

**g. Prohibitions on Member Advertising.**

1. No member shall display any sign or symbol, or include any symbol, statement, or explanation relating to SIPC or membership therein in any advertising, promotional or other material other than the official brochure, symbol and statements as specified in (a) of this Section.
2. Notwithstanding the provisions of (b), (c), (e) and (f) above, advertisements or other material relating primarily to services or types of investments which might, if the official symbol, the official advertising statement, or the official explanatory statement were included therein, reasonably be deemed misleading to public customers, may not include any reference to SIPC except, where applicable rules or regulations of any self-regulatory organization require, a forthright disclaimer of SIPC protection.

An advertisement including the official symbol, the official advertising statement, or the official explanatory statement might be misleading if the Act as amended would not under most circumstances provide protection with respect to the investment or service advertised or if it might appear that SIPC protects or insures the quality of such investment or service. Matters to which the prohibition of this paragraph apply include, but are not limited to, those relating primarily to the following:

- A. Commodities or related contracts or futures contracts or any warrant or right to subscribe to, purchase or sell any of the same, other than futures contracts or options on futures contracts received, acquired, or held in a portfolio margining account carried as a securities account pursuant to a portfolio margining program approved by the Securities and Exchange Commission.
- B. Direct investments in real estate and real estate or mortgage brokerage.
- C. Insurance.
- D. Investment services which are exclusively advisory in character.
- E. Interests which are not included in the definition of the term "security" in the Act.

# New FINRA Rules – effective February 4, 2013

## 2210 Communications with the Public

### (a) Definitions

For purposes of this Rule and any interpretation thereof:

- (1) “Communications” consist of correspondence, retail communications and institutional communications.
- (2) “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) “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.
- (4) “Institutional investor” means any:
  - (A) person described in Rule 4512(c), regardless of whether the person has an account with a member;
  - (B) governmental entity or subdivision thereof;
  - (C) employee benefit plan, or multiple employee benefit plans offered to employees of the same employer, that meet the requirements of Section 403(b) or Section 457 of the Internal Revenue Code and in the aggregate have at least 100 participants, but does not include any participant of such plans;
  - (D) qualified plan, as defined in Section 3(a)(12)(C) of the 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 such plans;
  - (E) member or registered person of such a member; and
  - (F) person acting solely on behalf of any such institutional investor.

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

- (5) “Retail communication” means any written (including electronic) communication that is distributed or made available to more than 25 retail investors within any 30 calendar-day period.
- (6) “Retail investor” means any person other than an institutional investor, regardless of whether the person has an account with a member.

### (b) Approval, Review and Recordkeeping

#### (1) Retail Communications

- (A) An appropriately qualified registered principal of the member must approve each retail communication before the earlier of its use or filing with FINRA’s Advertising Regulation Department (“Department”).
- (B) The requirements of paragraph (b)(1)(A) may be met by a Supervisory Analyst approved pursuant to NYSE Rule 344 with respect to: (i) research reports on debt and equity securities; (ii) retail communications as described in NASD Rule 2711(a)(9)(A); and (iii) other research that does not meet the definition of “research report” under NASD Rule 2711(a)(9), provided that the Supervisory Analyst has technical expertise in the

particular product area. A Supervisory Analyst may not approve a retail communication that requires a separate registration unless the Supervisory Analyst also has such other registration.

(C) The requirements of paragraph (b)(1)(A) shall not apply with regard to any retail communication if, at the time that a member intends to publish or distribute it:

- (i) another member has filed it 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 this subparagraph has not materially altered it and will not use it in a manner that is inconsistent with the conditions of the Department's letter.

(D) The requirements of paragraph (b)(1)(A) shall not apply with regard to the following retail communications, provided that the member supervises and reviews such communications in the same manner as required for supervising and reviewing correspondence pursuant to NASD Rule 3010(d):

- (i) any retail communication that is excepted from the definition of "research report" pursuant to NASD Rule 2711(a)(9)(A), unless the communication makes any financial or investment recommendation;
- (ii) any retail communication that is posted on an online interactive electronic forum; and
- (iii) any retail communication that does not make any financial or investment recommendation or otherwise promote a product or service of the member.

(E) Pursuant to the Rule 9600 Series, FINRA may conditionally or unconditionally grant an exemption from paragraph (b)(1)(A) 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.

(F) Notwithstanding any other provision of this Rule, an appropriately qualified principal must approve a communication prior to a member filing the communication with the Department.

## **(2) Correspondence**

All correspondence is subject to the supervision and review requirements of NASD Rule 3010(d).

## **(3) Institutional Communications**

Each member shall establish written procedures that are appropriate to its business, size, structure, and customers for the review by an appropriately qualified registered principal of institutional communications used by the member and its associated persons. Such procedures must be reasonably designed to ensure that institutional communications comply with applicable standards. When such procedures do not require review of all institutional communications prior to first use or distribution, they must include provision for the education and training of associated persons as to the firm's procedures governing institutional communications, documentation of such education and training, and surveillance and follow-up to ensure that such procedures are implemented and adhered to. Evidence that these supervisory procedures have been implemented and carried out must be maintained and made available to FINRA upon request.

#### **(4) Recordkeeping**

(A) Members must maintain all retail communications and institutional communications for the retention period required by SEA Rule 17a-4(b) and in a format and media that comply with SEA Rule 17a-4. The records must include:

- (i) a copy of the communication and the dates of first and (if applicable) last use of such communication;
- (ii) the name of any registered principal who approved the communication and the date that approval was given;
- (iii) in the case of a retail communication or an 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;
- (iv) information concerning the source of any statistical table, chart, graph or other illustration used in the communication; and
- (v) for any retail communication for which principal approval is not required pursuant to paragraph (b)(1)(C), the name of the member that filed the retail communication with the Department, and a copy of the corresponding review letter from the Department.

(B) Members must maintain all correspondence in accordance with the recordkeeping requirements of NASD Rules 3010(d)(3) and Rule 4511.

#### **(c) Filing Requirements and Review Procedures**

##### **(1) Requirement for Certain Members to File Retail Communications Prior to First Use**

(A) For a period of one year beginning on the date reflected in the Central Registration Depository (CRD®) system as the date that FINRA membership became effective, the member must file with the Department at least 10 business days prior to 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). To the extent any retail communication that is subject to this filing requirement is a free writing prospectus that has been filed with the SEC pursuant to Securities Act Rule 433(d)(1)(ii), the member may file such retail communication within 10 business days of first use rather than at least 10 business days prior to first use.

(B) Notwithstanding the foregoing provisions, if the Department determines that a member has departed from the standards of this Rule, it may require that such member file all communications, or the portion of such member's communications that is related to any specific types or classes of securities or services, with the Department at least 10 business days prior to first use. The Department will notify the member in writing of the types of communications to be filed and the length of time such requirement is to be in effect. Any filing requirement imposed under this subparagraph will take effect 21 calendar days after service of the written notice, during which time the member may request a hearing under Rules 9551 and 9559.

## **(2) Requirement to File Certain Retail Communications Prior to First Use**

At least 10 business days prior to first use or publication (or such shorter period as the Department may allow), a member must file the following retail communications with the Department and withhold them from publication or circulation until any changes specified by the Department have been made:

- (A) 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. Such filings must include a copy of the data on which the ranking or comparison is based.
- (B) Retail communications concerning security futures. The requirements of this paragraph (c)(2)(B) shall not be applicable to:
  - (i) retail communications concerning security futures that are submitted to another self-regulatory organization having comparable standards pertaining to such 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.
- (C) Retail communications concerning bond mutual funds that include or incorporate bond mutual fund volatility ratings, as defined in Rule 2213.

## **(3) Requirement to File Certain Retail Communications**

Within 10 business days of first use or publication, a member must file the following communications with the Department:

- (A) Retail communications concerning registered investment companies (including mutual funds, exchange-traded funds, variable insurance products, closed-end funds, and unit investment trusts) not included within the requirements of paragraphs (c)(1) or (c)(2). The filing of any retail communication that includes or incorporates a performance ranking or performance comparison of the investment company with other investment companies must include a copy of the ranking or comparison used in the retail communication.
- (B) Retail communications concerning public direct participation programs (as defined in Rule 2310).
- (C) Any template for written reports produced by, or retail communications concerning, an investment analysis tool, as such term is defined in Rule 2214.
- (D) Retail communications concerning collateralized mortgage obligations registered under the Securities Act.
- (E) Retail communications 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, not included within the requirements of paragraphs (c)(1), (c)(2) or subparagraphs (A) through (D) of paragraph (c)(3).

#### **(4) Filing of Television or Video Retail Communications**

If a member has filed a draft version or “story board” of a television or video retail communication pursuant to a filing requirement, then the member also must file the final filmed version within 10 business days of first use or broadcast.

#### **(5) Date of First Use and Approval Information**

A member must provide with each filing the actual or anticipated date of first use, the name, title and Central Registration Depository (CRD®) number of the registered principal who approved the retail communication, and the date that the approval was given.

#### **(6) Spot-Check Procedures**

In addition to the foregoing requirements, each member’s written (including electronic) communications may be subject to a spot-check procedure. Upon written request from the Department, each member must submit the material requested in a spot-check procedure within the time frame specified by the Department.

#### **(7) Exclusions from Filing Requirements**

The following communications are excluded from the filing requirements of paragraphs (c)(1) through (c)(4):

- (A) Retail communications that previously have been filed with the Department and that are to be used without material change.
- (B) Retail communications that are based on templates that were previously filed with the Department the changes to which are limited to updates of more recent statistical or other non-narrative information.
- (C) Retail communications that do not make any financial or investment recommendation or otherwise promote a product or service of the member.
- (D) 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.
- (E) Retail communications that do no more than identify the member or offer a specific security at a stated price.
- (F) Prospectuses, preliminary prospectuses, fund profiles, offering circulars and similar documents that have been filed with the SEC or any state, or that is exempt from such registration, except that an investment company prospectus published pursuant to Securities Act Rule 482 and a free writing prospectus that has been filed with the SEC pursuant to Securities Act Rule 433(d)(1)(ii) will not be considered a prospectus for purposes of this exclusion.
- (G) Retail communications prepared in accordance with Section 2(a)(10)(b) of the Securities Act, as amended, 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.
- (H) Press releases that are made available only to members of the media.
- (I) Any reprint or excerpt of any article or report issued by a publisher (“reprint”), provided that:

- (i) 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;
- (ii) 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
- (iii) 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.

(J) Correspondence.

(K) Institutional communications.

(L) Communications that refer to types of investments solely as part of a listing of products or services offered by the member.

(M) Retail communications that are posted on an online interactive electronic forum.

(N) Press releases issued by closed-end investment companies that are listed on the New York Stock Exchange (NYSE) pursuant to section 202.06 of the NYSE Listed Company Manual (or any successor provision).

#### **(8) Communications Deemed Filed with FINRA**

Although the communications described in paragraphs (c)(7)(H) through (K) are excluded from the foregoing filing requirements, investment company communications described in those paragraphs shall be deemed filed with FINRA for purposes of Section 24(b) of the Investment Company Act and Rule 24b-3 thereunder.

#### **(9) Filing Exemptions**

(A) Pursuant to the Rule 9600 Series, FINRA may exempt a member from the pre-use filing requirements of paragraph (c)(1)(A) for good cause shown.

(B) Pursuant to the Rule 9600 Series, FINRA may conditionally or unconditionally grant an exemption from paragraph (c)(3) 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.

#### **(d) Content Standards**

##### **(1) General Standards**

(A) 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.

(B) 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.



(C) Information may be placed in a legend or footnote only in the event that such placement would not inhibit an investor's understanding of the communication.

(D) Members must ensure that statements are clear and not misleading within the context in which they are made, and that they provide balanced treatment of risks and potential benefits. Communications must be consistent with the risks of fluctuating prices and the uncertainty of dividends, rates of return and yield inherent to investments.

(E) 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.

(F) 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 paragraph (d)(1)(F) does not prohibit:

(i) A hypothetical illustration of mathematical principles, provided that it does not predict or project the performance of an investment or investment strategy;

(ii) An investment analysis tool, or a written report produced by an investment analysis tool, that meets the requirements of Rule 2214; and

(iii) 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.

## **(2) Comparisons**

Any comparison in retail communications between investments or services 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.

## **(3) Disclosure of Member's Name**

All retail communications and correspondence must:

(A) 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;

(B) reflect any relationship between the member and any non-member or individual who is also named; and

(C) if it includes other names, reflect which products or services are being offered by the member.

This paragraph (d)(3) does not apply to so-called "blind" advertisements used to recruit personnel.

#### (4) Tax Considerations

(A) 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.

(B) 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.

(C) A comparative illustration of the mathematical principles of tax-deferred versus taxable compounding must meet the following requirements:

- (i) The illustration must depict both the taxable investment and the tax-deferred investment using identical investment amounts and identical assumed gross investment rates of return, which may not exceed 10 percent per annum.
- (ii) The illustration must use and identify actual federal income tax rates.
- (iii) The illustration may reflect an actual state income tax rate, provided that the communication prominently discloses that the illustration is applicable only to investors that reside in the identified state.
- (iv) Tax rates used in an illustration that is intended for a target audience must reasonably reflect its tax bracket or brackets as well as the tax character of capital gains and ordinary income.
- (v) If the illustration covers the payout period for an investment, the illustration must reflect the impact of taxes during this period.
- (vi) The illustration may not assume an unreasonable period of tax deferral.
- (vii) The illustration must disclose, as applicable:
  - a. the degree of risk in the investment's assumed rate of return, including a statement that the assumed rate of return is not guaranteed;
  - b. the possible effects of investment losses on the relative advantage of the taxable versus the tax-deferred investments;
  - c. the extent to which tax rates on capital gains and dividends would affect the taxable investment's return;
  - d. the fact that ordinary income tax rates will apply to withdrawals from a tax-deferred investment;
  - e. its underlying assumptions;
  - f. the potential impact resulting from federal or state tax penalties (e.g., for early withdrawals or use on non-qualified expenses); and
  - g. that an investor should consider his or her current and anticipated investment horizon and income tax bracket when making an investment decision, as the illustration may not reflect these factors.

## (5) Disclosure of Fees, Expenses and Standardized Performance

(A) Retail communications and correspondence that present non-money market fund open-end management investment company performance data as permitted by Securities Act Rule 482 and Rule 34b-1 under the Investment Company Act must disclose:

- (i) the standardized performance information mandated by Securities Act Rule 482 and Rule 34b-1 under the Investment Company Act; and
- (ii) to the extent applicable:
  - a. the maximum sales charge imposed on purchases or the maximum deferred sales charge, as stated in the investment company's prospectus current as of the date of distribution or submission for publication of a communication; and
  - b. the total annual fund operating expense ratio, gross of any fee waivers or expense reimbursements, as stated in the fee table of the investment company's prospectus described in paragraph (d)(5)(A)(ii)(a).

(B) All of the information required by paragraph (d)(5)(A) must be set forth prominently, and in any print advertisement, in a prominent text box that contains only the required information and, at the member's option, comparative performance and fee data and disclosures required by Securities Act Rule 482 and Rule 34b-1 under the Investment Company Act.

## (6) Testimonials

(A) 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.

(B) 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:

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

## (7) Recommendations

(A) Retail communications that include a recommendation of securities must have a reasonable basis for the recommendation and must disclose, if applicable, the following:

- (i) 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;

(ii) 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

(iii) 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.

(B) 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.

(C) 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; provided, however, that a retail communication or correspondence may 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 member within the immediately preceding period of not less than one year, if the communication or list:

(i) states the name of each such security recommended, the date and nature of each such recommendation (*e.g.*, whether to buy, sell or hold), the market price at that time, the price at which the recommendation was to be acted upon, and the market price of each such security as of the most recent practicable date; and

(ii) contains the following cautionary legend, which must appear prominently within the communication or list: “it should not be assumed that recommendations made in the future will be profitable or will equal the performance of the securities in this list.”

(D) (i) This paragraph (d)(7) does not apply to any communication that meets the definition of “research report” for purposes of NASD Rule 2711 and includes all of the applicable disclosures required by that Rule.

(ii) Paragraphs (d)(7)(A) and (d)(7)(C) do not apply to any communication that recommends only registered investment companies or variable insurance products; provided, however, that such communications must have a reasonable basis for the recommendation.

#### **(8) Prospectuses Filed with the SEC**

Prospectuses, preliminary prospectuses, fund profiles and similar documents that have been filed with the SEC are not subject to the standards of this paragraph (d); provided, however, that the standards of this paragraph (d) shall apply to an investment company prospectus published pursuant to Securities Act Rule 482 and a free writing prospectus that has been filed with the SEC pursuant to Securities Act Rule 433(d)(1)(ii).

**(e) Limitations on Use of FINRA's Name and Any Other Corporate Name Owned by FINRA**

Members may indicate FINRA membership in conformity with Article XV, Section 2 of the FINRA By-Laws in one or more of the following ways:

- (1) in any communication that complies with the applicable standards of this Rule and neither states nor implies that FINRA, or any other corporate name or facility owned by FINRA, or any other regulatory organization endorses, indemnifies, or guarantees the member's business practices, selling methods, the class or type of securities offered, or any specific security, and provided further that any reference to the Department's review of a communication is limited to either "Reviewed by FINRA" or "FINRA Reviewed";
- (2) in a confirmation statement for an over-the-counter transaction that states: "This transaction has been executed in conformity with the FINRA Uniform Practice Code"; and
- (3) on a member's website, provided that the member provides a hyperlink to FINRA's internet home page, [www.finra.org](http://www.finra.org), in close proximity to the member's indication of FINRA membership. A member is not required to provide more than one such hyperlink on its website. If the member's website contains more than one indication of FINRA membership, the member may elect to provide any one hyperlink in close proximity to any reference reasonably designed to draw the public's attention to FINRA membership. This provision also shall apply to an internet website relating to the member's investment banking or securities business maintained by or on behalf of any person associated with a member.

**(f) Public Appearances**

- (1) When sponsoring or participating in a seminar, forum, radio or television interview, or when otherwise engaged in public appearances or speaking activities that are unscripted and do not constitute retail communications, institutional communications or correspondence ("public appearance"), persons associated with members must follow the standards of paragraph (d)(1).
- (2) 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:
  - (A) 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 (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
  - (B) any other actual, material conflict of interest of the associated person or member of which the associated person knows or has reason to know at the time of the public appearance.
- (3) Each member shall establish written procedures that are appropriate to its business, size, structure, and customers to supervise its associated persons' public appearances. Such procedures must provide for the education and training of associated persons who make public appearances as to the firm's procedures, documentation of such education and training, and surveillance and follow-up to ensure that such procedures are implemented and adhered to. Evidence that these supervisory procedures have been implemented and carried out must be maintained and made available to FINRA upon request.

(4) Any scripts, slides, handouts or other written (including electronic) materials used in connection with public appearances are considered communications for purposes of this Rule, and members must comply with all applicable provisions of this Rule based on those communications' audience, content and use.

(5) Paragraph (f)(2) does not apply to any public appearance by a research analyst for purposes of NASD Rule 2711 that includes all of the applicable disclosures required by that Rule. Paragraph (f)(2) also does not apply to a recommendation of investment company securities or variable insurance products; provided, however, that the associated person must have a reasonable basis for the recommendation.

**(g) Violation of Other Rules**

Any violation by a member of any rule of the SEC, the Securities Investor Protection Corporation or the Municipal Securities Rulemaking Board applicable to member communications will be deemed a violation of this Rule 2210.

## 2212 Use of Investment Companies Rankings in Retail Communications

### (a) Definition of “Ranking Entity”

For purposes of this Rule, the term “Ranking Entity” refers to any entity that provides general information about investment companies to the public, that is independent of the investment company and its affiliates, and whose services are not procured by the investment company or any of its affiliates to assign the investment company a ranking.

### (b) General Prohibition

Members may not use investment company rankings in any retail communication other than (1) rankings created and published by Ranking Entities or (2) rankings created by an investment company or an investment company affiliate but based on the performance measurements of a Ranking Entity. Rankings in retail communications also must conform to the following requirements.

### (c) Required Disclosures

#### (1) Headlines/Prominent Statements

A headline or other prominent statement must not state or imply that an investment company or investment company family is the best performer in a category unless it is actually ranked first in the category.

#### (2) Required Prominent Disclosure

All retail communications containing an investment company ranking must disclose prominently:

- (A) the name of the category (e.g., growth);
- (B) the number of investment companies or, if applicable, investment company families, in the category;
- (C) the name of the Ranking Entity and, if applicable, the fact that the investment company or an affiliate created the category or subcategory;
- (D) the length of the period (or the first day of the period) and its ending date; and
- (E) criteria on which the ranking is based (e.g., total return, risk-adjusted performance).

#### (3) Other Required Disclosure

All retail communications containing an investment company ranking also must disclose:

- (A) the fact that past performance is no guarantee of future results;
- (B) for investment companies that assess front-end sales loads, whether the ranking takes those loads into account;
- (C) if the ranking is based on total return or the current SEC standardized yield, and fees have been waived or expenses advanced during the period on which the ranking is based, and the waiver or advancement had a material effect on the total return or yield for that period, a statement to that effect;
- (D) the publisher of the ranking data (e.g., “ABC Magazine, June 2011”); and
- (E) if the ranking consists of a symbol (e.g., a star system) rather than a number, the meaning of the symbol (e.g., a four-star ranking indicates that the fund is in the top 30% of all investment companies).

**(d) Time Periods****(1) Current Rankings**

Any investment company ranking included in a retail communication must be, at a minimum, current to the most recent calendar quarter ended prior to use or submission for publication. If no ranking that meets this requirement is available from the Ranking Entity, then a member may only use the most current ranking available from the Ranking Entity unless use of the most current ranking would be misleading, in which case no ranking from the Ranking Entity may be used.

**(2) Rankings Time Periods; Use of Yield Rankings**

Except for money market mutual funds:

- (A) retail communications may not present any ranking that covers a period of less than one year, unless the ranking is based on yield;
- (B) an investment company ranking based on total return must be accompanied by rankings based on total return for a one year period for investment companies in existence for at least one year; one and five year periods for investment companies in existence for at least five years; and one, five and ten year periods for investment companies in existence for at least ten years supplied by the same Ranking Entity, relating to the same investment category, and based on the same time period; provided that, if rankings for such one, five and ten year time periods are not published by the Ranking Entity, then rankings representing short, medium and long term performance must be provided in place of rankings for the required time periods; and
- (C) an investment company ranking based on yield may be based only on the current SEC standardized yield and must be accompanied by total return rankings for the time periods specified in paragraph (d)(2)(B).

**(e) Categories**

- (1) The choice of category (including a subcategory of a broader category) on which the investment company ranking is based must be one that provides a sound basis for evaluating the performance of the investment company.
- (2) An investment company ranking must be based only on (A) a published category or subcategory created by a Ranking Entity or (B) a category or subcategory created by an investment company or an investment company affiliate, but based on the performance measurements of a Ranking Entity.
- (3) Retail communications must not use any category or subcategory that is based upon the asset size of an investment company or investment company family, whether or not it has been created by a Ranking Entity.

**(f) Multiple Class/Two-Tier Funds**

Investment company rankings for more than one class of investment company with the same portfolio must be accompanied by prominent disclosure of the fact that the investment companies or classes have a common portfolio and different expense structures.



**(g) Investment Company Families**

Retail communications may contain rankings of investment company families, provided that these rankings comply with this Rule, and further provided that no retail communication for an individual investment company may provide a ranking of an investment company family unless it also prominently discloses the various rankings for the individual investment company supplied by the same Ranking Entity, as described in paragraph (d)(2)(B). For purposes of this Rule, the term “investment company family” means any two or more registered investment companies or series thereof that hold themselves out to investors as related companies for purposes of investment and investor services.

**(h) Independently Prepared Reprints**

This Rule shall not apply to any reprint or excerpt of any article or report that is excluded from the FINRA Advertising Regulation Department filing requirements pursuant to Rule 2210(c)(7)(I).

## 2213 Requirements for the Use of Bond Mutual Fund Volatility Ratings

### (a) Definition of Bond Mutual Fund Volatility Ratings

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

### (b) Prohibitions on Use

Members and persons associated with a member may use a bond mutual fund volatility rating only in a communication that is accompanied or preceded by a prospectus for the bond mutual fund (“supplemental sales literature”) and only when the following requirements are satisfied:

- (1) The rating does not identify or describe volatility as a “risk” rating.
- (2) The supplemental sales literature incorporates the most recently available rating and reflects information that, at a minimum, is current to the most recently completed calendar quarter ended prior to use.
- (3) The criteria and methodology used to determine the rating must be based exclusively on objective, quantifiable factors. The rating and the Disclosure Statement that accompanies the rating must be clear, concise, and understandable.
- (4) The supplemental sales literature conforms to the disclosure requirements described in paragraph (c).
- (5) The entity that issued the rating provides detailed disclosure on its rating methodology to investors through a toll-free telephone number, a website, or both.

### (c) Disclosure Requirements

- (1) Supplemental sales literature containing a bond mutual fund volatility rating shall include a Disclosure Statement containing all the information required by this Rule. The Disclosure Statement may also contain any additional information that is relevant to an investor’s understanding of the rating.
- (2) Supplemental sales literature containing a bond mutual fund volatility rating shall contain all current bond mutual fund volatility ratings that have been issued with respect to the fund. Information concerning multiple ratings may be combined in the Disclosure Statement, provided that the applicability of the information to each rating is clear.
- (3) All bond mutual fund volatility ratings shall be contained within the text of the Disclosure Statement. The following disclosures shall be provided with respect to each such rating:
  - (A) the name of the entity that issued the rating;
  - (B) the most current rating and date of the current rating, with an explanation of the reason for any change in the current rating from the most recent prior rating;
  - (C) a description of the rating in narrative form, containing the following disclosures:

- (i) a statement that there is no standard method for assigning ratings;
- (ii) a description of the criteria and methodologies used to determine the rating;
- (iii) a statement that not all bond funds have volatility ratings;
- (iv) whether consideration was paid in connection with obtaining the issuance of the rating;
- (v) a description of the types of risks the rating measures (e.g., short-term volatility);
- (vi) a statement that the portfolio may have changed since the date of the rating; and
- (vii) a statement that there is no guarantee that the fund will continue to have the same rating or perform in the future as rated.

## 2214 Requirements for the Use of Investment Analysis Tools

### (a) General Considerations

This Rule provides a limited exception to Rule 2210(d)(1)(F). No member may imply that FINRA endorses or approves the use of any investment analysis tool or any recommendation based on such a tool. A member that offers or intends to offer an investment analysis tool under this Rule (whether customers use the member's tool independently or with assistance from the member) must, within 10 business days of first use, (1) provide FINRA's Advertising Regulation Department ("Department") access to the investment analysis tool and, (2) pursuant to Rule 2210(c)(3)(D), file with the Department any template for written reports produced by, or retail communications concerning, the tool.

### (b) Definition

For purposes of this Rule and any interpretation thereof, an "investment analysis tool" is 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 the potential risks and returns of investment choices.

### (c) Use of Investment Analysis Tools and Related Written Reports and Retail Communications

A member may provide an investment analysis tool (whether customers use the member's tool independently or with assistance from the member), written reports indicating the results generated by such tool and related retail communications only if the tool, written report or related retail communication:

- (1) describes the criteria and methodology used, including the investment analysis tool's limitations and key assumptions;
- (2) explains that results may vary with each use and over time;
- (3) if applicable, describes the universe of investments considered in the analysis, explains how the tool determines which securities to select, discloses if the tool favors certain securities and, if so, explains the reason for the selectivity, and states that other investments not considered may have characteristics similar or superior to those being analyzed; and
- (4) displays the following additional disclosure: "IMPORTANT: The projections or other information generated by [name of investment analysis tool] regarding the likelihood of various investment outcomes are hypothetical in nature, do not reflect actual investment results and are not guarantees of future results."

### (d) Disclosures

The disclosures and other required information discussed in paragraph (c) must be clear and prominent and must be in written (which may be electronic) narrative form.

### Supplementary Material:

**.01 Relationship to Rule 2210(d)(1)(F).** Rule 2210(d)(1)(F) states that "[c]ommunications may not predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast." This Rule allows member firms to offer investment analysis tools (whether customers use the member's tool independently or with assistance from the member), written reports indicating the results generated by such tools and related retail communications in certain circumstances. Rule 2210(d)(1)(F) does not prohibit, and this Rule does not apply to, hypothetical illustrations of mathematical principles that do not predict or project the performance of an investment or investment strategy.

**.02 Advertising Regulation Department Requests.** A member subject to this Rule must provide any supplemental information requested by the Department. The Department may require that the member modify the investment analysis tool, written-report template, or retail communication. The Department also may require that the member not offer or continue to offer or use the tool, written-report template, or retail communication until all changes specified by the Department have been made by the member.

**.03 Material Changes to Disclosures.** After the Department has reviewed the investment analysis tool, written-report template, or retail communication, a member must notify the Department and provide additional access to the tool and re-file any template, or retail communication if it makes a material change to the presentation of information or disclosures as required by paragraphs (c) and (d).

**.04 Investment Analysis Tools Used with Institutional Investors.** A member that offers an investment analysis tool exclusively to “institutional investors,” as defined in Rule 2210(a)(4), is not subject to the post-use access and filing requirement in paragraph (a) of this Rule if the communications relating to or produced by the tool meet the criteria for “institutional communication,” as defined in Rule 2210(a)(3). A member that intends to make the tool available to, or that intends to use the tool or any related report with, any “retail investor,” as defined in Rule 2210(a)(6) (such as an employee benefit plan participant or a retail broker-dealer customer), will be subject to the filing and access requirements, however.

**.05 Compliance with Other Applicable Laws and Rules.** As in all cases, a member’s compliance with this Rule does not mean that the member is acting in conformity with other applicable laws and rules. A member that offers an investment analysis tool under this Rule (whether customers use the member’s tool independently or with assistance from the member) is responsible for ensuring that use of the investment analysis tool and all recommendations based on the investment analysis tool (whether made via the automated tool or a written report) comply, as applicable, with FINRA’s suitability rule (NASD Rule 2310), the other provisions of Rule 2210 (including, but not limited to, the principles of fair dealing and good faith, the prohibition on exaggerated, unwarranted or misleading statements or claims, and any other applicable filing requirements for retail communications), the federal securities laws (including, but not limited to, the antifraud provisions), the SEC rules (including, but not limited to, Securities Act Rule 156) and other FINRA rules.

**.06 Incidental References to Investment Analysis Tools.** A retail communication that contains only an incidental reference to an investment analysis tool (e.g., a brochure that merely mentions a member’s tool as one of the services offered by the member) need not include the disclosures required by this Rule and would not need to be filed with the Department, unless otherwise required by the other provisions of Rule 2210. A retail communication that refers to an investment analysis tool in more detail but does not provide access to the tool or the results generated by the tool must provide the disclosures required by paragraphs (c)(2) and (c)(4), but may exclude the disclosures required by paragraphs (c)(1) and (c)(3).

**.07 Investment Analysis Tools that Favor Certain Securities.** The disclosure required by paragraph (c)(3) must indicate, among other things, whether the investment analysis tool searches, analyzes or in any way favors certain securities within the universe of securities considered based on revenue received by the member in connection with the sale of those securities or based on relationships or understandings between the member and the entity that created the investment analysis tool. The disclosure also must indicate whether the investment analysis tool is limited to searching, analyzing or in any way favoring securities in which the member makes a market, serves as underwriter, or has any other direct or indirect interest. Members are not required to provide a “negative” disclosure (i.e., a disclosure indicating that the tool does not favor certain securities).

## 2215 Communications with the Public Regarding Security Futures

### (a) FINRA Filing Requirements

- (1) As set forth in paragraph (c)(2) of Rule 2210, a member must submit all retail communications concerning security futures to FINRA's Advertising Regulation Department at least 10 business days prior to first use.
- (2) The requirements of this paragraph (a) shall not be applicable to:
  - (A) retail communications concerning security futures that are submitted to another self-regulatory organization having comparable standards pertaining to such retail communications, and
  - (B) retail communications in which the only reference to security futures is contained in a listing of the services of a member.

### (b) Standards Applicable to Security Futures Communications

#### (1) Communications Used Prior to Delivery of the Security Futures Risk Disclosure Statements

- (A) All communications concerning security futures shall be accompanied or preceded by the security futures risk disclosure statement unless they meet the following requirements:
  - (i) Such communications must be limited to general descriptions of the security futures being offered.
  - (ii) Such communications must contain contact information for obtaining a copy of the security futures risk disclosure statement.
  - (iii) Such communications must not contain recommendations or past or projected performance figures, including annualized rates of return, or names of specific securities.
- (B) Communications concerning security futures that meet the requirements of paragraphs (b)(1)(A)(i) through (iii) may have the following characteristics:
  - (i) the text of the communication may contain a brief description of security futures, including a statement that identifies registered clearing agencies for security futures. The text may also contain a brief description of the general attributes and method of operation of the securities exchange or notice-registered securities exchange on which such security futures are traded, including a discussion of how a security future is priced;
  - (ii) the communication may include any statement required by any state law or administrative authority; and
  - (iii) advertising designs and devices, including borders, scrolls, arrows, pointers, multiple and combined logos and unusual type faces and lettering as well as attention-getting headlines and photographs and other graphics may be used, provided such material is not misleading.

#### (2) General Standards

- (A) No member or associated person of a member shall distribute or make available any communication concerning a security future that:

- (i) contains any statement suggesting the certain availability of a secondary market for security futures;
- (ii) fails to reflect the risks attendant to security futures transactions and the complexities of certain security futures investment strategies;
- (iii) fails to include a warning to the effect that security futures are not suitable for all investors or contains suggestions to the contrary; or
- (iv) fails to include a statement that supporting documentation for any claims (including any claims made on behalf of security futures programs or the security futures expertise of sales persons), comparisons, recommendations, statistics or other technical data, will be supplied upon request.

(B) Paragraphs (b)(2)(A)(iii) and (b)(2)(A)(iv) do not apply to institutional communications as defined in Rule 2210(a)(3).

(C) Any statement referring to the potential opportunities or advantages presented by security futures must be balanced by a statement of the corresponding risks. The risk statement must reflect the same degree of specificity as the statement of opportunities, and must avoid broad generalities.

### (3) Projections

Notwithstanding the provisions of Rule 2210(d)(1)(F), security futures communications may contain projected performance figures (including projected annualized rates of return), provided that:

- (A) all such communications must be accompanied or preceded by the security futures risk disclosure statement;
- (B) no suggestion of certainty of future performance is made;
- (C) parameters relating to such performance figures are clearly established;
- (D) all relevant costs, including commissions, fees, and interest charges (as applicable) are disclosed and reflected in the projections;
- (E) such projections are plausible and are intended as a source of reference or a comparative device to be used in the development of a recommendation;
- (F) all material assumptions made in such calculations are clearly identified;
- (G) the risks involved in the proposed transactions are disclosed; and
- (H) in communications relating to annualized rates of return, that such returns are not based upon any less than a 60-day experience; any formulas used in making calculations are clearly displayed; and a statement is included to the effect that the annualized returns cited might be achieved only if the parameters described can be duplicated and that there is no certainty of doing so.

#### (4) Historical Performance

Security futures communications may feature records and statistics that portray the performance of past recommendations or of actual transactions, provided that:

- (A) all such communications must be accompanied or preceded by the security futures risk disclosure statement;
- (B) any such portrayal is done in a balanced manner, and consists of records or statistics that are confined to a specific “universe” that can be fully isolated and circumscribed and that covers at least the most recent 12-month period;
- (C) such communications include the date of each initial recommendation or transaction, the price of each such recommendation or transaction as of such date, and the date and price of each recommendation or transaction at the end of the period or when liquidation was suggested or effected, whichever was earlier; provided that if the communications are limited to summarized or averaged records or statistics, in lieu of the complete record there may be included the number of items recommended or transacted, the number that advanced and the number that declined, together with an offer to provide the complete record upon request;
- (D) all relevant costs, including commissions, fees, and daily margin obligations (as applicable) are disclosed and reflected in the performance;
- (E) whenever such communications contain annualized rates of return, all material assumptions used in the process of annualization are disclosed;
- (F) an indication is provided of the general market conditions during the period(s) covered, and any comparison made between such records and statistics and the overall market (e.g., comparison to an index) is valid;
- (G) such communications state that the results presented should not and cannot be viewed as an indicator of future performance; and
- (H) a principal qualified to supervise security futures activities determines that the records or statistics fairly present the status of the recommendations or transactions reported upon and so initials the report.

#### (c) Security Futures Programs

In communications regarding a security futures program (i.e., an investment plan employing the systematic use of one or more security futures strategies), the cumulative history or unproven nature of the program and its underlying assumptions must be disclosed.

#### (d) Standard Forms of Worksheets

Such worksheets must be uniform within a member. If a member has adopted a standard form of worksheet for a particular security futures strategy, nonstandard worksheets for that strategy may not be used.

#### (e) Recordkeeping

Communications that portray performance of past recommendations or actual transactions and completed worksheets shall be kept at a place easily accessible to the sales office for the accounts or customers involved.



## 2216 Communications with the Public About Collateralized Mortgage Obligations (CMOs)

### (a) Definition

For purposes of this Rule, the term “collateralized mortgage obligation” (CMO) refers to a multi-class debt instrument backed by a pool of mortgage pass-through securities or mortgage loans, including real estate mortgage investment conduits (REMICs) as defined in the Tax Reform Act of 1986.

### (b) Disclosure Standards and Required Educational Material

#### (1) Disclosure Standards

All retail communications and correspondence concerning CMOs:

- (A) must include within the name of the product the term “Collateralized Mortgage Obligation”;
- (B) may not compare CMOs to any other investment vehicle, including a bank certificate of deposit;
- (C) must disclose, as applicable, that a government agency backing applies only to the face value of the CMO and not to any premium paid; and
- (D) must disclose that a CMO’s yield and average life will fluctuate depending on the actual rate at which mortgage holders prepay the mortgages underlying the CMO and changes in current interest rates.

#### (2) Required Educational Material

Before the sale of a CMO to any person other than an institutional investor, as defined in Rule 2210(a)(4), a member must offer to the person educational material that includes the following:

- (A) a discussion of:
  - (i) characteristics and risks of CMOs including credit quality, prepayment rates and average lives, interest rates (including their effect on value and prepayment rates), tax considerations, minimum investments, transaction costs and liquidity;
  - (ii) the structure of a CMO, including the various types of tranches that may be issued and the rights and risks pertaining to each (including the fact that two CMOs with the same underlying collateral may be prepaid at different rates and may have different price volatility); and
  - (iii) the relationship between mortgage loans and mortgage securities;
- (B) questions an investor should ask before investing; and
- (C) a glossary of terms.

### (c) Promotion of Specific CMOs

In addition to the standards set forth above, retail communications and correspondence that promote a specific security or contain yield information must conform to the standards set forth below. An example of a compliant communication appears at the end of this Rule.

- (1) The retail communication or correspondence must present the following disclosure sections with equal prominence. The information in Sections 1 and 2 must be included. The information in Section 3 is optional; therefore, the member may elect to include any, all or none of this information. The information in Section 4 may be tailored to the member’s preferred signature.

## Section 1 Title — Collateralized Mortgage Obligations:

Coupon Rate  
 Anticipated Yield/Average Life  
 Specific Tranche — Number & Class  
 Final Maturity Date  
 Underlying Collateral

## Section 2 Disclosure Statement:

“The yield and average life shown above consider prepayment assumptions that may or may not be met. Changes in payments may significantly affect yield and average life. Please contact your representative for information on CMOs and how they react to different market conditions.”

## Section 3 Product Features (Optional):

Minimum Denominations  
 Rating Disclosure  
 Agency/Government Backing  
 Income Payment Structure  
 Generic Description of Tranche (e.g., PAC, Companion)  
 Yield to Maturity of CMOs Offered at Par

## Section 4 Company Information:

Name, Memberships  
 Address  
 Telephone Number  
 Representative's Name

**(2) Additional Conditions**

The following conditions must also be met:

- (A) All figures in Section 1 must be in equal type size.
- (B) The disclosure language in Section 2 may not be altered and must be given equal prominence with the information in Section 1.
- (C) The prepayment assumption used to determine the yield and average life must either be obtained from a nationally recognized service or the member must be able to justify the assumption used. A copy of either the service's listing for the CMO or the member's justification must be attached to the copy of the communication that is maintained in the member's advertising files in order to verify that the prepayment scenario is reasonable.
- (D) Any sales charge that the member intends to impose must be reflected in the anticipated yield.

(E) The communication must include language stating that the security is “offered subject to prior sale and price change.” This language may be included in any one of the four sections.

(F) If the security is an accrual bond that does not currently distribute principal and interest payments, then Section 1 must include this information.

### **(3) Radio/Television Advertisements**

(A) The following oral disclaimer must precede any radio or television advertisement in lieu of the Title information set forth in Section 1:

“The following is an advertisement for Collateralized Mortgage Obligations. Contact your representative for information on CMOs and how they react to different market conditions.”

(B) Radio or television advertisements must contain the following oral disclosure statement in lieu of the legend set forth in Section 2:

“The yield and average life reflect prepayment assumptions that may or may not be met. Changes in payments may significantly affect yield and average life.”

### **(4) Standardized CMO Communication Example**

#### **Collateralized Mortgage Obligations**

7.50% Coupon

7.75% Anticipated Yield to 22-Year Average Life

FNMA 9532X, Final Maturity March 2023

Collateral 100% FNMA 7.50%

The yield and average life shown above reflect prepayment assumptions that may or may not be met. Changes in payments may significantly affect yield and average life. Please contact your representative for information on CMOs and how they react to different market conditions.

\$5,000 Minimum

Income Paid Monthly

Implied Rating/Volatility Rating

Principal and Interest Payments Backed by FNMA

PAC Bond

Offered subject to prior sale and price change.

Call Mary Representative at (800) 555-1234

Your Company Securities, Inc., Member SIPC

123 Main Street

Anytown, State 12121



**Investor protection. Market integrity.**

1735 K Street, NW  
Washington, DC 20006-1506

9509 Key West Avenue  
Rockville, MD 20850

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