

Client Alert

Current Issues Relevant to Our Clients

June 10, 2015

FINRA Adds Additional Guidance to Its Q&A on Communications with the Public

The Financial Industry Regulatory Authority (“FINRA”) recently issued a Regulatory Notice announcing that it had added additional guidance to the FINRA Rule 2210 (Communications with the Public) questions and answers webpage to provide additional guidance on advertising and other communications with retail investors. This Client Alert is a summary of the newly released guidance. A copy of the Regulatory Notice announcing the new guidance is available [here](#), and the updated questions and answers section is available [here](#). The release of this guidance follows a FINRA request for comment on a number of proposed revisions to the existing FINRA rules governing communications with the public, a summary of which can be found in our Client Alert available [here](#).

Filing and Principal Approval Requirements Related to Non-Promotional Communications

The new guidance clarifies that certain non-promotional communications (e.g. retail communications limited to market or economic commentary, factual information about certain types of retirement accounts, stationery, business cards and other communications that do not make any financial or investment recommendation or otherwise promote a product or service of a member firm) are generally not required to be filed or approved by a principal prior to use. The guidance also states that in most cases a firm would not be required to file or have a principal approve certain notices to retirement plan participants required under the Employee Retirement Income Security Act of 1974 (“ERISA”) or Department of Labor rules so long as such notices did not make any financial or investment recommendation or otherwise promote a product or service of the member. However, if such a notice includes performance information, descriptions of investment objectives of new investment options, or otherwise promotes new investment options, the member firm would be required to file the notice unless the information was required to be included under ERISA or Department of Labor rules.

Social Media Posts in Online Interactive Electronic Forums

The new guidance confirms that interactive electronic forum posts, such as social media status updates, are excluded from the FINRA principal pre-use approval and filing requirements.

Filing Exclusion for Non-Material Changes to Previously Filed Retail Communications

The new guidance clarifies that a retail communication that has been previously filed is excluded from the FINRA filing requirement when converted to an additional format so long as there are no material changes to the communication from the version previously filed. The guidance states that certain changes, such as changes related to formatting on different types of electronic devices, color scheme changes, changes to a mutual fund’s name, or adding certain additional past-performance information, would not be considered material. In addition, if a firm files fact sheets for all share classes of one fund in its fund family, and the share class fact sheets for other funds in the fund family follow the same format in presenting sales load, fee and performance information, then the firm would not be required to file the fact sheet for each share class of the other funds in the family. In such a situation, the firm would be permitted to file the fact sheet for only one share class of each of the other funds in the fund family to satisfy its filing obligations, provided the firm indicates in its filing that it is relying on the exclusion for templates for the other share classes of its fund.

Article Reprints

The new guidance states that articles distributed to retail customers produced by unaffiliated third-party magazines or newspapers are excluded from the FINRA filing requirements, provided that the only changes to the article are the addition of the firm’s name and any necessary disclosures.

Institutional Communications

The new guidance clarifies members' obligations when an institutional communication distributed to an intermediary meeting the definition of "institutional investor" is subsequently distributed to retail investors. The guidance states that in such a situation, unless the firm becomes aware that the intermediary has distributed the communication to retail investors, or the firm has not adequately labeled the communication as institutional-only, the firm will not be required to treat the communication as retail. However, if the recipient intermediary informs the firm that it intends to distribute the communication to its retail customers, or the firm otherwise becomes aware of this practice, the firm must either treat the communication as a retail communication going forward or cease distributing institutional communications to the recipient intermediary until it reasonably concludes that the intermediary has adopted appropriate procedures to prevent redistribution.

Rule 482 and Rule 34b-1 Issues

The new guidance clarifies FINRA's view that promotional items such as t-shirts, caps or pens that contain only the name of a mutual fund or fund family are not required to include the prospectus offering legend required by Rule 482 under the Securities Act of 1933 (the "Securities Act"). Similarly, FINRA does not believe that a communication that merely informs an existing customer of his or her security holdings and other investment positions would be considered to be subject to Rule 482 or Rule 34b-1 under the Investment Company Act of 1940 (the "Investment Company Act"), provided that the communication does not explicitly or implicitly induce the purchase of shares of a registered investment company.

Disclosure of Expense Reimbursement Arrangements in Mutual Fund Performance Advertising

For a retail communication that presents non-money market fund open-end management investment company performance data as permitted by Securities Act Rule 482 and Investment Company Act Rule 34b-1 for a fund in which fund expenses are subsidized through a fee waiver or expense reimbursement arrangement, the new guidance states that the communication must disclose the fund's total annual operating expense ratio gross of any fee waivers or expense reimbursements, as stated in the fund's prospectus fee table. FINRA will permit the presentation of a subsidized expense ratio as well, so long as the firm presents both the gross and subsidized expense ratios in a fair and balanced manner and the communication discloses whether the fee waivers or expense reimbursements were voluntary or mandated by

contract and the time period, if any, during which the fee waiver or expense reimbursement obligation remains in effect.

Business Development Companies

The new guidance clarifies that retail communications concerning business development companies ("BDCs") registered under the Securities Act are subject to the FINRA filing requirements. Furthermore, because a BDC is not registered as an investment company under the Investment Company Act, a Series 26 registration will not qualify a principal to approve of any BDC-related retail communications.

What Should I Do Now?

In light of FINRA's newly issued guidance, member firms may use this as an opportunity to review both existing and future communication pieces and whether adjustments may be necessary to firm policies and procedures.

For More Information

To discuss any topic covered in this Client Alert, please contact a member of the Investment Management Group or visit us online at chapman.com.

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