



FMR LLC Legal Department
82 Devonshire Street, F7A
Boston, MA 02109

May 23, 2014

By Electronic Mail (pubcom@finra.org)

Ms. Marcia E. Asquith
Office of the Corporate Secretary
Financial Industry Regulatory Authority
1735 K Street, NW
Washington, DC 20006-1506

***RE: Retrospective Rule Review on Communications with the Public
(Regulatory Notice 14-14)***

Dear Ms. Asquith:

Fidelity Investments¹ appreciates the opportunity to comment on the effectiveness and efficiency of the Financial Industry Regulatory Authority's ("FINRA's") communications with the public rules. Fidelity strongly supports FINRA's proposal to re-examine the communications rules to determine whether the rules are meeting their intended investor-protection objectives by reasonably efficient means. We also support FINRA's examination of its processes in administering the rules.²

FINRA's effort to reexamine its communications rules coincides with the recent and substantial expansion of new technologies for communicating information to retail and institutional investors. Consumer use of smartphones and tablet devices has surged in the past few years and in many instances these devices have become the preferred means in which investors communicate with their financial services firms.³ Many investors use their

¹ Fidelity is one of the world's largest providers of financial services. The firm is a leading provider of investment management, retirement planning, portfolio guidance, brokerage, benefits outsourcing and many other financial products and services to more than 20 million individuals and institutions, as well as through 5,000 financial intermediary firms.

² *Regulatory Notice 14-14* (Apr. 2014).

³ According to a recent PewResearch Internet Life study, 90% of American adults have a cell phone; 58% of American adults have a smartphone; 32% own an e-reader; and 42% own a tablet computer. See Mobile Technology Fact Sheet, at <http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/>.

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cell phones as a means to go online.⁴ Investors are also increasingly embracing electronic delivery of information, including communications materials, in order to receive, store and retrieve information effectively and efficiently through multiple access points (*e.g.*, at home or while traveling). This development is particularly important as financial services firms and regulators work toward developing reasonable and innovative approaches to the display and delivery of content to investors. Existing regulatory paradigms that require typeface, prominence and proximity requirements should be reconsidered in light of the flexible design options and, in some instances, different design conventions used with today's communications. As discussed below, design-based approaches, including use of visual and graphical cues can be as (or perhaps more) effective in helping investors review and understand information delivered electronically.

Fidelity looks forward to working with FINRA on the retrospective review to evaluate the current regulations, to understand where there are significant impediments to developing best in class communications and to develop solutions that facilitate investors' desire to communication through technology while balancing regulatory requirements.⁵ Our comments cover the following areas:

- FINRA should evaluate how the communications rules can be updated with principles based concepts to address investor preferences for electronic communications and use of social media, particularly through Internet-enabled devices.
- FINRA should examine the recent increase in fine print disclosures in advertising with the goal of developing layered disclosure concepts that can promote clarity in messaging and alleviate consumer confusion.
- FINRA should reconsider its ban on the use of predictions and projections in light of a recently proposed rule by the Department of Labor and the goal of harmonization with investment adviser regulations.

⁴ According to PewResearch, "As of May 2013, 63% of adult cell owners use their phones to go online. 34% of cell internet users go online *mostly* using their phones, and not using some other device such as a desktop or laptop computer." *Id.*

⁵ Fidelity also supports the views expressed by the Investment Company Institute ("ICI") and the Securities Industry and Financial Markets Association ("SIFMA") in their respective comment letters to FINRA, dated May 23, 2014.

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- FINRA should consider how investors can be permitted greater access to materials produced by investment analysis tools for educational purposes and consider how member firms can develop educational content that includes *Monte Carlo* simulations outside of investment analysis tools.
- FINRA should re-examine a number of specific areas within the Communications Rules, including expanding the definition of institutional investor and bringing back the public appearance definition. FINRA should also focus on rules regarding member name disclosures, mutual fund rankings and performance, and comparative advertising.
- FINRA should re-examine the filing requirement for communications concerning investment companies, investment analysis tools and fund annual reports.
- FINRA's requirements regarding the collection of records from member firms should be re-examined to determine whether there are more effective approaches, particularly for social media and electronic communications. Also, FINRA should work collaboratively with the SEC and financial services industry on a principles-based paradigm for record keeping of electronic communications.

I. Broker-Dealer Communications

Investors who wish to open an account and obtain products and services at a financial services firm have many places from which to obtain information. Investors may receive information from the financial institution through various communication channels, including from its public advertising and marketing materials, websites, mobile apps, and representatives (over the telephone and in investor centers). Today, there are many other avenues for investors to learn and research financial products and services, including through print and online news and media outlets, print and online education and investment research providers, and governmental websites, such as FINRA's investor education materials.

Fidelity finds that retail investors who are interested in obtaining financial services most often look to a combination of materials and information before making a decision. An investor may see a financial services advertisement and then access the firm's website or mobile app to obtain further details about what is being offered, or perhaps speak with representative over the telephone or visit a branch office with further questions. Further, an investor might access third-party websites to read articles, reviews or other information about a financial service provider and its products and services.

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Once an investor has made a decision to open an account or make an investment, he or she will continue to receive additional information from the firm before completing the process. When investors engage with a firm, such as Fidelity, they typically will have been exposed both to firm-provided content and to third-party information. Thus, when a firm advertises, it can expect that investors who see the advertisement have been, or will be, exposed to additional information regarding the subject of the advertising.⁶

We have observed over the past several years that FINRA staff has interpreted the communications rules to mean that advertisements by member firms should include descriptive disclosures and language to allow the advertisements to stand alone without reference to information that may be found elsewhere. Further, FINRA recently issued guidance that indicates that certain claims and statements about products and services should include qualifications and disclosures proximate and in context within an advertisement.⁷ Under this approach only limited use of layered disclosures is possible.⁸ While there are some types of communications or claims made in advertisements in which it may not be possible to provide layered disclosure in order to ensure that the communication is not misleading, there may be other situations in which layered disclosures can be appropriately used. FINRA's guidance appears to have resulted in increasing amounts of disclosures in many different types of broker-dealer advertisements. Some of the disclosures are contained in the text of the advertisement while others are found in the "fine print" at or near the bottom of the advertisement. While these disclosures can convey important information concerning an advertisement, their substance, format and display, particularly as reflected in fine printed text, should be studied and evaluated.

Fine print disclosures often fall into four general categories. First, certain FINRA and SEC regulations may require that specific language be included in an advertisement about a product or service, including for example a prospectus offering legend or disclosures regarding fund rankings or performance advertising. Second, while they may not be directly required by a rule, certain disclosures may be required as a result of FINRA staff comments and FINRA's interpretations of its rules. These disclosures address products, services or claims that FINRA

⁶ For example, a recent Fidelity survey conducted of over 1,000 retail investors found that over half of prospects and existing customers seek out additional information when determining whether to invest or obtain a product or service from a firm.

⁷ See FINRA Notice 13-23 (July 2013).

⁸ The term "layered disclosures" herein means: (1) in an online advertisement, a descriptive hyperlink provided for investors, allowing them to access and obtain further details and information at the member firm's website; and (2) in a print advertisement, a descriptive reference to a member firm's website or telephone number where an investor can obtain further detailed information.

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staff says should be enhanced with qualifications and explanations. The staff often indicates these requirements in comment letters on filed sales material. Third, FINRA member firms may include certain disclosures within advertisements and sales material in order to warn investors of specific risks or conditions regarding advertised products or services. Finally, member firms may have a contractual obligation with a third-party to provide a disclosure in communications with the public.⁹

For print advertising and sales material, the first, second and third categories of disclosures often appear in footnotes, as firms have difficulty in placing these disclosures in context and in the overall messaging of the material. The results are often bifurcated communications that confuse and befuddle investors who view the material. Moreover, studies reveal that investors have negative views and feelings about the fine print disclosure in print advertisements.¹⁰ For electronic advertisements and sales material, there are ways to use layered disclosures that mitigate investor confusion. However, FINRA's front-line review staff is often not empowered to permit the use of layered disclosures. Moreover, FINRA staff has not publicly provided its views on what it deems as appropriate methods and techniques for layering disclosures.

As discussed in more detail below, FINRA should use its retrospective review to evaluate how the communications rules can be revised to facilitate member firms' development of advertisements and sales material with clear and concise messaging, which can be easily understood by, and will resonate with, investors.

A. Multimedia Communications

FINRA should examine how its rules affect member firm's development of web-based communications both in firm-sponsored websites and in third-party sites. As part of this review, we believe that FINRA should explore how member firms are using web design techniques to convey information in a clear and logical manner to investors.

Member firms are developing websites using "responsive design" techniques that allow websites and webpages to adjust in size and shape depending on how they are viewed (*e.g.*, on desktops, laptops, tablets and smartphones). Disclosures and other information carry along with the content as it scales up or down in display size. Recent design techniques allow investors to

⁹ For example, a third-party data provider may require that the member firm provide attribution in a footnote.

¹⁰ Fidelity's survey of retail investors, conducted in April-May 2014, asked investors for their views on print disclosures in advertisements. *See, supra*, note 6.

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access easily disclosures and information by clicking or tapping on contextual boxes, links, buttons and icons. Firms now have a host of design techniques for multimedia content to signal to readers that there is important additional information located nearby and within easy access.

While FINRA staff has been flexible in allowing for accommodations with disclosures in certain situations, in other situations the staff is insistent that disclosures be included in the space of the advertisement rather than through the use of links or other visual techniques.¹¹ There is a lack of clarity in regulatory standards, especially between FINRA's and SEC's administration of their respective communications and advertising rules. As a preliminary matter, we recommend that FINRA explore alternative approaches to standard regulatory typeface, proximity and prominence requirements under the rules and its interpretations.

B. Mobile and Wearable Devices

In comment letters on FINRA's rulebook consolidation, Fidelity recommended that FINRA focus its attention on mobile communications.¹² In its response to comments received on the rulebook consolidation proposal, FINRA stated that it "agrees that issues related to mobile electronic devices are important and will consider further guidance or rulemaking as issues arise, but does not believe that this proposed rulemaking is the appropriate vehicle to address all issues raised by new technologies."¹³

Since our last writing, the use of mobile phones and devices has continued to grow rapidly.¹⁴ Consumer demand for access to websites through mobile devices is accelerating and many recent innovations in displays are allowing investors to conduct sophisticated business

¹¹ An example of how these requirements vex firms is with electronic advertising on third-party websites, including use of banners and buttons (small banner ads with very limited space). When a firm mentions products or investment performance in such an advertisement, the rules require proximate offering legends, performance disclosures and the member name within a very limited space. In some instances, layered disclosure is allowed, but there are no standards or public guidelines as to when this can occur.

¹² See Letter from Alexander C. Gavis, Fidelity Investments, to Marcia E. Asquith, FINRA, dated Nov. 20, 2009; Letter from Alexander C. Gavis, Fidelity Investments, to Elizabeth Murphy, SEC, dated Aug. 11, 2011; Letter from Alexander C. Gavis, Fidelity Investments, to Elizabeth Murphy, SEC, dated Dec. 2011.

¹³ 76 Fed. Reg. 46870 (Aug. 2011) ("FINRA Letter").

¹⁴ Pew Internet and American Life Project, *Americans and their cell phones* (August 17, 2011), at www.pew.org. Recent estimates indicate that there are over 250 million U.S. mobile subscribers, correlating to about 80 percent of the U.S. population.

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transactions and dealings through handheld devices, away from desktop and laptop computers. Fidelity has recognized this development and responded to its customers' needs by introducing software applications for tablets and smartphones. Fidelity's tablet-based applications provide investors with up-to-the-minute market news, charting, investment research, quotes, account information and transaction capabilities, such as trading and money movement functionality.

FINRA's disclosure requirements regarding, for example, member names, comparisons, rankings, fees and expenses, and performance information should be examined to determine how they can be rendered effectively in mobile commerce. Given the pace of developments with mobile displays, the disclosure requirements in FINRA's communications rules may not serve their intended purpose if they are either too long or detailed to be read on handheld screens.¹⁵

In addition to examining mobile commerce, FINRA should take note of the growing mobility and connectivity of devices for communications. Wearable devices are being introduced that allow for connectivity to the Internet along with other computing functions. Fidelity has developed a *Market Monitor App* for Google Glass and *Pebble Watchapp* for a wearable watch that connects to an Android device.¹⁶ Each app allows investors to obtain information from Fidelity regarding their investments.

While wearable devices are an emerging area, they bring with them the convenience and mobility of information for investors on the go. As additional devices emerge, more investors will see them as a convenient way of keeping in touch with financial information and conducting their business. FINRA must work with the financial services industry to address how its communication rules can adapt to this development. A further extension of this concept is found with the "Internet of Things," which was the subject of a recent Federal Trade Commission workshop.¹⁷ The Internet of Things is a concept in which many common consumer devices are connected to the Internet, including automobiles, televisions, appliances and other consumer durables. Accordingly, Fidelity recommends that FINRA consider how its communications rules are impacted by these developments, and that it use the retrospective review as an opportunity to seek further comments and suggestions on this important development.

¹⁵ For a further discussion of regulatory issues with mobile communications, see Alexander C. Gavis, *Mobile Financial Communications and New Disclosure Paradigms*, WallStreetLawyer, vol. 16, issue 5 (May 2012).

¹⁶ For a further description of each of these apps, see <https://www.fidelitylabs.com/content/fidelity-market-monitor-for-glass> and <https://www.fidelitylabs.com/content/pebble-watchapp>.

¹⁷ See FTC workshop, *Internet of Things – Privacy in a Connected World*, at <http://www.ftc.gov/news-events/events-calendar/2013/11/internet-things-privacy-security-connected-world>.

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C. Social Media

FINRA worked closely with financial services firms to develop interpretive guidance on social media use.¹⁸ This collaborative approach yielded flexibility for member firms while maintaining investor protections. The approach worked, in part, because FINRA staff was willing to consider alternatives to its existing rules in order to facilitate interactive communications. FINRA's approach in using a task force along with interpretive notices provided swift and effective guidance.

Since the guidance provided by FINRA occurred in 2010 and 2011, and member firms have relied upon it for several years, we recommend that FINRA consider amending its rules to incorporate this guidance. In addition, Fidelity recommends that FINRA consider maintaining a task force that is dedicated to considering communications innovations and interpretive issues under its rules. This task force would continue to consider social media issues, but would have a broader mandate to examine other areas for communications, such as mobile communications and emerging technologies.

Since social media use by member firms and their associated persons is primarily dependent upon third-party platforms, we recommend that FINRA continue to be flexible in considering how its rules apply to these communications. Further, we recommend that FINRA provide its communications review staff with access to social media platforms in order to understand how these platforms are constructed and how they change over time. For example, in the past year, both LinkedIn and Twitter changed the format for user pages, without providing significant notice to users. Member firms and associated persons who had established pages on these sites needed to revamp quickly the display of FINRA-required disclosures (*e.g.*, placement of the member name and fund offering legend). By providing access to social media sites, FINRA's staff would have up-to-date knowledge of changes and could respond better to firm's questions regarding repositioning and formatting of disclosures.¹⁹

¹⁸ See *Guidance on Blogs and Social Networking Sites*, FINRA Notice 10-06 (Jan. 2010); *Social Media Websites and Use of Personal Devices for Business Communications*, FINRA Notice 11-39 (Aug. 2011).

¹⁹ With changes on Twitter, for example, Fidelity determined that one way to continue to include the firm's member name on the firm's Twitter homepage was to embed it into a photograph on the site. While this may have been a stop-gap measure to ensure display of the member name, it was not an ideal solution and other principles-based approaches such as using the member's brand name may have been more appropriate (see member name discussion below).

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These developments also point to a need to consider principles-based rules regarding placement of disclosures, as the member firm must be reactive to changes by third-party social media sites. Finally, as discussed in more detail below and in Fidelity's previous comment letters on the rulebook consolidation, we recommend that FINRA work with the SEC to reexamine the record keeping regulations for broker-dealers in light of these developments.

D. Print Advertisements

While electronic communications are an important focus for FINRA in its retrospective review, Fidelity also recommends that FINRA examine the current state of print advertising. As mentioned above, we have noticed an increased amount of fine print disclosure in financial services advertising that comes under FINRA's jurisdiction. The increase in disclosures within the fine print has multiple sources, including FINRA staff interpretations and rule requirements. FINRA should include this disclosure creep issue as part of its examination of the rules.

A review of disclosure creep in print advertising might have a number of important components. First, FINRA could conduct a review of the Advertising Department staff's comment letters and interpretive practices when providing comments on print advertising. Second, FINRA might solicit firms' feedback and views on the review process for print advertising. Third, FINRA might look to other industries to determine how disclosures and other comments may be incorporated into advertising. Finally, FINRA might undertake a review of its underlying regulatory principles in advertising review. Since investors today rely on a number of sources to obtain information and to make decisions about financial products and services, FINRA should reexamine its notion that print advertisements should contain all necessary information for an investor to make a decision. While this review approach may be relevant for certain types of advertisements, it may not be as relevant for others, particularly where there are additional sources of information available from the firm on its website.

II. **Investment Analysis Tools and Predictions and Projections by Broker-Dealers**

FINRA originally adopted interpretive guidance regarding the use of investment analysis tools by broker-dealers in 2005. In 2013, FINRA incorporated this guidance as part of its rulebook consolidation effort.²⁰ Fidelity believes that the retrospective rule review provides an opportunity for FINRA to clarify application and scope as a result of more recent advances in technology and communications in delivering investment analyses to investors. In addition, we believe that there is an opportunity to take another look at the filing requirements for tools by

²⁰ See NASD IM-2210(6) and Rule 2214.

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member firms, as discussed in more detail in section IV(b) below.²¹

A. Use of Predictions and Projections

FINRA Rule 2210(d)(1)(F) states that communications may not (1) predict or project performance, (2) imply that past performance will recur, or (3) make any exaggerated or unwarranted claim, opinion or forecast. The rule as drafted does not prohibit (1) hypothetical illustrations of mathematical principles, (2) investment analysis tools, and (3) price targets contained in research reports. This language implicitly restricts predictions and projections used by broker-dealers to three articulated exceptions.²² Moreover, with the exception of a price target contained in a research report, any analysis of investment or investment strategy performance must be produced by an investment analysis tool meeting the requirements of Rule 2214.

FINRA's rules regarding predictions and projections also conflict with SEC investment adviser standards, which allow the use of predictions and projections by advisers so long as there is a reasonable basis and the assumptions underlying the projections are adequately explained.²³ Investment advisers commonly use predictions and projections in their client materials, leading to a dichotomy in communications when a broker-dealer is also involved. Fidelity therefore recommends that FINRA reexamine the bases for such exclusion, with an eye toward harmonizing its rules with those for investment advisers.²⁴

²¹ For Fidelity's comments on the original interpretive proposal, *see* Letter from Alexander C. Gavis, Fidelity Investments, to Jonathan Katz, SEC, dated Apr. 2003.

²² *See* SEC Release No. 34-47590 (March 28, 2003), 68 FR 16325 (April 3, 2003) at note 1 ("Rule 2210(d)(2)(N) [currently Rule 2210(d)(1)(D)] does not prohibit, and this Interpretive Material [NASD IM-2210(6)] does not apply to, automated educational tools that are hypothetical or general in nature. For instance, Rule 2210(d)(2)(N) generally does not prohibit, and this Interpretive Material does not cover, portfolio-based planning tools that merely generate a suggested mix of asset classes, broad categories of securities or funds, or probabilities as to how classes of financial assets or styles of investing might perform.").

²³ *See* Investment Advisers Act of 1940.

²⁴ The SEC staff has recommended the harmonization of broker-dealer and investment adviser advertising rules either as part of the implementation of a uniform fiduciary standard or as a separate initiative. *See* Staff of the U.S. Securities and Exchange Commission, *Study on Investment Advisers and Broker-Dealers as Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act* (Jan. 2011) available at: <http://www.sec.gov/news/studies/2011/913studyfinal.pdf>.

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Predictions and projections are material to investors making financial decisions, especially when planning for longer-term goals such as retirement and college savings. The principles-based regulation applied to investment advisers establishes standards for any communication containing predictions or projections, including those that will be produced or distributed through technological advances. Restricting broker-dealers from distributing predictions and projections limits information available to individual investors, while maintaining divergent standards for broker-dealers and investment advisers.²⁵

Fidelity is also concerned that FINRA's prohibitions regarding predictions and projections may come into conflict with a proposed rule by the U.S. Department of Labor ("DOL"), which would require that retirement plan statements include projections of participant account balances as level monthly lifetime income payments to assess retirement readiness and plan for retirement.²⁶ FINRA should use this rule review as an opportunity to determine a permissible means for member firms to comply with the proposed DOL requirements for retirement plan participants and other customers.

B. Use of Investment Analysis Tool Results in Communications

Fidelity has observed that there is a need to educate investors as to how various market conditions can potentially affect their retirement readiness when developing and monitoring a retirement plan. Investment analysis tools can help illustrate this concept by using *Monte Carlo* modeling, which demonstrates an array of probabilities (and confidence levels) of reaching a specific goal based on market simulations run against an investment portfolio.

Fidelity believes that the requirements FINRA staff have imposed on investment analysis tools and materials produced by these tools is stifling the ability of member firms to make the latest modeling simulations available in the marketplace. This has a detrimental effect on investor's education and understanding of how sophisticated investment analysis can help them plan for retirement. If investors are educated in how potential market performance can affect investment portfolios, they may be better prepared to take action regarding their own savings and retirement planning. While some investors may desire immediately to evaluate their portfolio

²⁵ See *Blount v. SEC*, 61 F.3d 938 (D.C. Cir. 1995), *cert. denied*, 517 U.S. 1119 (1996) (upholding a First Amendment challenge to MSRB rule G-37. We believe that a flat ban on reasonable, non-misleading predictions and projections is inconsistent with current First Amendment principles concerning commercial speech and is applicable to self-regulatory organization rules approved by the SEC.).

²⁶ See 29 C.F.R. 2520 (May 8, 2013).

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with a tool, others would prefer to receive general education and guidance that illustrates market scenarios, which may result in a future tool interaction.

To enhance investor education, we believe that investors should be permitted greater access to materials produced by investment analysis tools. This can be achieved by specifically allowing investors to receive these materials prior to a tool interaction, whether the investor requests that an analysis be completed on his/her behalf or is subsequently provided access to the tool for use at his/her convenience.²⁷

We further believe that educational materials should be permitted to include *Monte Carlo* simulations to illustrate potential investment outcomes pursuant to statistical probabilities of various market conditions without reliance on a Rule 2214 investment analysis tool. We anticipate that educational materials would not address the performance of any specific investment product, but would include illustrations based on *Monte Carlo* simulations that allow investors to analyze financial goals (*e.g.*, retirement planning and college savings) and investment concepts (*e.g.*, asset allocation and diversification). Consistent with the creation of general investment analysis tool materials, educational materials would also comply with the suitability provisions of Rule 2111, content standards provided in Rule 2210(d), and other applicable laws and rules.

III. Communications Regulations

A. Institutional Investor Definition

Fidelity recommends that FINRA examine the definitions of “Institutional Investors” in the rule.²⁸ Under this definition, FINRA defines employee benefit plans (“plan sponsors”) with at least 100 participants as institutional investors. Fidelity continues to believe that the 100 participant threshold lacks a compelling and meaningful basis, as defined in the communication rules, and continues to urge FINRA to revise the rule to treat all plan sponsors the same given their like fiduciary duties.

As Fidelity has stated in comment letters on the rulebook consolidation, all retirement plan sponsors – without regard to the amount of assets in, or participants of, the plan – have a

²⁷ Note that Rule 2214 speaks to “whether customers use the members’ tool independently or with assistance from the member” and acknowledges that reports based on investment analysis tools may be used with the public, and the tools may or may not interface with investors.

²⁸ Rule 2210(a)(4).



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fiduciary duty under the Employee Retirement Income Security Act of 1974 to choose and monitor the options offered under their retirement plans. This statutory responsibility requires these fiduciaries to have an in-depth understanding of investment concepts and of the products chosen as retirement plan options. Plan sponsors supplement their investment knowledge and remain abreast of current financial trends through regular contact with their investment providers and record keepers.

Fidelity has not found there to be a measurable correlation between the level of sophistication of a plan sponsor and the size of the company or number of employees. Retirement plans with fewer than 100 participants often include professional services firms (*e.g.*, specializing in law, accounting, consulting or engineering). Plan sponsors in these firms are as financially sophisticated as sponsors of larger plans. Further, a 100-participant standard is very difficult to administer in practice, since member firms need to track the number of plan participants in each of their clients' plans in order to confirm that each plan meets the definition of institutional investor before institutional sales material is distributed.

Accordingly, Fidelity recommends that FINRA reconsider the definition of Institutional Investor under its rules, and seek public comments as to whether enhancements are appropriate to allow a broader group of institutional clients to receive communications materials that are prepared for their level of financial sophistication.

B. Public Appearance Definition

In consolidating the communications categories from six to three in the rulebook consolidation effort, FINRA has eliminated the definition of "Public Appearance." FINRA has continued to rely upon this definition in its interpretive guidance on social media. Specifically, FINRA classified participation in a real-time interactive forum as a Public Appearance, allowing such activity to fall outside of the prior approval and filing requirements. In its response to comments on the rulebook consolidation, FINRA mentioned that it "disagrees that it is necessary to continue to treat posts on interactive electronic fora as public appearances [since] it has already created an exception from the principal pre-use approval requirements for such posts, permitting members to supervise and review such posts in the same manner permitted for correspondence."²⁹

While Fidelity understands FINRA's goal of reducing the number of categories for communications, we continue to be concerned that by eliminating the Public Appearance definition, FINRA eliminated flexibility in addressing new forms of communications in the

²⁹ FINRA Letter, at p.17.

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future. Without such a category, it is necessary for FINRA to amend the rules governing Retail communications, Institutional communications and Correspondence each time there is a new form of communication that needs to be addressed under the rule.

Fidelity recommends that FINRA reconsider its deletion of the Public Appearance definition so that it may continue to cover interactive electronic communications within this framework recognizing that these communications are more analogous to physical public appearances. With a unified definition, FINRA may then provide rulemaking for interactive electronic communications for Retail communications, Institutional communications and Correspondence, without creating separate exceptions for each category.

C. Member Name Disclosure

Under FINRA Rule 2210(d)(3), retail communications and correspondence of a member firm are required to disclose prominently the member's name. FINRA's recent rulebook consolidation effort did not address whether this requirement should be revised or revisited. Fidelity recommends that FINRA evaluate whether this requirement should be revised to accommodate better the use of electronic communications, particularly through mobile and wearable devices and social media.

Communications through mobile and wearable devices involve the display of information on a very small screen that may not be able appropriately to accommodate a full member name. In addition, social media posts, particularly through Twitter, involve a limited number of characters. FINRA should consider whether to allow firms the ability to abbreviate a member name or to provide a shorter brand name that is recognizable in the marketplace. Moreover, the member name requirement should be principles based, allowing firms to develop a reasonable approach to providing the name in communications. For example, certain communications in which an investor may already know the sender may not need to have a full member name in order to economize on text and meet character limits.

FINRA might provide examples of what it deems reasonably appropriate placement, including situations in which the member name might be included in sign-up materials for messaging programs or a member's mobile device application instead of within each communication on the device or message. In addition, the innovative use of textual graphics or links within display screens and messages also should be permitted. Creating communications without the member name is not without precedence, as FINRA has allowed members to link to it in certain instances and the rule currently allows for it in "blind" advertisements used to recruit personnel.

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D. Mutual Fund Rankings in Communications

FINRA Rule 2212 governs the use of investment companies' rankings in retail communications. The rule provides a specific and rigid framework for member firms to follow when using fund rankings. Fidelity recommends that FINRA focus on allowing greater flexibility for firms that use rankings and greater efficiency when handling required backup materials.

As a preliminary matter, we recommend that FINRA examine its policies around allowing member firms to use non-traditional rankings, such as aggregate fund family rankings, depending on the circumstances. In limited circumstances, FINRA staff allows for the use of aggregate rankings of fund families provided that the member firm also includes the ranking of each fund comprising the aggregate ranking in its communication. With fund family aggregate rankings, the number of underlying funds quickly becomes unmanageable, and use of aggregate rankings is essentially precluded from magazine or print advertisements, as multiple page buys would be needed to provide the ranking support. Perhaps a rule with a layered approach to providing the supporting disclosure could be considered, in which viewers are directed to the member firm's web site for the supporting information.

Another area for focus is Rule 2212's prohibition of the use of total returns rankings of less than one year for non-money market mutual funds. While such a prohibition may prevent funds from touting highly ranked positions based on short time periods, it also prevents member firms from providing useful fund data to investors. Fund web pages and other data-rich communications often provide fund performance for a variety of historical time periods, including daily, monthly quarterly and annually as long as the fund's standard SEC returns also are included. We see no reason why rankings should not be treated similarly with the proper guardrails in the rule.

Finally, FINRA should consider no longer requiring member firms to provide ranking back-up when they file rankings materials with FINRA. Ranking information from third parties is publicly available and the additional work and time required by member firms to gather the rankings information for each filing is administratively burdensome and, arguably, without a commensurate investor protection benefit. Perhaps a better solution would be to have member firms maintain files with the ranking back-up for any rankings used in retail communications for FINRA spot check examinations or requests.

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E. Comparison Advertising

Under FINRA Rule 2210(d)(2), any comparison used in retail communications must disclose “all material differences between them, including (as applicable) investment objective, costs and expenses, liquidity, safety, guarantees or insurance, fluctuation of principle or return, and tax features.”³⁰

Comparative advertising by member firms benefits investors as it provides important information regarding products, services, fees and expenses. It also spurs greater transparency and drives competition, and it may result in firms lowering fees on products and services for investors. We believe that FINRA should focus its attention on how to facilitate comparative advertising. The current regulatory standard appears to be stifling comparative advertising, as FINRA staff scrutinizes advertisements under the rule and has required significant fine print disclosures. The number of comparative advertisements for member firm services in the marketplace pales in comparison to stand alone advertising for each firm.

While comparative advertising may be influenced by market conditions, it may also be influenced by whether firms are able to develop a straightforward marketing message that compares products and services. We recommend that FINRA examine approaches to comparative advertising that involve layered disclosures, with the advertising comparing key characteristic of firm offerings and a link or reference to a website where an investor can obtain further details.

Accordingly, Fidelity recommends that FINRA re-examine the current rule and its implementation by the staff and focus on how FINRA can promote comparative advertising.³¹

F. Mutual Fund Performance

1. Related Performance

Fidelity recommends that FINRA review its prohibition on the use of related performance or composite performance in mutual fund advertising. The longstanding divergence of FINRA and SEC approaches to related performance highlights an area where member firms have found confusion and dissonance when handling sales material.

³⁰ FINRA Rule 2210(d)(2).

³¹ FINRA also should consider a similar type of analysis for comparative illustrations of tax deferred verses taxable compounding under FINRA Rule 2210(d)(4).

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While the FINRA staff has established some areas of relief for member firms, allowing them, for example, to use certain types of related performance and not others, the standards have not been clearly articulated.³² Further, we are unaware of ongoing dialogue between the SEC and FINRA to resolve differences or of recent attempts by FINRA to develop a uniform standard. We urge FINRA during this process to look at areas of inconsistency and work with the SEC to align regulatory standards.

2. SEC Rule 482 Performance

As another example of the incongruity between SEC and FINRA standards, SEC Rule 482 sets forth the requirements for the inclusion of standardized investment company performance information, sales charges and expense ratios in investment company advertisements. When FINRA Rule 2210(d)(5), “Disclosure of Fees, Expenses and Standardized Performance,” was originally adopted, it was done so with an eye toward consistency with Rule 482 and, indeed, references within the rule direct members to Rule 482.³³ Yet, FINRA Rule 2210(d)(5) pertains to all retail communications and correspondence, while Rule 482 pertains solely to investment company advertisements and other sales material. Thus, the import of compliance is far broader under FINRA Rule 2210(d)(5).

Investment advisers are not subject to FINRA rules, but are subject to Rule 482 when they create and distribute investment company sales material with investment company performance. In compliance with Rule 482, an investment adviser could produce a communication that did not rise to the level of sales material for distribution to existing customers, such as a non-promotional performance report regarding a customer’s current holdings, and include non-standardized investment company performance without having to also provide standardized performance.

In today’s marketplace, investors are demanding more and more analytical information regarding their investments and, more specifically, consolidated performance reports from their brokers and advisers. The inconsistency between the requirements under Rule 482 versus FINRA Rule 2210(d)(5) place brokers at a competitive disadvantage relative to their advisory competitors in attempting to supply all of the requisite standardized performance information in

³² We understand that FINRA staff through channels other than rulemaking, *e.g.*, conferences and interactions with member firms, has indicated it may not object to the sharing of certain types of related performance on a limited basis with certain investment professional audiences. We recommend that FINRA examine this area to determine whether its current position is inhibiting the flow of useful information to investors.

³³ See SEC Release No. 34-54103 (July 2006); NASD Notice to Members 06-48 (Sept. 2006).

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a printed report. When this standardized information is presented in the context of actual account holdings, the standardized performance information, reflective of very different measurement periods than that of the report and/or the period during which the customer actually owned the security, adds confusion and leads to further disclosure and explanation.

Fidelity recommends that FINRA review the incongruity between the SEC and FINRA requirements in the context of non-promotional materials that include investment company performance information. Solely in this context, Fidelity requests that FINRA consider providing interpretive guidance to either (i) limit the disclosure requirements of FINRA Rule 2210(d)(5) to investment company advertisements as would be consistent with Rule 482 mandates, or (ii) support alternate methods of delivery of the requisite standardized performance information in the context of non-promotional print pieces directed at existing customers that mention the performance of investment company securities held by the customer, such as a reference to a website where such information is readily available.³⁴

IV. Filing Requirements

A. Filing of Retail Communications Concerning Investment Companies

Under FINRA rules, member firms are required to file all retail communications “concerning registered investment companies.”³⁵ Under this broad standard, FINRA staff requires filing of practically all member firm retail communications that mention mutual funds, closed end funds, variable insurance products, unit investment trusts or exchange traded funds. Fidelity recommends that FINRA reexamine its approach to the required filing of fund communications, particularly in light of the requirements under the Investment Company Act of 1940 and SEC regulations.³⁶ The statutory requirement for the filing of investment company content specifically mentions the filing of advertisements, pamphlets, circulars, form letters, or

³⁴ Note that Rule 2210(d)(5) does permit hyperlinks to requisite disclosure in the context of electronic communications to customers.

³⁵ FINRA Rule 2210(c)(2) & (3).

³⁶ Section 24(b) of the Investment Company Act of 1940 states, “It shall be unlawful for any of the following companies, or for any underwriter for such a company, in connection with a public offering of any security of which such company is the issuer, to make use of the mails or any means or instrumentalities of interstate commerce, to transmit any advertisement, pamphlet, circular, form letter, or other sales literature addressed to or intended for distribution to prospective investors unless three copies of the full text thereof have been filed with the Commission or are filed with the Commission within ten days thereafter: any registered open-end company . . .” Investment Company Act of 1940, at <http://www.sec.gov/about/laws/ica40.pdf>.



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other sales literature addressed to or intended for distribution to *prospective investors*.³⁷ FINRA's filing requirement is broader, extending to all retail communications concerning investment company's content that is designed for existing and prospective investors.

FINRA staff typically asks member firms to file large quantities of communications content when in fact only a small portion or fraction of the content may be required for review under the rule. For example, for a mobile app, FINRA may require that the entire app be filed in order for FINRA staff to understand and evaluate the software, when in fact only a handful of pages may contain fileable content. While we appreciate FINRA's goal in attempting to understand an entire communication rather than a portion of it, it is often the situation that after Fidelity has filed a lengthy piece the staff may determine that it should be handled under its limited review program. In these situations, Fidelity is filing a substantial amount of content that remains in FINRA's database of filing but with no further action by the staff.

One possible solution for FINRA to consider is to align its filing requirement with that of the plain language of the Investment Company Act of 1940. This approach would restrict filing to material that is designed to be used with prospective investors, rather than with all investors. This approach might alleviate the filing burdens for fund communications to existing customers, including all content that is not specifically address to a prospective investor. FINRA may also want to consider a risk based filing approach for communications that it believes may need particular regulatory attention or that it deems necessary for further scrutiny based on sales practices or other issues.

In all events, Fidelity recommends that FINRA take a close look at both its rule regarding filing of communications and the practices of the Advertising Regulation Department.

³⁷ Moreover FINRA's broad filing requirements for registered investment company communications contrasts with the SEC's proposed filing requirements for general solicitation and advertising materials related to private funds. See SEC Amendments to Regulation D, Form D and Rule 156 under the Securities Act (File No.S7-06-13) Release Nos. 33-9416, 34-69960, and IC-30595, available at <http://www.sec.gov/rules/proposed/2013/33-9416.pdf> (the "Proposed Amendments"). The Proposed Amendments would require, among other items, that private fund issuers submit, on a temporary basis, *written* general solicitation materials used in Rule 506(c) offerings to the Commission no later than the date of the first use of such materials. While we are not advocating for private fund and registered investment company communications to follow the same regulatory regime, we find it difficult to justify the disparate regulatory treatment of private fund and registered investment company communications and urge FINRA to consider more narrowly tailored filing requirements for registered investment company communications.

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B. Filing of Investment Analysis Tools

Since 2005, FINRA has had the opportunity to receive filings of investment analysis tools from member firms. During this time period, there does not appear to have been significant publicly disclosed regulatory issues or enforcement actions with these filings. When an investment analysis tool is filed with FINRA, the member firm can expect to wait several weeks for a comment response from the staff. In addition, member firms continue to encounter challenges making interactive tools available for the staff to review in the format that will be used by investors. This issue arises due to the various technology firewalls and access rights that are in place both at FINRA and the member firm.

Once FINRA staff receives a filing from a member firm, its responsibility is not to evaluate the merits of the tool but to determine whether the required disclosures are in place. Fidelity recommends that FINRA consider evaluating whether the filing requirement for investment analysis tools continues to be relevant after nearly nine years of reviewing such materials. If it is determined that most filings do not raise regulatory risks or problems, we would recommend that FINRA discontinue this requirement.

C. Filing of Mutual Fund Annual Reports

Fidelity urges FINRA to revisit the requirement that firms file sales material including the Managers Discussion of Fund Performance (“MDFP”) in the fund’s annual reports filed on Form N-CSR (“shareholder reports”). Many firms and trade associations during the rulebook consolidation advocated for FINRA to amend this requirement. In this retrospective review, Fidelity strongly recommends reconsideration of this requirement.

Item 27 of Form N-1A requires a discussion “of the factors that materially affected the Fund’s performance during the most recently completed fiscal year, including the relevant market conditions and the investment strategies and techniques used by the Fund’s investment adviser.”³⁸ The entire shareholder report is filed with the SEC, and it is subject to certification by the fund’s principal financial officers, as required by the Sarbanes-Oxley Act of 2002, and compliance with anti-fraud rules.

It is difficult to see how the investor protection benefits provided by a FINRA’s review outweigh the costs absorbed by member firms such as Fidelity with a diverse fund lineup. Moreover, FINRA’s previous responses to member firms’ concerns -- that filing is only required when the member firm uses the shareholder report as sales literature (*e.g.*, makes it available on

³⁸ SEC Form N-1A, Item 27.

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its public website) – did not recognize that firms are required by the SEC to make the report publicly available on their website if they wish to use a summary prospectus. With the current SEC regulatory structure in place, Fidelity believes that there are sufficient controls in place to eliminate filing of the shareholder reports with FINRA without sacrificing investor protection concerns.

V. Record Keeping

As discussed above, new and varied platforms are becoming available for investors to communicate with member firms. Maintaining the records from these systems on a write once, read many (“WORM”) compliant solution is a complex and costly endeavor. Member firm records are kept in WORM storage solely to provide them to FINRA and the SEC upon request.

We recommend that FINRA examine whether there are alternative and equally effective ways in which firms can store electronic data that will provide similar or the same protections regarding the safety and integrity of the stored records. FINRA should work with the brokerage industry to determine whether new technologies have come online that may allow firms to keep records in native storage systems that are more cost effective but equally compliant with the concept of write once, read many. Uncovering alternative systems would benefit both regulators and the industry, as it would allow for the production of records that can be seen in their original or native format (*e.g.*, for social media, the posts might be produced in a format as they are seen by the social media user, rather than in disaggregated data strings or arrays).

Finally, Fidelity continues to recommend that the SEC, FINRA and the securities industry work cooperatively to examine the existing regulatory paradigm for electronic record keeping, with an eye toward fresh ideas that address protection concerns, existing and emerging technologies and the need for rationalization of storage of massive amounts of interactive electronic content and data. This collective effort could be accomplished by establishing a special joint task force to examine and make recommendations on the issue.



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Fidelity appreciates the opportunity to comment on this important retrospective review of regulations. If you have any questions about any of these comments or need additional information, please contact the undersigned, or Bryan Weaver, Senior Legal Counsel (for comments on investor analysis tools), at 617-563-7000.

Sincerely yours,

/s/ Alexander C. Gavis

Alexander C. Gavis
Vice President & Associate General Counsel
FMR LLC Legal Department
Fidelity Investments

Copies to:

Mr. Robert Colby, Chief Legal Officer
Mr. Thomas Selman, Executive Vice President
Mr. Daniel Sibears, Executive Vice President
Mr. Joseph Price, Senior Vice President
Mr. Jonathan Sokobin, Senior Vice President
Mr. Thomas Pappas, Vice President and Director
Mr. Joseph Savage, Vice President and Counsel
Ms. Amy Sochard, Senior Director
Financial Industry Regulatory Authority