AMERITRADE

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November 19, 2009

Marcia E. Asquith
Senior Vice President & Corporate Secretary
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1500

Dear Ms. Asquith,

In Regulatory Notice 09-55, FINRA requests comments on proposed new FINRA rules governing communications with the public. The new rules would replace current NASD Rules 2210 and 2211 and the Interpretive Materials that follow NASD Rule 2210, and portions of Incorporated NYSE Rule 472. TD Ameritrade[1] submits these comments in response to the proposed rules.

The elimination of the distinction between existing retail customers and prospective retail customers from the definition of Correspondence will impact firms by potentially increasing the number of communications subject to FINRA filing. In communicating with customers, large broker dealers with large customer bases will almost always exceed the arbitrary "breakpoint" of 25 or less recipients. We do, however, support the proposed exclusion from the filing requirements for retail communications that are solely administrative in nature. In our opinion, the factors that should be weighed in deciding whether a communication should require FINRA review include: the nature of the communication (i.e., is it intended to promote a product or service, or is it administrative or educational); the specific content; and the intended audience.

We believe that communications with the public can have an educational intent and serve a valuable purpose without promoting a particular security. Sometimes an example of a hypothetical transaction is extremely valuable in demonstrating to the viewer the potential ramifications, both positive and negative, of a trade. If all assumptions related to the parameters of the example are provided and clearly labeled as assumptions, and if the results are presented in a fair and balanced manner, we believe the example of a hypothetical transaction would not predict or project performance of a particular investment or investment strategy. With that in mind, we respectfully propose two revisions:

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[1] TD Ameritrade is a wholly owned broker-dealer subsidiary of TD AMERITRADE Holding Corporation ("TD Ameritrade Holding"). TD Ameritrade Holding has a 34-year history of providing financial services to self-directed investors. TD Ameritrade Holding's wholly owned broker-dealer subsidiary, TD Ameritrade serves an investor base comprised of over 5.1 million funded client accounts with approximately $297 billion in assets.

Revise proposed section 2210(d)(1)(F) to clarify that hypothetical illustrations of mathematical principles could include examples of hypothetical transactions, as long as all assumptions were adequately disclosed. Additional text shown in italics.

> ([D]F) 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. *Thus, the presentation of an illustration of the potential results of a hypothetical transaction, such as maximum gain or loss based on assumed change in market price of a security would be allowed, so long as all assumptions pertaining to the example were provided and clearly labeled as assumptions.*

Revise proposed section 2215(b)(1)(A)(iii) to clarify that the restriction on recommendations and past and projected performance applies to actual securities, and that hypothetical illustrations of mathematical principles could include examples of hypothetical transactions, as long as all assumptions were adequately disclosed. Additional text shown in italics.

> ([C]iii) Such communications [shall] must not contain recommendations or past or projected performance figures, including annualized rates of return, *of actual securities* or names of *actual* specific securities. *Presentation of an illustration of the potential results of a hypothetical transaction, such as maximum gain or loss based on assumed change in market price of a security would be allowed, so long as all assumptions pertaining to the example were provided and clearly labeled as assumptions.*

We support the current requirement, with respect to security futures and options communications, to include a statement that supporting documentation for claims, comparisons, recommendations, statistics, or other technical data will be provided upon request. However, that requirement has been interpreted to apply even if the communication does not make any claims, comparisons, recommendations, etc. We find this interpretation illogical and potentially misleading, as it implies to the investor that supporting documentation will be provided even though such documentation may not exist because there is nothing in the communication that requires support. As such, we would request FINRA to clarify that the requirement for such a statement only applies when the content actually presents claims, comparisons, recommendations, statistics, or other technical data. We respectfully recommend a revision to proposed section 2215(b)(2)(A)(iv) as follows. Additional text shown in italics.

[(3) Security futures communications shall state] (iv) fails to include a statement, *where applicable,* 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.

As mentioned previously, we consider the intended audience to be a primary concern when evaluating public communications, and believe that the risk of unintentional receipt can, in some cases, be outweighed by the potential benefits to the firm and mitigated by prominent disclosure. Our firm, like many others, must compete for prospective institutional investors such as independent registered investment advisors. One medium for garnering interest is via non-password-protected web sites specifically designed for an institutional audience. While we support the restriction on the actual distribution (i.e., "pushing") of Institutional communications to retail investors, we believe the current (and proposed) "made available to" aspect of the definition is too limiting. We would request FINRA consider allowing some Institutional communications to reside on a non-password-protected web site. We believe a rewording of the proposed definition of Institutional material would accomplish FINRA's goal, while allowing member firms the ability to more effectively communicate to this audience (prospective institutional investors). With that in mind, we respectfully propose the following revisions. Additional text shown in italics, deleted text struck through.

Proposed section 2210(a)(3):

> (3) "Institutional communication" means any written (including electronic) communication that is distributed *to, or intended for an audience of,* ~~or made available to~~ institutional investors."

Proposed section 2210(a)(4), in the paragraph following section (F):

> 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.

We appreciate the continued exclusion from filing requirements, provided in different sections of the rules, for communications limited to a listing of the products or services offered by a member. We would propose, however, to clarify and expand this exclusion to allow firms: to discuss the types of securities which can be traded through a member, and to include a generic, educational description of those types of securities; to explain the functionality of online trading platforms or online tools (i.e., these are the buttons you press to see this chart or take this action); and to present related fees and commissions, all so long as no actual security was named. A sample recommended revision is provided, however, the language would apply wherever the "laundry list" exclusion was discussed. We respectfully recommend a revision to section 2210(c)(7)(J). Additional text shown in italics.

([9]J) [Material] Communications that [refers] refer to investment company securities, direct participation programs, or exempted securities (as defined in Section 3(a)(12) of the Exchange Act) solely as part of a listing *or brief description* of products or services offered by the member [, is excluded from the requirements of paragraphs (c)(2) and (c)(4)]. *This description could include a generic discussion of the types of securities, to explain the functionality of online trading platforms or other tools, and present related fees and commissions, so long as no actual security was named.*

As a firm with a national online audience, it is often problematic to restrict viewership based on location, and we believe in some cases concerns based on state residency can be addressed by disclosure rather than restriction from use. With that in mind, we respectfully recommend a revision to proposed section 2210(d)(4)(iii) to allow the use of illustrations of actual state income tax rates as long as the material clearly discloses that the rate is applicable only to residents of the particular state. Additional text shown in italics, deleted text struck through.

(iii) The illustration also may reflect an actual state income tax rate, provided that the communication *clearly discloses that the rate pertains only to residents of* ~~is used only with investors that reside in~~ the identified state.

In the case of Institutional communications, if a firm's policies include review and approval by a registered principal, it is the registered principal's name and date of approval which is important to document, not the person who prepared or distributed the material. With that in mind, we respectfully recommend a revision to proposed section 2210(b)(4)(ii) to clarify that if a registered principal has approved an institutional communication, the name of the person who prepared and distributed the communication would not be required. In such a case, section 2210(b)(4)(iii) would apply. Additional text shown in italics.

(ii) in the case of an institutional communication *not approved by a registered principal*, the name of the person who prepared or distributed the communication;

For clarification, we respectfully recommend a revision to proposed section 2210(d)(3)(B) to codify that disclosure of a relationship is only required when one exists. Additional text shown in italics.

([ii]B) reflect any relationship, *if one exists,* between the member and any nonmember or individual who is also named; and

During our review of the proposal, it was noted that proposed section 2215(b)(2)(B) includes a typographical error. The sections referenced should be (b)(2)(A)(iii) and (b)(2)(A)(iv) to conform with Rule 2220 language.

TD Ameritrade appreciates FINRA's consideration of these comments and suggested revisions to the proposed rules to replace current NASD Rules 2210 and 2211 and the Interpretive Materials that follow NASD Rule 2210, and portions of Incorporated NYSE Rule 472.

Respectfully,

Lisa J. Hénoch
Chief Compliance Officer
TD Ameritrade

LJH/mdp