

## Advertising Regulation

### FINRA Provides Guidance on Application of Communications Rules to Disclosures Required by Department of Labor

#### Executive Summary

FINRA is providing guidance to firms on the application of NASD Rules 2210 and 2211 to information provided by a firm to participant-directed individual account plan participants pursuant to U.S. Department of Labor Rule 404a-5 under the Employee Retirement Income Security Act of 1974.

Questions concerning this *Notice* should be directed to:

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#### Background

On October 20, 2010, the U.S. Department of Labor (DOL) adopted Rule 404a-5 (DOL rule) under the Employee Retirement Income Security Act of 1974 (ERISA). The DOL rule requires the disclosure of certain plan and investment-related information, including performance information, to participants and beneficiaries in participant-directed individual account plans (plan participants and plans, respectively) by a plan administrator or any person designated by a plan administrator to act on its behalf (plan administrator).<sup>1</sup> The DOL rule is designed to ensure that plan participants are provided with sufficient information regarding the plan and designated investment alternatives (investment options), in a comparative format, to make informed decisions when managing their accounts.

A plan may designate securities issued by an investment company registered under the Investment Company Act of 1940 (Investment Company Act) as an investment option. Under the DOL rule, a plan administrator must furnish investment-related information for each investment option offered under a plan, including performance information, to a plan participant prior to or on the date on which the plan participant can first direct his or her

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#### Suggested Routing

- ▶ Advertising
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#### Key Topics

- ▶ Advertising
- ▶ Mutual Funds
- ▶ Retirement Plans

#### Referenced Rules & Notices

- ▶ DOL Rule 404a-5
- ▶ Investment Company Act Rule 34b-1
- ▶ NASD Rule 2210
- ▶ NASD Rule 2211
- ▶ Securities Act Rule 482
- ▶ Securities Act Rule 497

investment and at least annually thereafter.<sup>2</sup> The DOL rule requires that the investment-related information for all investment options under a plan be presented in a chart or other comparative format.<sup>3</sup> The comparative chart must provide contact information for the purpose of obtaining a prospectus (for investment options registered under the Securities Act of 1933 (Securities Act) or the Investment Company Act) or similar document (for investment options that are not so registered).<sup>4</sup>

### SEC No-Action Letter

On October 26, 2011, the Securities and Exchange Commission (SEC) staff issued a letter to the DOL in which the staff agreed to treat information provided by a plan administrator to plan participants that is required by and complies with the disclosure requirements set forth in the DOL rule as if it were a communication that satisfies the requirements of Rule 482 under the Securities Act.<sup>5</sup> The SEC staff further stated that such information need not be filed pursuant to Rule 497 under the Securities Act and Section 24(b) of the Investment Company Act with the SEC or FINRA.<sup>6</sup>

The SEC letter noted that FINRA staff intends to interpret applicable FINRA rules consistent with the SEC letter.

### Application of NASD Rules 2210 and 2211

NASD Rules 2210 and 2211 impose certain approval, recordkeeping, filing and content standards on firm communications with the public.<sup>7</sup> Among other things, NASD Rule 2210(c)(2) requires a firm to file advertisements and sales literature concerning registered investment companies within 10 business days of first use or publication. NASD Rule 2210(d)(3) requires firm 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 and Rule 34b-1 under the Investment Company Act to disclose certain performance and expense information in a manner prescribed by paragraph (d)(3).

To the extent that a firm provides information to plan participants that is required by and complies with the disclosure requirements set forth in the DOL rule, FINRA will treat the information as if it were a communication that satisfies the content and filing requirements of NASD Rules 2210 and 2211. Accordingly, firms are not required to file the information with FINRA pursuant to NASD Rule 2210(c), nor is the information subject to the content requirements of NASD Rule 2210(d), including the expense and performance-related provisions of NASD Rule 2210(d)(3).

Firms are cautioned, however, that including the disclosures required by the DOL rule in a communication does not affect other content not required by the DOL rule. Accordingly, to the extent a firm includes in an advertisement or item of sales literature content that promotes a product or service of the firm, and is in addition to what is required by the DOL rule, the non-required content is subject to the requirements of NASD Rules 2210 and 2211.

For example, if a firm prepares a brochure for plan participants that includes the disclosures required by the DOL rule, and also includes non-required promotional content regarding investment company securities available as investment options through the plan, the non-required content will be subject to the content and filing requirements of NASD Rules 2210 and 2211. A firm that prepared such a brochure would be required to file the brochure with FINRA for review of the content not required by the DOL rule.<sup>8</sup>

## Endnotes

1. Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans, 75 FR 64910 (Oct. 20, 2010) (adopting Rule 404a-5) [29 CFR § 2550.404a-5] (“Adopting Notice”).
2. See 29 CFR § 2550.404a-5(d)(1). The required investment-related disclosure, among other information, includes the name, performance data, comparative benchmark, and fees and expenses of the investment option.
3. See *id.* § 2550.404a-5(d)(2)(i).
4. See *id.* § 2550.404a-5(d)(2)(i)(A).
5. See Department of Labor, [SEC No-Action Letter \(October 26, 2011\)](#).
6. Securities Act Rule 497 requires Rule 482 advertisements to be filed with the SEC. Rule 482 advertisements are considered filed with the SEC if filed with a national securities association registered with the SEC that has adopted rules and procedures for reviewing investment company advertisements, such as FINRA. See Rule 497(i). In addition, Section 24(b) of the Investment Company Act generally requires funds, among others, to file any advertisement, pamphlet, circular, form letter or other sales literature with the SEC. Under Investment Company Act Rule 24b-3, such sales material is deemed to be filed with the SEC upon its filing with FINRA.
7. NASD Rule 2210 (Communications with the Public) applies generally to all firm communications with the public. NASD Rule 2211 (Institutional Sales Material and Correspondence) imposes approval, record-keeping, spot-check and content standards on firm institutional sales material and correspondence.
8. Conversely, content that does not promote a product or service of the firm that is included in the disclosure document would not be subject to the filing and content standards of NASD Rule 2210. For example, to the extent that a firm includes blended returns of more than one appropriate broad-based index (see Adopting Notice, 75 FR at 64917), or appropriate risk disclosure concerning investment options as part of the disclosure document required by the DOL rule, FINRA does not consider this type of additional content to be subject to NASD Rule 2210’s filing or content standards.

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