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## FINRA Issues New Advertising Q&As

FINRA issued [Regulatory Notice 15-17](#) on May 22, announcing the publication of several new and updated advertising Q&As. A brief summary of these Q&As follows.

### General Market Commentary

General market commentaries or economic discussions that are not used for the purpose of promoting a product or service of a member firm would be considered retail communications that do not make any financial or investment recommendations or otherwise promote a product or service of the member. Consequently, filing and principal pre-use approval would not be required for these materials. *See* FINRA Rules 2210(b)(1)(D)(iii) and 2210(c)(7)(C).

### Factual Retirement Account Explanatory Information

A retail communication that merely explains factual information regarding an individual retirement account, qualified plan or 401(k) account would also be considered nonpromotional and thus not subject to the principal pre-use approval or filing requirements.

### ERISA Required Information

In most cases, a firm would not be required to file, or have a principal approve prior to use, a retail communication that merely provides information to participants in an employee retirement plan required under ERISA or the current Department of Labor rules under ERISA (e.g., a retail communication that merely informs plan participants of changes to the available investment options). FINRA would consider such a notice to be a retail communication that does not make any financial or investment recommendation or otherwise promote a product or service of the member. However, if the notice also includes performance or other information that describes the investment objectives of the new investment options, or otherwise includes a headline or other graphic or text that promotes these new options, the firm would be required to file the notice, unless this information is required by ERISA or Department of Labor rules. For example, FINRA previously has stated that firms are not required to file information, including performance information, provided to participant-directed individual account plan participants pursuant to Department of Labor Rule 404a-5 under ERISA.

### Multiple Class Funds

A firm that files fact sheets for all share classes of one fund in its fund family would not be required to file the fact sheet for each share class of the other funds if the other funds follow the same format in presenting sales load, fees and performance. Instead, under the filing exclusion for templates set forth in FINRA Rule 2210(c)(7)(B), 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. A firm relying on the exclusion should disclose this in its filing with FINRA.

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## Filing to Reflect Format Changes

FINRA would not consider revising a previously filed retail communication to appear in a different format to be a material change, provided that the content has not materially changed. For example, if a firm has previously filed a retail communication in the format that it appears on a desktop or laptop computer, and the firm is redesigning the presentation to appear on a tablet or smartphone, the firm would not have to refile the version that will appear on a tablet or smartphone. For the same reason, a firm that uses responsive Web design technology to deliver a retail communication in different formats, depending on the device used, would not be required to file each version of the retail communication. Similarly, a firm that previously filed a retail communication in print form would not be required to refile the same communication posted online, provided no material change is made. Finally, a firm would not be required to refile communications that change solely as the result of the use of a new or different color scheme.

## Fund Name Changes

A firm is not required to refile a retail communication concerning a mutual fund solely due to a change in the fund's name.

## Five- and Ten-year Fund Performance

A firm is not required to refile retail communications that present fund performance that merely add five- or ten-year performance information as required under Rule 482 of the Securities Act of 1933.

## Article Reprints

A firm is not required to file article reprints from unaffiliated magazines or newspapers, provided that the firm alters the article solely to add its own name and/or any disclosures necessary to meet applicable regulatory standards.

## Institutional Communications

A firm that distributes clearly labelled institutional communications solely to intermediaries that fall within the definition of "institutional investor" generally is not required to treat these materials as retail communications in the event the intermediaries subsequently disseminate them to retail investors, unless the firm has reason to believe that this has happened. For example, a broker-dealer that receives an institutional communication from a mutual fund underwriter is responsible for ensuring that its associated persons do not forward the communication to retail investors. The "reason to believe" standard is not intended to require a mutual fund underwriter to audit recipient broker-dealers' use of institutional communications. However, if the recipient broker-dealer informs the fund



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underwriter that it intends to distribute the communication to its retail customers, or the fund underwriter otherwise becomes aware of this practice, the fund underwriter must either treat the communication as a retail communication going forward, or cease distributing institutional communications to the recipient broker-dealer until it reasonably concludes that the broker-dealer has adopted appropriate procedures to prevent redistribution.

## Application of Rule 482 to Fund Promotional Items

A firm is not required to include the prospectus offer language required under Rule 482 on promotional items, such as T-shirts, caps or pens, that contain only the name of a mutual fund or fund family. In FINRA's view, these types of promotional items would not be considered an "advertisement" for the purposes of Rule 482, and therefore are not subject to the requirements of that rule, including the requirement to include a prospectus offering legend.

## Customer Account Statements

FINRA would not apply Rule 482 to a communication to an existing customer that lists the customer's securities and other investments, as well as the performance of those investments, provided that the communication does not explicitly or implicitly induce the purchase of fund shares.

## Disclosure of Mutual Fund Expense Reimbursement Arrangements

FINRA Rule 2210(d)(5)(A) requires retail communications and correspondence that present non-money market fund open-end management investment company performance data as permitted by Rule 482 and Rule 34b-1 under the Investment Company Act to disclose, among other things, the fund's total annual operating expense ratio, gross of any fee

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waivers or expense reimbursements, as stated in the fund's prospectus fee table. FINRA also permits a firm to present in performance communications the fund's subsidized expense ratio, as long as the firm presents both the gross and subsidized expense ratios in a fair and balanced manner. If a firm wishes to present a fund's subsidized expense ratio in correspondence or retail communications, the communication must disclose 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.

**Filing of Business Development Company Communications**

A firm is required to file within 10 business days of first use or publication any retail communication concerning a business development company (BDC) that is registered under the

Securities Act of 1933. *See*, Rule 2210(c)(3)(B). This is because a BDC falls within the definition of “direct participation program” under FINRA Rule 2310(a)(4).

**Principal Approval of BDC Communications**

A Series 26 registration (Limited Principal - Investment Company and Variable Contracts Products) does not qualify a principal to approve a retail communication concerning a BDC since BDCs are not registered under the Investment Company Act. Consequently to approve a retail communication concerning a BDC, the registered principal must possess either a Series 24 (General Securities Principal), a Series 9/10 (General Securities Sales Supervisor) or a Series 39 (Limited Principal - Direct Participation Programs) registration, if the BDC is structured as a direct participation program as defined in NASD Rule 1022(e)(2). ■

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