

# Securities Law

## Broker-Dealers

### Communications

#### Internal Communications and the FINRA Advertising Rules: What does FINRA's Proposed Guidance Mean for Member Firms?

*Contributed by David A. Thompson,  
Bingham McCutchen LLP*

Member firms of the Financial Industry Regulatory Authority (FINRA) often communicate internally about products or services offered through the firm, and label documents that are not to be shared with persons outside the firm as “internal-use only” material. Communications that are purely internal, and not shared with anyone outside the firm, are often supervised as part of the firm’s training or general supervisory procedures. In recent years, however, FINRA has contended, primarily in the context of enforcement actions, that internal communications not shared with persons outside a member firm can be “Institutional Sales Material” under [National Association of Securities Dealers \(NASD\) Rule 2211](#), and therefore subject to the standards FINRA uses to evaluate communications with members of the public under [NASD Rule 2210\(d\)\(1\)](#).

NASD Rules 2210 and 2211 are commonly referred to as the “advertising rules,” and address the approval, recordkeeping, filing, review requirements, and content standards for six

categories of “Communications with the Public.”<sup>1</sup> Rule 2210(d)(1), titled “Standards Applicable to All Communication with the Public,” requires (among other things) that communications be fair and balanced, and that they provide a sound basis for evaluating the facts in regard to any security or type of security (hereafter referred to as the “Content Standards”).

The Content Standards prohibit members from omitting any material fact or qualification that would cause the communication to be misleading, and prohibit members from making any false, exaggerated, unwarranted, or misleading statement or claim in any communication with the public. FINRA’s recent position regarding the interplay between the Content Standard rules and purely internal materials has not yet been adjudicated by a FINRA hearing panel or the Securities and Exchange Commission (SEC). Indeed, many in the financial industry are not aware that “internal-use only” material may be scrutinized for compliance with the advertising rules during regulatory examinations or by the FINRA Department of Enforcement.

#### FINRA’s Proposal

To erase any ambiguity on this point and as FINRA contemplates revisions to the Consolidated Rulebook,<sup>2</sup> FINRA now has proposed formalizing its interpretation of NASD Rule 2211 as it relates to internal communications. FINRA does not recommend changes to the relevant parts of the current rule as one might expect. Instead, it proposes to add an interpretive statement to the rule entitled “Supplementary Material 2210.01.” As drafted, the statement instructs that “a member’s internal written (including electronic) communications that are intended to educate or train registered persons about the products or services offered by a member” will be considered “Institutional Communications.” On November 1, 2011, the SEC issued a release calling for additional public comment on the proposed FINRA advertising rules, including Supplementary Material 2210.01, and instituting proceedings

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under [Section 19\(b\)\(2\)\(B\)](#) of the Securities Exchange Act of 1934 (Exchange Act) to determine whether to approve or disapprove of the proposed rule change.<sup>3</sup>

FINRA's policy concern behind the proposed supplemental statement is clear and to be commended. Training materials used to educate registered persons about the increasingly complex products in today's financial marketplace should be fair and balanced. Such materials often form the basis for what registered representatives will later say to prospective customers, and they arguably form the basis for future advertising. Traditionally, however, member firms have viewed internal training materials as part of their training or supervisory programs; they have not considered them subject to FINRA advertising rules. Member firms have also not traditionally reviewed purely internal communications for compliance with the NASD advertising rules.

### Open Issues

From a member firm's perspective, the training of registered representatives is a matter fundamentally different than communicating with external parties, even institutional ones. A firm's training of registered persons, unlike communications with a third party, are made in the context of a supervisory relationship. The firm knows, or should know, the training needs of registered persons, and can tailor each communication with them as part of an overall training program. The firm bears the responsibility under current supervisory and training rules to provide accurate training, and FINRA has various mechanisms under current rules to bring regulatory actions against firms that provide inaccurate information to their employees.<sup>4</sup> Against this backdrop, there is reason to question whether FINRA's advertising rules are the best regulatory framework within which to address the accuracy of internal communications about products and services.

FINRA's proposal also raises significant questions about how member firms will comply. For instance, the interpretation includes electronic communications that are intended to educate or train registered persons. How will firms establish procedures for the review by an appropriately qualified registered principal of internal e-mail communications intended to educate or train registered persons?<sup>5</sup> If such materials are "institutional communications," they must be captured and reviewed, at least on a periodic basis, as part of the firm's supervisory procedures. Moreover, Supplementary Material 2210.01, on its face, does not address the training of unregistered employees of a member firm. Are those communications also subject to the advertising rules, and if so, how are the content standards different from the standards that would apply to communications with the investing public and with registered employees? How will member firms distinguish e-mail messages to registered persons from e-mail messages to unregistered persons?

These issues have, to some degree, flown under the radar during the comment process, in part because FINRA did not include Supplementary Material 2210.01 in its initial rule proposal in 2009.<sup>6</sup> It was added only in the revised proposal filed in July 2011, which had a shortened comment period.<sup>7</sup> Four industry

comment letters opposed adding Supplementary Material 2210.01.<sup>8</sup> On October 31, 2011, FINRA filed a response to the comments received,<sup>9</sup> and, an amended version of the proposed advertising rule (the Proposed FINRA Advertising Rule).<sup>10</sup> In its October 31 response to comments, FINRA stood by its proposal to add Supplementary Material 2210.10, stating that its position on internal material was "consistent with current FINRA rules and FINRA's current and past interpretations of those rules."<sup>11</sup>

The SEC, however, called for public comment, so the issue is once again on the table and the industry has another opportunity to be heard. Whether approved by the SEC or not, there is no doubt that FINRA's filing has significant implications for member firms. FINRA's proposed guidance articulates, for the first time, the circumstances under which "internal-use only" material will be subject to FINRA's advertising rules. Supplementary Material 2210.01 states:

**Internal Communications.** A member's internal written (including electronic) communications that are intended to educate or train registered persons about the products or services offered by a member are considered institutional communications pursuant to paragraph (a)(3) of this Rule. Accordingly, such internal communications are subject to both the provisions of this Rule and NASD Rule 3010(d) (Review of Correspondence).

If approved by the SEC, the statement will have the practical effect of becoming part of the rule, even though the definition of "Institutional Communication" and "Institutional Investor" will remain unchanged. The interpretation will be an integral part of the new regime. If not approved, the status of FINRA's interpretation may depend on what position the SEC takes as part of its ongoing proceedings. At stake is not just a rule change, but a statement of FINRA's current view. In the meantime, the filing puts firms in the rather awkward position of determining whether the proposal itself—as a statement of FINRA's current position—should prompt an immediate evaluation of their policies and procedures.

This is important because the current version of Rule 2211 imposes supervisory and recordkeeping obligations relating to the use of "Institutional Sales Material." If "internal-use only" materials currently are subject to Rule 2211, member firms' policies and procedures are not sufficient if they address only material shared with "institutional investors" outside the firm. And, although Supplementary Material 2210.01 provides some guidance about the kinds of internal materials that are subject to the advertising rule, many questions remain.

### Tracing the Logic: Internal Communications as Institutional Sales Material

Viewing internal communications as "Institutional Sales Material" may seem somewhat counter-intuitive. How can a communication expressly intended for use only with a broker-dealer's own employees—and indeed not shared with anyone outside the firm—

be governed by a rule titled “Communications with the Public,” and be subject to standards that apply to communications with the public at large? Is this what NASD Rules 2210 and 2211 require?

FINRA’s interpretation is rooted in a view that internal training material can be an indirect communication with a customer, akin to a “telemarketing script” or a “seminar text.” This is especially true when training material is the primary source for a registered person’s knowledge about a product offered through the firm—knowledge that will then be passed along to the investing public. Telemarketing scripts and seminar texts are, under current Rule 2210, “Sales Literature,” and accordingly may need to be filed with FINRA before use, depending on their subject matter. Sales literature is currently subject to the content standards of Rule 2210(d).<sup>12</sup>

The problem, however, is that Rule 2211 does not explicitly address a firm’s internal-communications. Judged by its title, Rule 2211 seems to address a member firm’s communications with institutional “investors,” which most would take to mean external clients or prospective clients. FINRA’s policy concern may be legitimate, but FINRA must be able to demonstrate that internal materials are covered by the text of the existing (or the proposed) rule.

FINRA’s position is that “internal-use only” communications are “Institutional Sales Material” under the current version of NASD Rule 2211. “Institutional Sales Material” consists of “any communication that is distributed or made available only to institutional investors.”<sup>13</sup> An “Institutional Investor” is defined, among other things, as an “NASD member or registered associated person of such a member.”<sup>14</sup> Thus, a communication made available to itself (the NASD member) or any of its registered associated persons, is “Institutional Sales Material.”<sup>15</sup> Although Institutional Sales Material need not be approved by a registered principal prior to first use, it nevertheless must meet the content standards of Rule 2210(d)(1) and the applicable Interpretive Materials under Rule 2210.<sup>16</sup>

The Proposed FINRA Advertising Rule consolidates the six categories of communications in the current rule to three, naming what is now “Institutional Sales Material” as “Institutional Communication.” Under the Proposed FINRA Advertising Rule, however, “Institutional Communication” will continue to be defined as material distributed or made available only to institutional investors, and “institutional investors” will continue to include NASD members and their associated persons.<sup>17</sup> In other words, the new rule does not change the existing rule as it relates to internal material—it is the “Supplemental Material” that will define how member firms must treat internal material going forward.

FINRA’s application of Rule 2211 to purely internal communications is not new, but its origins are murky at best. In 2002, when NASD first proposed the creation of Rule 2211, industry comment letters urged FINRA to reconsider including NASD members and their associated persons in the definition of “institutional investor,” or make clear that internal communications are not communications with the public.<sup>18</sup> FINRA rejected those comments, stating that

“while NASD Rule 2210 exempts internal communications from its filing requirements, the NASD has long taken the position that broker/dealer-only materials must meet the rule’s content requirements.”<sup>19</sup>

NASD’s support for that statement was two “Ask the Analyst” entries in 1996 and 1998, before Rule 2211 was created. The 1996 Q&A discussed the circumstances under which a registered representative may show or reference an “internal use only” piece with the public.<sup>20</sup> The 1998 Q&A discusses whether there is a “regulatory difference between delivering ‘internal use only’ communications to registered investment advisers versus personnel registered with an NASD firm.”<sup>21</sup> The 1998 Q&A stated that “the only regulatory difference” between them had to do with filing requirements, and that “the content standards set forth in Rule 2210 apply to both types of communications.”

It is unclear, however, whether the Q&A answer meant to apply to purely internal communications (within the broker-dealer that created the material), or whether it meant to apply to internal-use only material delivered to another NASD member firm, but not for use with the general public. NASD’s comment in 2002 that “broker/dealer-only materials must meet the [Rule 2210] content requirement” could have meant simply that if an internal-use only piece was shared with an institutional investor outside the firm, it would be subject to Rule 2210. Nothing in FINRA’s previous comments has put the industry on clear notice that “internal-use only” materials that were never shared with anyone outside the firm are covered by Rule 2211. Certainly, none of the previous guidance put the industry on notice of the specific terms contained in Supplementary Material 2210.01—that only internal communications intended to train registered persons about the products or services offered by the firm will be considered Internal Communications under the Proposed FINRA Advertising Rule.

### FINRA’s Recent Enforcement Actions

FINRA’s view on internal communications has come to the fore primarily through enforcement actions. When the auction rate securities market collapsed in February 2008, FINRA’s Department of Enforcement focused significant attention on PowerPoint presentations and other training materials that were used by member firms to educate registered representatives about the risk of auction rate securities. To date, FINRA has announced 20 settlements with member firms relating to the sale of auction rate securities, all of them based, at least in part, on NASD Rules 2210 and 2211 and Municipal Securities Rulemaking Board advertising rules.<sup>22</sup> In many cases, FINRA criticized statements made about auction rate securities on web sites or in documents shared with clients or prospective clients. However, in at least eight settlements, the allegations focused on material distributed internally to registered representatives.<sup>23</sup> In at least two settlements, the advertising rule violations were limited to internal materials.<sup>24</sup>

Of course, these disciplinary settlements were the result of negotiation, and may have been entered into despite disagreement about the application of Rule 2211 to internal communications. Commentators observed the trend at the time and urged FINRA to address the issue through rulemaking rather than disciplinary settlements.<sup>25</sup> In response, FINRA's recent filings resolve the lingering uncertainty, at least as to FINRA's view. They also explain, more clearly than in the past, the kinds of materials that FINRA considers subject to Rule 2211.

### When Is Internal Material Covered By the Rule?

The proposed guidance makes clear that not all internal communications will be subject to scrutiny under the content standards of Rule 2210(d)(1). According to Supplementary Material 2210.01, only communications that are "intended to educate or train registered persons about the products or services offered by a member" will be subject to the Content Standards. This encompasses the kinds of communications that were the focus of the auction rate securities cases—namely, presentations and training materials that describe the benefits and risks of securities offered through the firm. Indeed, the guidance seems to exclude communications that describe securities not offered by the firm. It also seems to exclude communications with non-registered employees. The guidance applies to "electronic communications," which in other contexts includes e-mail communications and instant messages.

### Unanswered Questions

The above analysis confirms that while Supplementary Material 2210.01 answers some questions, it simultaneously raises many others. For example, the outer boundaries of what it means to "educate or train" registered representatives remains unclear. Is an article in an employee newsletter that describes or mentions products offered by the firm "intended to educate or train registered representatives"? Is a presentation prepared for management describing a potential new product covered? What about an internal e-mail from a supervisor to a group of registered representatives suggesting that they consider a class of product offered by the firm in their recommendations to customers? The guidance seems to be limited to communications with registered persons. Does that mean communications with unregistered employees are not "Institutional Communications" under the new rule? If so, is that consistent with the logic that underpins the application of the rule in the first place, or, alternatively, does that mean that communications with unregistered employees of a member firm are "advertising," and subject to all of the requirements of Rule 2210?

The proposed guidance also raises questions about internal publications prepared by the member firm. Does Supplemental Material 2210.01 mean that employee compliance manuals or supervisory manuals that describe products offered by the firm are now "Institutional Material" subject to Rule 2210(d)(1)? Arguably, the risk to firms in this area does not appear to be great,

as compliance manuals are typically subject to significant internal review. Nevertheless, compliance and supervisory manuals must be kept current as products change. If FINRA chooses to consider compliance and supervisory manuals subject to the content standards of Rule 2210(d)(1), it would have another rule-based option in an enforcement action. For example, an enforcement inquiry that would ordinarily have been considered under the supervision rules could now also be pursued as a violation of the advertising rules, with the corresponding ability to seek separate sanctions under the FINRA Sanctions Guidelines. While this scenario seems unlikely, the text of the proposed Supplementary Material, on its face, does not prevent FINRA from employing that approach.

There are also questions about how much disclosure is required in an "internal-use only" communication. What is the content standard that will apply to communications that are "intended to educate or train registered persons?" Under the current rule, member firms may rely, to some degree on NASD IM-2210-1 for the proposition that communications with sophisticated institutional investors should be judged under a different standard than communications made available to the general public. NASD IM-2210-1(2) states, in part:

Members must consider the nature of the audience to which the communication is directed. Different levels of explanation or detail may be necessary depending on the audience to which a communication is directed.

Communications with a sophisticated institutional customer may be less fulsome in their disclosure of risk or in their explanation of how a product works, than communications placed on a website and made available to the investing public. What is the standard that applies to communications with registered representatives and registered sales assistants who receive "internal-use only" training materials? Is a member firm required to include all of the disclosures that are necessary in a piece made available to the public? Does that analysis change if the registered associated persons, though registered, are relatively unsophisticated? Finally, how would this impact unregistered employees?

Significantly, FINRA's guidance includes electronic communications which again raises many questions for member firms. For example, does a firm now have a supervisory obligation under current Rule 2211(b)(1)(B) to monitor internal electronic communications to ensure that any message intended to "educate or train" a registered person about the firm's products complies with the content standard in Rule 2210(d)(1)? Moreover, does that obligation extend to internal communications made through internal chat rooms? If a registered person attends a formal training session, and then sends an e-mail to the person who presented the training asking for more information about a product or service offered through the firm, is the e-mail exchange now "Institutional Communication" subject to the advertising rules?

In recent years, FINRA has provided helpful guidance to member firms on the application of its rules governing communications with the public through social media web sites and personal

devices, issuing [FINRA Regulatory Notice 10-06](#) in January 2010, and [FINRA Regulatory Notice 11-39](#) in August 2011. The Regulatory Notices were instructive to member firms and also provided a process through which FINRA could develop a coherent policy on the use of social media. Given the number of questions the guidance raises, a similar approach may be useful in defining and clarifying the use of internal materials by member firms.

### What Does FINRA's Guidance Mean for Member Firms?

With the filing of proposed Supplementary Material 2210.01, member firms are put on clear notice of FINRA's position regarding internal communications. Certainly, the proposed language is consistent with the treatment FINRA has advanced in the auction rate securities cases and with its previous public statements. It thus may be fair to conclude that the industry has been on notice of at least the broad outline of FINRA's view. Yet, FINRA has never provided detailed guidance describing its position and how to apply it to a firm's internal procedures. In the absence of formal guidance, a member firm could wait for the SEC's approval of the proposed language and only then adopt new procedures as necessary.

The more cautious approach, however, is to treat the proposed guidance as a statement of current policy, and proactively implement changes as necessary to ensure that a member firm's policies and procedures comply with the view expressed in the proposed language. If Supplementary Material 2210.01 is approved by the SEC, member firms will need to take steps (if they haven't already) to ensure that internal materials comply with the content standards of Rule 2210.<sup>26</sup> This effort will entail several key components:

1. **Identify and place controls around the development of internal material intended to educate and train registered persons.** Most member firms centralize their training function and should thus be able to identify materials that are designed to be used in formal training programs. Those training programs are unquestionably within the ambit of FINRA's review of communications with the public, whether in the examination process, spot-check process, or enforcement actions. However, there may be other material intended to educate or train registered associated persons, such as newsletters that discuss products offered through the firm and informal training materials used by supervisors or managers that are not part of a centralized program.
2. **Evaluate and revise the firm's written policies and procedures.** Rule 2211(b)(1)(B) places supervisory obligations on member firms to review institutional sales material, even when that material need not be approved before use or filed with FINRA.<sup>27</sup> The rule requires members to "establish written policies and procedures that are appropriate to its business size, structure, and customers for the review by a registered principal of institutional sales material used by a member and its

registered representatives."<sup>28</sup> It is important, therefore, for firms to ensure that their written policies and procedures address the preparation and review of communications, including electronic communications, "intended to educate or train registered associated persons." If a firm relies on an after-the-fact review of institutional sales material, the review must now encompass the kinds of internal communications described in Supplementary Material 2210.01.<sup>29</sup>

3. **Be mindful of recordkeeping requirements under FINRA Rules 2211(b)(1)(B) and 2211(b)(2), and SEC Rules 17a-3 and 17a-4.** Rule 2211(b)(1)(B) requires firms to maintain evidence that its supervisory procedures governing institutional sales material have been implemented and carried out and must be made available to FINRA upon request. Rule 2211(b)(2) requires that institutional sales material must be maintained for a period of three years after the date of last use in a file that identifies the person who prepared each item of institutional sales material. Also, Exchange Act [Rule 17a-4\(b\)\(4\)](#) requires a member firm to preserve "inter-office memoranda and communications... relating to the its business as such, including all communications which are subject to the rules of a self-regulatory organization . . . ."
4. **Ensure compliance with spot-check response requirements and examination requests.** Rule 2211(c) provides that the FINRA Advertising Regulation Department may subject a member's institutional sales literature to a spot-check procedure under Rule 2210, and the member is required to produce it within the time period specified by the Department. FINRA examiners may also ask a firm to provide Institutional Sales Material (or, in the future, Institutional Communications) as part of routine or for-cause examinations. Firms should be mindful of the need to include the kinds of materials described in Supplementary Material 2210.01 when responding to those requests.

### Conclusion

FINRA's proposed guidance brings some clarity to a topic that has until now been vexing and uncertain. Without a doubt, FINRA and the investing public have an interest in ensuring that the information the public ultimately receives about products and services offered through member firms is accurate, fair, and balanced. The current rulemaking process affords FINRA and the industry an opportunity to vet the issues raised by the proposed Supplemental Material 2210.01 fully and arrive at a clear set of rules governing how member firms should treat internal communications.

*David Thompson is Counsel in the Financial Services Area for Bingham McCutchen LLP. He is resident in the firm's New York office, and focuses his practice on securities enforcement defense, litigation, and regulatory compliance matters. He represents broker-dealers, public companies, investment companies, investment advisers and individuals in enforcement investigations brought*

by the Securities and Exchange Commission, FINRA, and other SROs and state regulators. His practice also includes conducting internal investigations and preparing independent compliance consultant reviews.

Before joining Bingham, David was a Senior Attorney in the Enforcement Division of NASD (now FINRA) in Washington, D.C. Prior to NASD, David was with a private law firm, focusing his practice on complex commercial litigation and securities litigation.

<sup>1</sup> NASD Rule 2210(a). The six categories are advertisements, sales literature, correspondence, public appearances, and independently prepared reprints.

<sup>2</sup> FINRA began the process of forming a Consolidated Rulebook following the combination of NASD and the regulatory arm of the New York Stock Exchange. See FINRA Information Notice (Mar. 12, 2008).

<sup>3</sup> See SEC Release No. 34-65663, File No. SR-FINRA-2011-035 (Nov. 1, 2011); 76 Fed. Reg. 215 (Nov. 7, 2011).

<sup>4</sup> FINRA's regulatory oversight in this area includes NASD Rule 3010 and potentially new FINRA Rule 2010. In addition, the proposed revision of Rule 3010 includes a component addressing internal communications. See proposed Rule 3110(b)(4); SEC Release No. 34-64736 (June 23, 2011).

<sup>5</sup> See proposed FINRA Rule 2210(b)(3).

<sup>6</sup> See FINRA Regulatory Notice No. 09-55 (Sept. 21, 2009).

<sup>7</sup> SEC Release No. 34-64984 (July 28, 2011); 76 Fed. Reg. 46870 (Aug. 3, 2011). Comments were due no later than August 24, 2011. The SEC was required, within 90-days of notice in the Federal Register, to either approve or disapprove the rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. *Id.* at 46888.

<sup>8</sup> See Comment Letters from Sandra J. Burke, Principal, Vanguard (Aug. 24, 2011); Dorothy M. Donohue, Senior Associate Counsel, Investment Company Institute (Aug. 24, 2011); Alexander C. Gavis, Fidelity Investments (Aug. 24, 2011); and John Polanin and Claire Santaniello, on behalf of the Securities Industry and Financial Markets Association (Aug. 25, 2011).

<sup>9</sup> See Comment Letter from Joseph P. Savage, Vice-President and Counsel, FINRA (Oct. 31, 2011).

<sup>10</sup> See Comment Letter from Philip A. Shaikun, Associate Vice President and Associate General Counsel, FINRA (Nov. 2, 2011).

<sup>11</sup> See Savage comment letter, *supra* note 9, at 17-18.

<sup>12</sup> See Rule 2210(c).

<sup>13</sup> Rule 2210(a)(2).

<sup>14</sup> Rule 2211(a)(3)(E).

<sup>15</sup> As discussed below, FINRA has taken this position in the recent auction rate securities cases, which were based in large part on alleged violations of the advertising rules. The settlement documents in those cases stated FINRA's conclusion without tracing the steps taken to reach it: "NASD Rule 2211 provides that materials distributed to registered or associated persons must also meet the requirements of NASD Rule 2210(d)(1)." See, for example, the settlement document for *Dep't of Enforcement v. Northwestern Mutual Inv. Serv., LLC*, FINRA Disciplinary Proceeding No. 208.801.4902501 (Sept. 2, 2009), at p. 3. In fact, NASD Rule 2211 does not contain such a provision unless one reads the definition of "Institutional Investor" to include a member communication to itself or its own associated persons.

<sup>16</sup> See Rule 2211(d)(1).

<sup>17</sup> Note that the definition of "institutional investor" in current Rule 2211 and proposed Rule 2210 includes "associated persons," a category broader than "registered representatives."

<sup>18</sup> See Comment letters from Yoon-Young Lee, Wilmer, Cutler & Pickering (Feb. 13, 2002); Alexander C. Gavis, Fidelity Investments (Feb. 15, 2002).

<sup>19</sup> SEC Release No. 34-47820, File No. SR-NASD-00-12 (May 9, 2003).

<sup>20</sup> NASD Regulatory and Compliance Alert, Ask the Analyst, "Internal Use Only Material" (July 1996).

<sup>21</sup> NASD Regulatory and Compliance Alert, Ask the Analyst, "Internal-Use/BD-Use-Only Material" (Sept. 1998).

<sup>22</sup> See e.g., *Dep't of Enforcement v. Fidelity Brokerage Servs. LLC*, FINRA Disciplinary Proceeding No. 200.801.3056101 (July 8, 2011); *Dep't of Enforcement v. SunTrust Robinson Humphrey, Inc.*, FINRA Disciplinary Proceeding No. 200.813.864101 (June 29, 2011); *Dep't of Enforcement v.*

*SunTrust Inv. Servs., Inc.*, FINRA Disciplinary Proceeding No. 200.801.636101 (June 29, 2011); *Dep't of Enforcement v. Nuveen Invs. LLC*, FINRA Disciplinary Proceeding No. 200.801.3056701 (May 20, 2011); *Dep't of Enforcement v. Jefferies & Co. Inc.*, FINRA Disciplinary Proceeding No. 200.801.386370 (Apr. 14, 2011); *Dep't of Enforcement v. HSBC Sec. (USA) Inc.*, FINRA Disciplinary Proceeding No. 200.801.3863801 (Apr. 22, 2010); *Dep't of Enforcement v. US Bancorp Invs., Inc.*, FINRA Disciplinary Proceeding No. 200.801.30571 (Feb. 12, 2010); *Dep't of Enforcement v. Northwestern Mutual Inv. Servs., LLC*, FINRA Disciplinary Proceeding No. 200.801.4902501 (Sept. 2, 2009); *Dep't of Enforcement v. Fifth Third Sec., Inc.*, FINRA Disciplinary Proceeding No. 200.801.4620501 (Sept. 1, 2009); *Dep't of Enforcement v. City Sec. Corp.*, FINRA Disciplinary Proceeding No. 200.801.5271401 (Sept. 1, 2009); *Dep't of Enforcement v. M&T Sec., Inc.*, FINRA Disciplinary Proceeding No. 200.801.50073 (May 7, 2009); *Dep't of Enforcement v. M & I Fin. Advisors, Inc.*, FINRA Disciplinary Proceeding No. 200.801.4620901 (May 6, 2009); *Dep't of Enforcement v. Janney Montgomery Scott LLC*, FINRA Disciplinary Proceeding No. 200.601.3056401 (May 1, 2009); *Dep't of Enforcement v. BNY Mellon Capital Markets, LLC*, FINRA Disciplinary Proceeding No. 200.801.355201 (Apr. 13, 2009); *Dep't of Enforcement v. NatCity Invs., Inc.*, FINRA Disciplinary Proceeding No. 200.801.46210 (Mar. 19, 2009); *Dep't of Enforcement v. City National Sec., Inc.*, FINRA Disciplinary Proceeding No. 200.801.4620101 (Feb. 4, 2009); *Dep't of Enforcement v. Comerica Sec., Inc.*, FINRA Disciplinary Proceeding No. 200.801.3055501 (Jan. 2, 2009); *Dep't of Enforcement v. First Southwest Co.*, FINRA Disciplinary Proceeding No. 200.801.1590901 (Dec. 16, 2008); *Dep't of Enforcement v. WaMu Invs., Inc.*, FINRA Disciplinary Proceeding No. 200.801.3057401 (Dec. 16, 2008); *Dep't of Enforcement v. Harris Investor Servs., Inc.*, FINRA Disciplinary Proceeding No. 200.801.462071 (Jan. 8, 2009). A recent June 2011 settlement with Morgan Keegan & Co., Inc. also alleged that "internal guidance" to members of the sales force "did not provide a sound basis to evaluate the facts" about the funds at issue in the case, but curiously did not allege violations of Rule 2211. See *Dep't of Enforcement v. Morgan Keegan & Co., Inc.*, FINRA Disciplinary Proceeding No. 200.701.1164502 (June 22, 2011).

<sup>23</sup> This count is based on a review of letters of Acceptance Waiver and Consent (AWC) that have been made available to the public. The settlement documents often do not provide a detailed recitation of the facts, and therefore, it is difficult to determine with precision whether the communications at issue were shared with clients or prospective clients outside the firm. Nevertheless, the language of the settlement documents demonstrates that FINRA was focused on materials prepared for registered representatives' internal use. See, e.g., *City National Securities* (criticizing "certain of the materials relied upon internally by the Firm's registered representatives"); *NatCity Investments* (training presentation and video used with 20 of its institutional registered representatives); *US Bancorp* (sales material made available to representatives); *WaMu Investments* (based on "internal sales material" posted on firm's intra-net site); *M&T Securities* (internal sales training document prepared for M&T registered representatives"); *Northwestern Mutual Investment Services* (internal sales material); *M&I Financial Advisors* (based on "informational fact sheets used to educate M&I's registered representatives about ARS"); *Fidelity Brokerage Services LLC* (material on intranet site designed for registered representatives).

<sup>24</sup> See *WaMu Investments* and *Northwestern Mutual Investment Services*.

<sup>25</sup> See Deborah G. Heilizer, Clifford F. Kirsch & Brian Rubin, "FINRA's Take On Internal Communications," *Law360* (Feb. 18, 2010).

<sup>26</sup> Member firms should also remember that training materials and other internal communications are addressed in other parts of the FINRA rules. For instance, NASD's 2005 notice addressing new product review and approval included an exhortation to provide adequate training of registered representatives about new products. See *NASD Notice to Members 05-26* (Apr. 6, 2005). FINRA's recent proposed revision of the supervisory rules also includes a component addressing the need to supervise internal communications. See proposed Rule 3110(b)(4); SEC Release No. 34-64736 (June 23, 2011).

<sup>27</sup> See Rule 2211(b)(1)(B) ("Registered Principal Approval" as applied to "Institutional Sales Material")

<sup>28</sup> *Id.*

<sup>29</sup> Rule 2211(b)(1)(B) permits after-the-fact review, but requires that when communications need not be reviewed by a principal prior to use, the firm's procedures must "include provision for education and training of associated persons as to the firm's procedures governing institutional sales material, documentation of such education and training, and surveillance and follow-up to ensure that those supervisory procedures have been implemented and carried out . . . ."