STRENGTHEN DISCLOSURES BY LIMITING THEIR ROLE IN THE DELIVERY OF INVESTMENT AND FINANCIAL ADVICE

KNUT ROSTAD*

I. Introduction

The word *fiduciary* comes from Latin and means *trust.* The heart of fiduciary duties for investment advisers entails acting with undivided loyalty, in good faith, with due care, absent conflicts of interest and with prudence. Fulfilling these duties necessarily presumes complete transparency. Herein the role of disclosures becomes central.

The importance of disclosures is routinely placed in the context of "educating" investors so that they may make "informed" decisions, much as citizens are advised to become informed about the different candidates at election time. There is no question that our political and economic free market system depends on informed consumers and citizens.

Yet, choosing a candidate or buying a car is, in important respects, more different than similar to managing a retirement portfolio. Despite the longstanding emphasis on disclosures, evidence abounds that many retail investors are not well-informed investors, and behavioral biases have been shown to negate the effectiveness of disclosures. Investors' clearly demonstrated limitations in fulfilling their responsibilities as consumers of investment products and advice must drive how disclosures are used.

Consequently, an overarching issue today is identifying the parameters within which disclosures are effective means of investor protection. It is recognizing circumstances when disclosures are clearly not effective. It is, first and foremost, recognizing investors' limitations. In situations when a conflict is present and the client clearly appears to not understand the conflict and its ramifications, by definition, there can be no informed and independent consent. In such situations, disclosures are ineffective and should have no role. As such, the key challenge for policymakers is to both improve disclosures when they can be effective, and, at the same time, limit their role when they are ineffective.

Recognizing investors' limitations is consistent with a point made by Securities and Exchange Commission ("SEC") Commissioner Elisse Walter in her discussion of a harmonized fiduciary standard. In May 2009, the Commissioner explained her rationale, in

part, for supporting a harmonized fiduciary standard by making this observation:

> When your Aunt Millie walks into her local financial professional to ask for advice, she does not need to know whether the person on the other side of the table is a registered representative of a broker-dealer or an investment adviser. She should not be placed at risk by the fact that application of those labels may lead to differing levels—or at least different kinds—of protection. Instead, she should know, or be able to assume—consciously or subconsciously—that regardless of the title held by the person sitting across the desk from her, she will receive an appropriate and comparable level of protection.[1]

This point underscores the broader need to acknowledge investors' limitations, and to apply the fiduciary standard consistent with these limitations.

II. Background: The Role of Disclosures in 2010 and the View from FINRA

Disclosures are widely seen as the foundation of securities regulation. As SEC Commissioner Troy Paredes noted in his article, "Blinded by the Light", "a demanding system of mandatory disclosure, which has become more demanding in the aftermath of the Sarbanes-Oxley Act of 2002, makes up the core of the federal securities laws."[2]

Disclosures today, in the aftermath of the financial crisis, seem to be relied on more than ever in ensuring market transparency.

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* Knut A. Rostad, MBA, is a compliance officer for an RIA, and the Chair of the Committee for the Fiduciary Standard.

[1] Elisse B. Walter, Comm'r, Sec. Exch. Comm'n, Regulating Broker-Dealers and Investment Advisers: Demarcation or Harmonization?, Address at the Mutual Fund Directors Forum Ninth Annual Policy Conference (May 5, 2009), http://www.sec.gov/news/speech/2009/spch050509ebw.htm.

[2] Troy A. Paredes, *Blinded by the Light: Information Overload and its Consequences for Securities Regulation*, 81 WASH. U. L. Q. 417, 417-18 (2003). This article was published in 2003, before Professor Paredes became an SEC Commissioner.

Former SEC Chairman Arthur Levitt told Congress, quite simply, "we need to dedicate ourselves to a decade of transparency."[3] Chairman Schapiro has focused on the importance of robust disclosures in restoring investor trust, stating that "investors must know that the information upon which they base their investment decisions is the truth, the whole truth and nothing but the truth."[4]

CEO of the Financial Industry Regulatory Authority ("FINRA"), Richard Ketchum, has also underscored the importance of disclosures for brokers moving from operating under the suitability to the fiduciary standard: "There also should be no question that this will involve real change. There is an important cultural change from shifting the question from is a product 'suitable' or 'ok' to is it 'in the best interest of the customer.'"[5] Ketchum noted that, while account opening disclosures have improved in recent years, this process has not been easy; rather, "[t]he process has been painful, involving lengthy debates and often enforcement actions as conflict by conflict has been identified and resulted in improper selling practices." Ketchum further noted that the industry should make sure "your customers understand any conflicts that may impact the recommendation as well as the worst case risks of the product . . . [as the] risk that an investment may not be 'in the best interests of the customer' can only be increased if he or she doesn't fully understand each of these facts."[6]

The acknowledged challenges in improving "account opening" disclosures, premised on a "buyer beware" principle, are important, but they understate the nature of the challenge in transforming from a sales to a fiduciary environment.[7] The rationale for disclosures in a sales environment is based on the customer being ultimately responsibility for the transaction. The rationale of

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[3] Arthur Levitt, Jr., Chairman, Sec. Exch. Comm'n, Testimony before the Senate Banking Committee (October 15, 2008), http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=7480cab6-cfb7-473a-a741-457ac59e3747.

[4] Mary L. Schapiro, Chairman, Sec. Exch. Comm'n, Speech by SEC Chairman: Building a Stable and Efficient Financial System (May 8, 2009), http://www.sec.gov/news/speech/2009/spch050809mls.htm.

[5] Richard Ketchum, Chairman and CEO, FINRA, Securities Industry and Financial Markets Association (SIFMA) Annual Meeting (Oct. 27, 2009), http://www.finra.org/Newsroom/Speeches/Ketchum/P120289.

[6] *Id.*

[7] The parallels between FINRA disclosure rules and commercial sales rules are evident. *See* Appendix A, *infra*.

disclosures in a fiduciary relationship must be based on the advisor holding ultimate responsibility for his or her recommendation.

III. Investor Knowledge and Understanding of Investing, Mutual Funds and Financial Advisors

Commissioner Paredes concluded his article, "Blinded by the Light" by stating that, "securities regulation needs to focus to a greater extent on the user of information . . . . [R]egulators and policy makers need to focus on how users process information and make decisions."[8]

The SEC's 2008 Rand Report, "Investor and Industry Perspectives on Investment Advisers and Broker Dealers," is widely cited for revealing that investors are unaware of the basic different legal requirements of brokers and registered investment advisers, that many investors presume their interests are put first and that some investors do not even believe that they pay for financial advice.[9] Moreover, the report found that "many survey respondents and focus group participants do not understand key distinctions between investment advisers and broker-dealers—their duties, the titles they use, the firms for which they work, or the services they offer."[10] Rand also reports that investors are generally satisfied with the services they receive, and "[t]his satisfaction was often reported to arise from the personal attention the investor receives." Regarding investment expenses, "[s]urvey responses also indicate[d] confusion about fees."[11]

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[8] Paredes, *supra* note 2, at 485.

[9] Angela A. Hung et al., *Investor and Industry Perspectives on Investment Advisers and Broker-Dealers*, 2008 LRN-RAND INST. FOR CIV. JUST. 212 ("Responses to the questions on methods of payment suggest that many respondents are confused about the methods of payment or the type of firm with which their individual professional is associated. For example, 84 respondents indicated that they receive advisory services (either alone or in conjunction with brokerage services) from an investment advisory firm that is not also a brokerage firm. Of these respondents, 19 percent reported that they pay for these advisory services based on a percentage fee, and 22 percent indicated that they pay commission for advisory services.").

[10] *Id.* at 112.

[11] *Id.* at 113. These widely reported and discussed findings regarding investors' lack of understanding of differences between brokers and invest-ment advisers and confusion about adviser fees are serious indictments of either investors or the regulatory regimes—or both. However, they may also

In the context of the confusion about financial advisors reported by Rand, academic research suggesting that many investors are unaware of the fundamentals of mutual funds may not be surprising. Mutual fund investors and investors using financial advisors overlap significantly. Investment Company Institute research reveals that financial advisors are the most common source of information for mutual fund investors, used by 73% of surveyed investors.[12]
Researchers Palmiter and Taha surveyed the academic research and concluded, simply, that, "investors are ignorant of basic fund characteristics."[13] This lack of knowledge about the funds they own often includes their asset classes, objectives and basic fund costs and operating expenses. In fact, according to these researchers, "overall, studies of the actual knowledge and behavior of investors show that fund fees and expenses matter little to many investors."[14] Interestingly, Palmiter and Taha point out that academic literature frequently contrasts with financial industry perspectives, whereas the fund industry "portrays fund investors as making informed decisions" and the SEC portrays fund investors as "needing only to be reminded to pay appropriate attention to important fund characteristics . . . ."[15]

More recently, the Envestnet Fiduciary Standards Study[16] has served to reinforce concerns about investors' understanding of advisors and brokers. The report characterizes investors as being

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understate the extent that investors are disengaged from their financial services broker or advisor. Investor disengagement may be more fully appreciated from another Rand finding: 25% of the survey respondents who reported using a financial service provider also report that they paid "$0" for advisory or brokerage services. *Id.* at 96-97. That one in four investors claim to believe their advisory or brokerage services are given to them free of charge suggests there may be a larger issue here than investor confusion.

[12] Sandra West & Victoria Leonard-Chambers, *Understanding Investor Preferences for Mutual Fund Information*, 2006 INV. CO. INST. 6 (noting that "[s]hareholders rely heavily on professional financial advisers when making mutual fund investment decisions.").

[13] Alan R. Palmiter & Ahmed E. Taha, *Mutual Fund Investors: Divergent Profiles*, 2008 COLUM. BUS. L. REV. 934, 975 (2008).

[14] *Id.* at 980.

[15] *Id.* at 974-75.

[16] THE FIDUCIARY OPPORTUNITY: SUCCEEDING IN A CHANGING ADVISORY LANDSCAPE 1 (2010), *available at* http://www.envestnetadvisor.com/marketingsupport/pdfs/ENV_fiduciary_whitepaper.pdf.

confused about brokers' and advisors' roles and obligations.[17] Of particular note regarding investors' knowledge of investment expenses and broker or advisor compensation, only 15% of investors state they can "very well" "assess how your advisor gets paid."[18] It would be a mistake to shrug off this new research as inconsequential simply because it is consistent with other research pointing out general investor confusion. This research offers new insight into the implications of this confusion and a more fundamental view of investor disengagement. It should be viewed in a broader context, and raises questions in relation to how these very same investors might respond to this same question regarding their accountant, lawyer or medical doctor. In this study, only 15% of investors appear to reply very confidently that they understand how (and by implication "what") their broker or advisor is paid. How would these investors reply about their other professional advisors? Would 85% also reply they do not know "very well" how their lawyer, for example, is paid, or what he or she is paid? This finding, by itself, should be a red flag for the profession and regulators alike.

This assessment that investors have a limited understanding of investing and the importance of expenses is not a new insight. In the 1995 "Report of the Committee on Compensation Practices" (a.k.a. The Tully Report, for its Chairman, Daniel B. Tully),[19] this same issue was raised. Most notably, the report illuminates the significance of investors' lack of knowledge of investment products and confusion derived from misunderstanding what's written in prospectuses. The report states that registered representatives and their clients are:

> [S]eparated by a wide gap of knowledge—knowledge of the technical and financial aspects of investing. The pace of product innovation in the securities industry has only widened this gap. It is a rare client who truly understands the risks and market behaviors of his or her investments, and the

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[17] *Id.* at 1 (finding that" less than one third of investors understand how/ when [a fiduciary standard] applies.").

[18] *Id.* at 5 tbl. (finding that 39% of investors stated that they could understand how their investment advisors were made "well" while 53% of investors responded "not too well," "not well at all," or "don't know").

[19] REPORT OF THE COMMITTEE ON COMPENSATION PRACTICE 1 (1995), http://www.sec.gov/news/studies/bkrcomp.txt.

> language of prospectuses intended to communicate those understandings is impenetrable to many.
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> This knowledge gap represents a potential source of client abuse, since uninformed investors have no basis for evaluating the merits of the advice they are given. It also makes communication between a registered representative and investor difficult and puts too much responsibility for decision-making on the shoulders of RRs—a responsibility that belongs with the investor.[20]

In short, two overriding, and arguably conflicting, themes stand out. The first theme is the importance of improving disclosures. Analyses of the financial crisis point to a significant need for greater transparency within the financial system, a goal that can be accomplished, arguably, by improving disclosures. The second theme, on the other hand, raises serious questions as to whether disclosures are effective. Academic research, the Rand Report and the Tully Report underscore investors' limited understanding of investing and advisors, and Commissioner Paredes has underscored the need for regulators to focus on how investors process such disclosures.

IV. Loyalty and the General Fiduciary Duty to Disclose

Loyalty is the cornerstone of the fiduciary duty. In affirming that fiduciary DNA is in the Adviser's Act of 1940, the Supreme Court has focused on the legislative history, as captured in the Congressional record.[21] According to the Supreme Court, the Congressional record reveals the sense of urgency of policymakers in the 1930s, seeking to restore the "highest ethical standards . . . in every facet of the securities industry."[22] The fiduciary vision of Congress for the investment advisory profession was clear and present in the view of the Court, noting the Act "'reflects a congressional recognition of the delicate fiduciary nature of an investment advisory relationship,' as well as a congressional intent to eliminate, or at least to expose, all conflicts of interest which might

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[20] *Id.* at 15.

[21] SEC v. Capital Gains Research Bureau Inc., 375 U. S. 180, 186-87 (1963).

[22] *Id.*

incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested."[23]

The Court further stated that "guiding principles" of fiduciary law included the following: (1) compensation should only include "'direct charges to clients for services rendered;'" and (2) an adviser should not "'directly or indirectly engage in any activity which may jeopardize his ability to render unbiased investment advice.'"[24] The president of the predecessor organization of the Investment Adviser Association opined that advisers should only engage in "the study of investment problems from the investor's standpoint, not engaging in any other activity, such as security selling or brokerage, which might directly or indirectly bias their investment judgment . . . ."[25]

Today, three broad prohibitions are entailed in the duty of loyalty. The fiduciary must not place his interests in conflict with his client's, gain profit at the expense of his client, or pit the interests of one client against another client.[26] Disclosure obligations derive from the duty of loyalty. The starting point is disclosing any and all *material* facts, (a fact that may reasonably be expected to alter the client's actions) in a timely manner. This responsibility includes not misleading clients and proactively volunteering information consistent with general good faith duties.

The record underscores that Congress stressed restoring the "highest ethical standards" to Wall Street, and the Supreme Court later affirmed Congressional intent to confer fiduciary status to investment advisers in the Advisers Act of 1940. The duty of loyalty

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[23] *Id.* at 191-92 (quoting 2 LOUIS LOSS ET AL., SECURITIES REGULATION 1423 (2d ed. 1961)).

[24] *Id.* at 188-89 (quoting Report of the Securities and Exchange Commission, Pursuant to Section 30 of the Public Utility Holding Company Act of 1935, on Investment Counsel, Investment Management, Investment Supervisory, and Investment Advisory Services, H. R. Doc. No. 477, at 29, 65).

[25] Ron A. Rhoades, *The Fiduciary Duty of Loyalty* (unpublished) (on file with author).

[26] *Id.; see also* Birnhaum v. Birnhaum, 503 N.Y.S.2d 451, 456 (N.Y. 1986) (noting that "[o]ne of the most stringent precepts in the law is that a fiduciary shall not engage in self-dealing and when he is so charged, his actions will be scrutinized most carefully. When a fiduciary engages in self-dealing, there is inevitably a conflict of interest: as fiduciary he is bound to secure the greatest advance for the beneficiaries; yet to do so might work to his personal disadvantage").

is central to fiduciary practices. Disclosures, starting with material facts, are part of being loyal.

V. Disclosing and Managing Conflicts

Disclosures take on greater importance when conflicts are present. Conflicts, where an adviser's interest competes with interests of a client, are always considered to be material. "In the context of conflicts of interests which may exist between the fiduciary and the client, the purpose of full and affirmative disclosure of material facts . . . is always to obtain the client's informed consent to proceeding with a recommendation or transaction."[27] It is presumed a client will only give "informed consent" if the adviser manages the conflict in the client's best interest in executing the recommendation or transaction. Otherwise, the transaction would be considered a gratuitous gift from the client to the adviser. The courts have held such a transaction as presumptively void. As such, the responsibility on the adviser is substantial.

This responsibility requires greater care than what might be considered "standard" disclosure and customer acknowledgement procedures common in many sales transactions. The initialing of the sales agreement on a cell phone plan, or signing numerous pages in an auto sales transaction are such familiar sales examples. Further, the brokerage industry, in the views expressed by FINRA's CEO, Richard Ketchum, has traveled a long road in improving disclosures. Still, the journey is not complete. Ketchum further notes that this task, imposing a fiduciary standard on broker-dealers, will likely be even more challenging.[28] He says, "harmonizing" the brokerage

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[27] RON A. RHODES, RIA'S AND FINANCIAL PLANNERS 52-53 (unpublished manuscript) (on file with author).

[28] Ketchum, *supra* note 5:

> As we look for ways to achieve harmonization, we should start with a commitment that the standard is "business model neutral" and focus on the basic shift that each recommendation must be in the "best interest of the customer." While I believe all present business models can thrive in a properly designed customer-facing fiduciary standard, there also should be no question that this will involve real change. There is an important cultural change from shifting the question from is a product "suitable" or "ok" to is it "in the best interests of the customer." While it will be up to the SEC to design the

standard into the fiduciary standard will not be easy for the brokerage industry.[29] It will "involve real change", as there is "an important cultural change" in shifting from asking the question, "is a product suitable" to "is it in 'the best interest of the consumer.'"[30]

In addition to affirmatively disclosing all material facts, client understanding of the transaction and its ramifications must be "ensured," and intelligent and informed client consent obtained. Further, the transaction must also be deemed to remain "substantively fair" for the client. Professor Tamar Frankel elaborates on the critical importance of the client's capacity to provide consent that is "informed" and "independent":

> Fiduciary rules cannot be avoided if the entrustors (clients) are incapable of independent and informed consent. The entrustors' consent is subject to a number of conditions. The fiduciaries must disclose the details of the proposed transactions to the client-entrustors. The information should enable the entrustors to protect themselves in the bargain and deal with their fiduciaries…. Clients' consents may be more doubtful and would require more evidence of entrustors' independence when the fiduciaries are experts, and the non-expert entrustors are unlikely to form informed and rational decisions.[31]

The identification of material conflicts significantly raises the burden on advisors. The burden requires more than clearly communicating material facts. When conflicts are identified advisors are required to reasonably ensure that investors understand the implications of the conflict, including how the conflict may harm them. Also, investors must understand how the advisor can mitigate this harm by managing the conflict. Further, once the conflict is

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> precise parameters of the standard, it's worth taking a moment to discuss what you as senior management should be focusing on now.

[29] Ketchum, *supra* note 5.
[30] Ketchum, *supra* note 5.
[31] Tamar Frankel, *Fiduciary Duties of Broker-Advisers-Financial Planners and Money Managers* 6-7 (Boston Univ. Sch. of Law Working Paper No. 09-36, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1446750.

managed, investors must also provide informed and independent consent in writing. Finally, even with fully informed consent, the advisor must still be able to demonstrate that the transaction was fairly and reasonably in the client's best interest. Clearly, fulfilling this responsibility is at the heart of putting the investor's interest ahead of the advisor's interest.[32]

VI. Conclusion

Chairman Schapiro noted in June 2009, as she made her case for extending the fiduciary duty, that the laws governing the regulatory framework were written in 1934 and 1940. [33] She then said: "It is time the regulatory regime for financial service providers reflects 21st century realities."[34]

One such 21st century reality is the increasing complexity of the financial markets and the significant evidence that many retail investors possess a very limited understanding of investing, the role of their broker or advisor and the importance of investment expenses to investment performance. This seeming burgeoning disparity of

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[32] The record suggests there is a basis to question how well many retail investors understand their own investments, the role of their advisor and the implications of higher (versus lower) expenses. The level of investor misunderstandings revealed in the Rand Report and the Palmiter and Taha article, for example, are affirmed, as a matter of fact, by the industry in the Tully Report. The implications of this record, and what it means for investor protection and additional considerations required to advise clients with a limited understanding of investing are significant. A parallel situation is the increasing attention of regulators on the particular challenges of serving senior investors. In 2008, SEC, NASAA and FINRA staff collaborated on a report summarizing how securities professionals are serving this large and growing demographic group. *See* SEC. EXCH. COMM'N ET AL., PROTECTING SENIOR INVESTORS: COMPLIANCE, SUPERVISORY AND OTHER PRACTICES USED BY FINANCIAL SERVICES FIRMS IN SERVING SENIOR INVESTORS 7 (2008). The thinking and concerns that form the basis of this report—the implications for firms serving investors with "diminished mental capacity" —might well be applied to a wider group of investors. The report makes an important observation in noting, "Securities professionals cannot take advantage of investors in a manner that would violate an advisor's fiduciary duty." *Id.* at 7.

[33] Mary L. Schapiro, Chairman, U.S. Sec. Exch. Comm'n, Address before the New York Financial Writers' Association Annual Awards Dinner (June 18, 2009).

[34] *Id.*

knowledge between the broker or advisor and client raises fundamental questions as to the role of disclosures consistent with responsibilities inherent in a fiduciary relationship.

While there should be appropriate efforts to improve disclosures, as discussed above, there should be no confusion about whether improving disclosures to seek greater investor understanding is tantamount to fulfilling the advisor or broker's fiduciary duty. It is not. Not only are improved disclosures insufficient to meeting fiduciary requirements, more importantly, they may also be fundamentally independent of whether fiduciary requirements have been met. Fiduciary duty is premised on the advisor being responsible (as opposed to the client being responsible) for his or her advice or product recommendations he or she deems to be in the client's best interests. Disclosures are independent of this determination.

Against this backdrop of the widely acknowledged limitations of investors, a backdrop that parallels the point made by Commissioner Walter, in part of her reasoning (noted above) for supporting a harmonized standard, there should be efforts to more clearly redefine disclosures' role in a fiduciary relationship. At minimum, disclosures should be only used in circumstances where independent research indicates disclosures effectively communicate the required information and enhance investor protection. Making this assessment is vital to ensure that communications between advisors or brokers and clients are effective. To not make this assessment in light of this 21st century reality may well be to overlook one of the single most powerful factors determining the effectiveness—or ineffectiveness—of broker and investment adviser regulation.

Appendix

Disclosures: The Commercial Standard for Determining Communications That Are "Fair" and Not "Deceptive."

The commercial standard for determining whether business communications, advertising or disclosures are fair to consumers is well established in the regulatory framework and rules promulgated by the Federal Trade Commission ("FTC"). FTC policy on deceptive practices or communications was articulated in a letter from the FTC Chairman in1983.[35]

Three key factors are considered central to all determinations of deceptive or misleading communications. The communication or practice must be: 1) "likely to mislead the consumer"; 2) "from the perspective of a consumer acting reasonably in the circumstances;" and 3) "material."[36] For example, some of the practices that have been found "misleading or deceptive in specific cases include false oral or written representations, [and] misleading price claims. . . ."[37]

More recently, the FTC supplemented some of its interpretive guidance in the Telemarketing Sales Rule in 2003. [38] In part, this Rule states that prohibited practices include: "Misrepresenting, directly or by implication, in the sale of goods or services any of the following material information: (i) The total cost to purchase, receive, or use . . . any goods or services that are the subject of a sales offer; . . . [(ii)] "[a]ny material aspect of the performance, efficacy, nature, or central characteristics of goods or services that are the subject of a sales offer; . . . [and (iii)] [a]ny material aspect of an investment opportunity including, but not limited to, risk, liquidity, earnings potential, or profitability . . . .[39]

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[35] Letter from FTC to John D. Dingell, Chairman, Comm. on Energy and Commerce, U.S. House of Reps. (Oct 14, 1983), http://www.ftc.gov/bcp/policystmt/ad-decept.htm (noting that "the Commission will find deception if there is representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment").

[36] *Id.* at 1-2.

[37] *Id.* at 1.

[38] Part 310—Telemarketing Sales Rule, 68 Fed. Reg. 4669 (Jan. 29, 2003) (to be codified at 16 C.F.R. part 310).

[39] *Id.* at 4670-71.

FINRA Guidelines to Ensure that Communications with the Public Are Not Misleading

FINRA guidance regarding general communications is in Rule 2210, "Guidelines to Ensure that Communications With the Public are not Misleading."[40] In this guideline, FINRA members are advised, for example, that they "must ensure that statements are not misleading within the context in which they are made," and "member communications must be clear."[41]

The emphasis of these guidelines is aimed at oral product and sales presentations, as noted in a widely circulated article on broker and adviser standards: "Sales materials and oral presentations must present a fair and balanced picture to investors regarding both the risks and the benefits of investing in a recommended product."[42] Specific disclosures must be made based on specific regulations. Some disclosures, such as product benefits and risks, are not required to be made in writing and may be made orally. As an example, disclosures are required to be made in the following documents: research reports, sales literature, advertising and correspondence. Form BDs are not required to be provided to customers.

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[40] FINRA Manual, NASD Rule IM-2210-1, available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=361.

[41] *Id.*

[42] Thomas P. Lemke & Steven W. Stone, *The Madoff "Opportunity" Harmonizing the Overarching Standard of Care for Financial Professionals Who Give Investment Advice,* 13 WALL STREET L., 1, 6 (2009).