

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-71792; File No. SR-FINRA-2014-012)

March 25, 2014

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change To Amend FINRA Rules 2210 (Communications with the Public) and 2214 (Requirements for the Use of Investment Analysis Tools)

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on March 10, 2014, Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to amend FINRA Rule 2210 (Communications with the Public) to exclude from the filing requirements research reports concerning only securities listed on a national securities exchange, other than research reports which must be filed pursuant to Section 24(b) of the Investment Company Act of 1940 (“1940 Act”).³ FINRA also is proposing to amend FINRA Rule 2210 to clarify that free writing prospectuses that are exempt from filing with the SEC are not subject to the rule’s filing or content standards. Finally, FINRA is proposing to correct a mistaken rule

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 80a-24(b).

cross-reference in FINRA Rule 2214 (Requirements for the Use of Investment Analysis Tools).

The text of the proposed rule change is available on FINRA's website at <http://www.finra.org>, at the principal office of FINRA and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

(a) Filing Exclusion for Research Reports on Exchange-Listed Securities

FINRA is proposing to amend the current requirements for members to file certain retail communications with the Advertising Regulation Department (the "Department"). Under this amendment, members would no longer be required to file research reports that concern only securities listed on a national securities exchange. Between the dedicated protections applied to research reports by other FINRA and SEC rules and the increased liquidity and price transparency associated with exchange-listed securities, FINRA believes the additional investor protection benefit of Department review of those retail communications is minimal in relation to the cost of compliance

and administration of the filing requirement. This proposed exemption would not apply to research reports that must be filed under Section 24(b) of the 1940 Act.

(1) Background

On March 29, 2012, the Commission approved new FINRA Rule 2210 (Communications with the Public), which replaced NASD Rules 2210 and 2211 and certain Interpretive Materials that followed NASD Rule 2210, and became effective on February 4, 2013. Among other things, FINRA Rule 2210 contains two new filing requirements. Paragraph (c)(3)(A) of FINRA Rule 2210 requires for the first time that member firms file with the Department all retail communications concerning closed-end investment companies⁴ within 10 business days of first use. Previously, NASD Rule 2210 only required that member firms file advertisements and sales literature concerning a closed-end fund during the fund's initial public offering period.

FINRA Rule 2210(c)(3)(E) also requires for the first time that member firms file all retail communications concerning any security that is registered under the Securities Act of 1933 ("Securities Act")⁵ and that is derived from or based on a single security, a basket of securities, an index, a commodity, a debt issuance or a foreign currency. This filing requirement is intended to apply to retail communications concerning so-called "structured products," although the breadth of the provision could arguably include retail communications concerning securities not typically thought of as structured products, including registered investment companies, security futures, public direct participation programs, or collateralized mortgage obligations. FINRA notes that those retail

⁴ For purposes of FINRA Rule 2210, a "closed-end investment company" or "closed-end fund" refers to a registered "closed-end company" as defined in Section 5(a)(2) of the 1940 Act, 15 U.S.C. 80a-5(a)(2).

⁵ 15 U.S.C. 77a et seq.

communications are already subject to separate filing requirements, and thus member firms are not required to file these communications a second time under the structured product filing requirement.⁶

(2) Filing Requirements for Research Reports

The Rule 2210 filing requirements apply to research reports⁷ to the extent that they constitute retail communications about a product category that requires filing pursuant to the Rule (including the provisions of the Rule referenced above), or to the extent that they are covered by the new member filing requirements of FINRA Rule 2210(c)(1)(A).⁸ Therefore, the filing requirements cover research reports concerning certain exchange-listed securities, such as exchange-listed master limited

⁶ See FINRA Rule 2210(c)(3)(A) through (D). The “structured product” filing requirement specifies that it does not apply to retail communications concerning these other products, as they are already covered by the filing requirements in FINRA Rule 2210(c)(1), (c)(2) and (c)(3)(A) through (D).

⁷ Rule 2711(a)(9) defines “research report” as “any written (including electronic) communication that includes an analysis of equity securities of individual companies or industries, and that provides information reasonably sufficient upon which to base an investment decision.” The definition specifically excludes certain types of communications, such as discussions of broad-based indices or commentaries on economic, political or market conditions.

⁸ Under paragraph (c)(1)(A) of FINRA Rule 2210, a new member must file with the Department at least 10 business days prior to use certain retail communications that are published or used in any electronic or public media. These retail communications include those published on any generally accessible website, newspaper, magazine or other periodical, radio, television, telephone or audio recording, video display, sign or billboard. A member is subject to this filing requirement for a period of one year beginning on the date reflected in the Central Registration Depository (CRD®) system as of the date that FINRA membership became effective. A member may file a retail communication that is a free writing prospectus filed with the SEC pursuant to Securities Act Rule 433(d)(1)(ii) within 10 business days of first use rather than at least 10 business days prior to first use.

partnerships and registered closed-end funds, as well as research reports concerning any securities to the extent that they are covered by the new member filing requirements.

For the reasons discussed below, FINRA believes that it is appropriate to amend FINRA Rule 2210 to exempt research reports concerning only exchange-listed securities from the filing requirements, other than research reports that must be filed pursuant to Section 24(b) of the 1940 Act. Section 24(b) requires any registered open-end investment company, any registered unit investment trust, or any registered face-amount certificate company, and any underwriter⁹ for such companies, to file all advertisements, pamphlets, circulars, form letters and other sales literature addressed to or intended for distribution to prospective investors with the Commission within 10 days of distribution of such material.¹⁰

An important purpose of FINRA's filing requirements is to help ensure that communications distributed or made available to investors are based on principles of fair dealing and good faith, are fair and balanced, and provide a sound basis for evaluating the facts in regard to any particular security or type of security. FINRA staff review of these communications also helps ensure that they do not contain any material omissions that

⁹ The 1940 Act defines "underwriter" to include "any person who has purchased from an issuer with a view to, or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking." The term excludes "a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributor's or seller's commission." See 1940 Act Section 2(a)(40), 15 U.S.C. 80a-2(a)(40).

¹⁰ Pursuant to Rule 24b-3 under the 1940 Act, 17 CFR 270.24b-3, any sales material shall be deemed filed with the Commission for purposes of Section 24(b) upon filing with FINRA.

would cause the communication to be misleading, and do not contain any false, exaggerated, unwarranted, promissory or misleading statements or claims.

FINRA believes that the likelihood of investor harm resulting from the distribution of research reports concerning only exchange-listed securities is significantly lessened due to additional investor protection standards that apply to research reports but do not apply to other types of sales material. In particular, research reports are subject to the comprehensive disclosure, content and analyst independence requirements of NASD Rule 2711 and SEC Regulation Analyst Certification (“Regulation AC”).¹¹ In addition, the fact that these securities are listed on a national securities exchange reduces the risk that a research report could manipulate a security’s trading price, because the ability to trade the security on an exchange provides both increased liquidity and a price discovery mechanism that does not exist for unlisted securities.

For example, if a research report contains a price target, NASD Rule 2711(h)(7) requires a member firm to disclose the valuation methods used to determine the price target, and firms must have a reasonable basis for the price target and must accompany it with a disclosure concerning the risks that may impede achievement of the price target. NASD Rule 2711(h) also requires numerous other conflicts of interest disclosures concerning such issues as individual and member holdings of the issuer’s securities, investment banking relationships with and receipt of compensation from the issuer, disclosure of the meanings and distribution of ratings assigned to issuers, inclusion of a price chart showing when the firm assigned or changed a rating or price target, and disclosure of market making activities.

¹¹ 17 CFR 242.500-505.

Research analysts also must prepare equity research reports in a controlled environment that is designed to reduce the potential for conflicts of interest. For example, the rules generally prohibit persons not directly responsible for the preparation, content and distribution of research from reviewing or approving research reports prior to publication.¹² In addition, Rule 2711 imposes certain requirements concerning the compensation paid to research analysts that are intended to reduce conflicts of interest.¹³

Regulation AC requires research analysts to provide certifications to research reports to help address the risk that research analysts may issue research reports that do not reflect their true beliefs or communicate views that differ from views expressed to institutional investors.¹⁴ The certifications include a statement certifying that all of the views expressed in the report accurately reflect the analyst's personal views about any and all of the covered securities and issuer, and another statement certifying either (1) that no part of the analyst's compensation was, is, or will be, directly or indirectly, related to the specific recommendations or views expressed by the analyst in the research report or (2) that part or all of the analyst's compensation was, is, or will be directly or indirectly related to the specific recommendations or views contained in the research report. If the analyst certifies to the second alternative, the statement must include the source, amount and purpose of such compensation and must further disclose that it may influence the recommendation in the research report.¹⁵

¹² See NASD Rule 2711(b).

¹³ See NASD Rule 2711(d).

¹⁴ See Securities Act Release No. 8193 (February 20, 2003), 68 FR 9482 (February 27, 2003).

¹⁵ See 17 CFR 242.501(a).

FINRA rules also require any person who is primarily responsible for the preparation of the substance of a research report, or whose name appears on a research report, to pass certain qualification examinations and register as a research analyst with FINRA. Pursuant to NASD Rule 1050, research analysts must be registered as a General Securities Representative under NASD Rule 1032, and must pass the qualification examinations for research analysts (Series 86 and 87).¹⁶ In addition, research reports must be approved either by a Supervisory Analyst that has passed the Series 16 qualification examination, or a registered principal that has passed both the Series 24 and Series 87 qualification examinations.¹⁷ Together with the pricing transparency and increased liquidity of exchange-listed securities generally, FINRA believes these additional investor protections minimize the need to have research reports concerning exchange-listed securities subject to filing with FINRA, as it is significantly less likely that these communications will contain false and misleading information or omit important risk and conflicts disclosures.¹⁸

FINRA believes that this filing exclusion is consistent with the approach that FINRA has taken for purposes of other parts of FINRA Rule 2210, such as the exclusion from the recommendation disclosure requirements of FINRA Rule 2210(d)(7) for

¹⁶ FINRA may grant a waiver from the analytical portion of the research analyst qualification examination (Series 86) upon verification that the applicant has passed other enumerated examinations. See NASD Rule 1050(c).

¹⁷ See NASD Rule 1022(a)(5) and FINRA Rule 2210(b)(1)(B); see also Notice to Members 07-04 (January 2007).

¹⁸ This text is slightly modified from the version filed by FINRA pursuant to a discussion between Joseph Savage and Philip Shaikun of FINRA and Marie-Louise Huth of the SEC on March 24, 2014 (“March 24 Phone Conversation”).

research reports that include all of the disclosures required by Rule 2711.¹⁹ Because FINRA concluded that Rule 2711's disclosure standards protect investors without the need for additional disclosure, FINRA exempted research reports from certain of Rule 2210's specific content standards. In the same manner, FINRA no longer believes it is necessary for research reports on exchange-listed securities to be filed with FINRA because of the investor protections offered by Rule 2711 and Regulation AC.²⁰

FINRA also recognizes the importance of allowing members to publish research on exchange-listed securities in a timely manner. Research that is stale or untimely has far less value to investors than research that is up-to-date. Particularly for new members, which are required to file certain retail communications at least 10 business days prior to first use, the current filing requirements could impose an impediment to publishing timely research on exchange-listed securities.

The Department's staff generally has not seen significant problems with research reports that have been filed with FINRA. The filing requirements for new firms under FINRA Rule 2210(c)(1)(A) are intended to provide an extra level of FINRA staff review for firms that are just beginning their business operations. FINRA is not aware of any firms that, in the past, have produced research subject to filing under the new firm filing requirement. In addition, FINRA believes that the supervisory and certification requirements applicable to research reports decrease the likelihood that a new firm would experience the types of problems that may occur with respect to other retail communications. Accordingly, FINRA believes that exempting research reports on

¹⁹ See FINRA Rule 2210(d)(7)(D)(i).

²⁰ See March 24 Phone Conversation, supra note 18.

exchange-listed securities from the new firm filing requirement would be consistent with investor protection.

As for reports that have been filed pursuant to other filing requirements, such as the filing requirements for retail communications concerning closed-end funds, public direct participation programs, or structured products, the staff mostly has reviewed these reports for compliance with NASD Rule 2711's disclosure requirements. FINRA believes that it can better employ the Department's resources viewing other types of communications that present a greater risk of investor harm. To the extent a review of members' research reports on exchange-listed securities is necessary, FINRA believes that it can address this need through either its examination program, or conducting a spot check of members' reports.

The proposal would not include research reports that are subject to filing pursuant to Section 24(b) of the 1940 Act, or research concerning securities that are not listed on a national securities exchange, within the proposed filing exclusion. Because the 1940 Act separately requires certain communications concerning registered open-end companies, registered unit investment trusts, and registered face-amount certificate companies to be filed, FINRA does not believe it is appropriate to include research reports that fall within this filing requirement within this proposed exclusion.

Securities that are not listed on a national securities exchange do not possess the same liquidity features and price discovery as exchange-listed securities, and thus at this time FINRA is proposing not to exclude research reports concerning such securities from filing. The increased liquidity and price discovery mechanisms for exchange-listed

securities reduce the likelihood that a research report could mislead an investor as to the true value of a security.

In contrast, a report concerning an unlisted security has greater potential to mislead investors. For example, FINRA believes that there are greater risks of investor harm and price manipulation with respect to a research report on a master limited partnership that is not listed on a national securities exchange. Accordingly, FINRA believes that such reports should not be subject to the proposed filing exclusion.

The proposed filing exclusion also would not apply to any retail communication concerning an exchange-listed security that is not a research report for purposes of NASD Rule 2711. Thus, for example, a member firm would still be required to file with FINRA a retail communication that is intended to promote the sale of the securities of an exchange-listed closed-end investment company or direct participation program if the retail communication was not a research report for purposes of Rule 2711. Because the additional investor protections that apply to research reports do not apply to these retail communications, FINRA believes that it is appropriate to continue to require member firms to file these types of retail communications.

(b) Clarification Regarding Free Writing Prospectuses Exempt from SEC Filing

The filing requirements and content standards of FINRA Rule 2210 do not apply to prospectuses and similar documents that have been filed with the SEC, other than investment company advertisements prepared pursuant to Securities Act Rule 482,²¹ and free-writing prospectuses that are used or referred to by a broker-dealer and distributed by or on behalf of the broker-dealer in a manner reasonably designed to lead to its broad

²¹ 17 CFR 230.482

unrestricted dissemination. FINRA Rule 2210(c)(7)(F) excludes from the rule’s filing requirements “[p]rospectuses, preliminary prospectuses, fund profiles, offering circulars and similar documents that have been filed with the SEC or any state, or that is exempt from such registration, except that an investment company prospectus published pursuant to Securities Act Rule 482 and a free writing prospectus that has been filed with the SEC pursuant to Securities Act Rule 433(d)(1)(ii) will not be considered a prospectus for purposes of this exclusion.” Similarly, FINRA Rule 2210(d)(8) excludes from the rule’s content standards “[p]rospectuses, preliminary prospectuses, fund profiles and similar documents that have been filed with the SEC,” but provides that the content standards do apply to “an investment company prospectus pursuant to Securities Act Rule 482 and a free writing prospectus that has been filed with the SEC pursuant to Securities Act Rule 433(d)(1)(ii).”

Questions have been raised as to whether these exclusions cover a free writing prospectus that is exempt from filing with the SEC pursuant to Securities Act Rule 433.²² FINRA intended these exclusions to cover prospectuses filed with the SEC as well as free writing prospectuses that are exempt from filing, other than so-called “omitting prospectuses” of registered investment companies governed by Securities Act Rule 482, and free writing prospectuses required to be filed with the SEC pursuant to Securities Act Rule 433(d)(1)(ii). Accordingly, a free writing prospectus that is exempt from filing with the SEC pursuant to Securities Act Rule 433 is not subject to the filing requirements and content standards of FINRA Rule 2210.²³ To clarify this intent, FINRA is proposing to

²² 17 CFR 230.433

²³ See Regulatory Notice 10-52 (October 2010) (FINRA communication rules “apply to free writing prospectuses distributed by a broker-dealer in a manner

amend FINRA Rule 2210(c)(7)(F) and FINRA Rule 2210(d)(8) specifically to exclude from the filing and content standards free writing prospectuses that are exempt from filing with the SEC. FINRA is also proposing to clarify that the filing and content requirements apply to free-writing prospectuses required to be filed with the SEC pursuant to Securities Act Rule 433(d)(1)(ii).

(c) Correction of Rule Cross-Reference in FINRA Rule 2214

Paragraph (a) of FINRA Rule 2214 (Requirements for the Use of Investment Analysis Tools) mistakenly cross-references FINRA Rule 2210(c)(3)(D) (the filing requirement for retail communications concerning collateralized mortgage obligations).²⁴ Rule 2214(a) should cross-reference Rule 2210(c)(3)(C) (the filing requirement for any template for written reports produced by, or retail communications concerning, an investment analysis tool). FINRA proposes to correct this rule cross-reference.

FINRA will announce the effective date of the proposed rule change in a Regulatory Notice to be published no later than 60 days following Commission approval. The effective date will be the date of publication of the Regulatory Notice announcing Commission approval.

2. Statutory Basis

FINRA believes that the proposal to exclude research reports concerning only exchange-listed securities from the filing requirements for certain retail communications

reasonably designed to lead to broad unrestricted dissemination”). FINRA Rule 2210’s filing and content standards are intended to apply to free writing prospectuses that are subject to filing with the SEC pursuant to Securities Act Rule 433(d)(1)(ii), but not to other types of free writing prospectuses.

²⁴ See Securities Exchange Act Release No. 66681 (March 29, 2012), 77 FR 20452 (April 4, 2012) (SR-FINRA-2011-035).

is consistent with the provisions of Section 15A(b)(6) of the Act,²⁵ which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes that the proposed filing exclusion will reduce the burdens imposed on member firms that would otherwise have to file research reports on exchange-listed securities with FINRA, while continuing to protect investors through the protections provided by FINRA Rule 2210 and NASD Rules 1022, 1050 and 2711.

FINRA also believes that the proposed clarification regarding the application of Rule 2210's filing and content standards to free writing prospectuses that are exempt from filing with the SEC is consistent with the provisions of Section 15A(b)(6) of the Act.²⁶ The proposal is consistent with FINRA's current interpretation of Rule 2210.

FINRA further believes that the proposed correction of the rule cross-reference in FINRA Rule 2214 is consistent with the provisions of Section 15A(b)(6) of the Act.²⁷ The correction of the cross-reference is consistent with the Rule's intent and purpose and will reduce any potential confusion due to the current incorrect cross-reference.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change would result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change would reduce burdens on members by relieving them of

²⁵ 15 U.S.C. 78o-3(b)(6).

²⁶ 15 U.S.C. 78o-3(b)(6).

²⁷ 15 U.S.C. 78o-3(b)(6).

the obligation and expense of filing research reports that are currently subject to filing. The proposed rule change also would clarify for members the intended application of Rule 2210 to free writing prospectuses that are exempt from filing with the SEC, and would not add any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form

(<http://www.sec.gov/rules/sro.shtml>); or

- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-FINRA-2014-012 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-FINRA-2014-012. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All

submissions should refer to File Number SR-FINRA-2014-012 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁸

Kevin M. O'Neill
Deputy Secretary

²⁸ 17 CFR 200.30-3(a)(12).