

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-78823; File No. SR-FINRA-2016-018]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Partial Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change Amending FINRA Rules 2210 (Communications With the Public), 2213 (Requirements for the Use of Bond Mutual Fund Volatility Ratings), and 2214 (Requirements for the Use of Investment Analysis Tools), as Modified by Partial Amendment No. 1

September 13, 2016.

#### I. Introduction

On May 25, 2016, Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”) <sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> proposed amendments that would revise the filing requirements in FINRA Rule 2210 (Communications with the Public) and FINRA Rule 2214 (Requirements for the Use of Investment Analysis Tools) and the content and disclosure requirements in FINRA Rule 2213 (Requirements for the Use of Bond Mutual Fund Volatility Ratings).

The proposed rule change was published for comment in the **Federal Register** on June 15, 2016.<sup>3</sup> The public comment period closed on July 6, 2016. On July 19, 2016, FINRA extended the time period in which the Commission must approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change to September 13, 2016. The Commission received five comment letters in response to the Notice.<sup>4</sup> On September 1, 2016, FINRA responded to the comment letters received in response to the Notice and filed a partial amendment to the

proposed rule change (“Partial Amendment No. 1”).<sup>5</sup>

This order provides notice of filing of Partial Amendment No. 1 and approves the proposal, as modified by Partial Amendment No. 1, on an accelerated basis.

#### II. Description of the Proposed Rule Change

##### Background

In April 2014, FINRA launched a retrospective review of its communications with the public rules to assess their effectiveness and efficiency. In December 2014, FINRA published a report on the assessment phase of the review.<sup>6</sup> The report concluded that, while the rules have met their intended investor protection objectives, they could benefit from some updating to better align the investor protection benefits and the economic impacts. To this end, FINRA recommended consideration of a combination of rule proposals, guidance and administrative measures, to enhance the efficiency of the rules with no reduction in investor protection.

Pursuant to these recommendations, FINRA initially is proposing amendments to the filing requirements in FINRA Rule 2210 and FINRA Rule 2214 and the content and disclosure requirements in FINRA Rule 2213.

##### Original Proposal

##### New Member Communications

FINRA Rule 2210(c)(1)(A) currently requires new FINRA members to file with FINRA retail communications used in any electronic or other public media at least 10 business days prior to use. This requirement extends for one year from the effective date of the firm’s membership. This new firm filing requirement only applies to broadly disseminated retail communications, such as generally accessible Web sites, print media communications, and television and radio commercials.

In its initial proposal, FINRA stated its belief that that the requirement for new members to file their broadly disseminated retail communications serves a useful purpose, since new

members may not be as familiar with the standards that apply to retail communications as more established members, but that the requirement to file these communications at least 10 business days prior to use can delay members’ abilities to communicate with the public in a timely manner. For example, if a new member wishes to update its public Web site with new information, the member must first file the proposed update with FINRA and wait at least 10 business days before it can post this update on its Web site. FINRA stated that such a delay may hinder its ability to communicate important information to its existing and prospective customers.

FINRA stated that it believed it could continue to protect investors from potential harm without imposing this time delay on new members by reviewing new members’ communications on a post-use, rather than a pre-use, basis. FINRA had found a post-use filing requirement to be an effective investor protection approach for retail communications with similar risk profiles as FINRA typically sees from new members. Accordingly, FINRA initially proposed to revise the new member filing requirement to require new members to file retail communications used in electronic or other public media within 10 business days of first use for a one-year period, rather than requiring these filings at least 10 business days prior to use.<sup>7</sup> As explained in more detail below, upon consideration of comments received on the proposal, FINRA has determined not to amend these requirements at this time, and filed a Partial Amendment No. 1 with the Commission to that effect.<sup>8</sup>

##### Investment Company Shareholder Reports

FINRA currently requires members to file the management’s discussion of fund performance (“MDFP”) portion of a registered investment company shareholder report if the report is distributed or made available to prospective investors.<sup>9</sup> FINRA has

<sup>7</sup> See proposed amendments to FINRA Rule 2210(c)(1)(A). This proposed change also would delete as redundant current rule text that permits a new member to 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.

<sup>8</sup> See FINRA Letter at 3; see also Partial Amendment No. 1.

<sup>9</sup> See, e.g., Notice to Members 99-79 (September 1999) (“[m]embers are not required to file shareholder reports with [FINRA] if they are only sent to current fund shareholders. However, if a member uses a shareholder report as sales material with prospective investors, the member must file the management’s discussion of fund performance

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Exchange Act Release No. 78026 (June 9, 2016), 81 FR 39081 (June 15, 2016) (“Notice”).

<sup>4</sup> See Letters from Hugh Berkson, Public Investors Arbitration Bar Association, dated July 5, 2016 (“PIABA Letter”); Alexander C. Gavis, Fidelity Investments, dated July 6, 2016 (“Fidelity Letter”); Dorothy Donohue, Investment Company Institute, dated July 6, 2016 (“ICI Letter”); Timothy W. Cameron and Lindsey Weber Keljo, Securities Industry and Financial Markets Association, dated July 6, 2016 (“SIFMA Letter”); and Erica A. Green, FOLIO Investments, Inc., dated July 7, 2016 (“FOLIO Letter”). Comment letters are available at [www.sec.gov](http://www.sec.gov).

<sup>5</sup> See Letter from Joseph P. Savage, Vice President and Counsel, Office of Regulatory Policy, FINRA, to the Commission, dated September 1, 2016 (“FINRA Letter”). The FINRA Letter and the text of Partial Amendment No. 1 are available on FINRA’s Web site at <http://www.finra.org>, at the principal office of FINRA, and at the Commission’s Public Reference Room; the text of the FINRA letter is also available at the Commission’s Web site at <https://www.sec.gov/comments/sr-finra-2016-018/finra2016018-6.pdf>.

<sup>6</sup> See Retrospective Rule Report, Communications with the Public, December 2014.

required the MDFP to be filed because members sometimes distribute or make shareholder reports available to prospective investors to provide more information about the funds they offer. Thus, FINRA has considered the MDFP to be subject to the filing requirement for investment company retail communications.

Although Rule 2210 does not contain any express filing exclusion for investment company shareholder reports, FINRA has not required members to file portions of shareholder reports other than the MDFP, such as the financial statements or schedules of portfolio investments. FINRA has not regarded these other parts of investment company shareholder reports to be subject to the filing requirements of Rule 2210, since they serve a regulatory purpose rather than promoting the sale of investment company securities.

Investment companies already must file shareholder reports with the SEC,<sup>10</sup> and the MDFP typically presents less investor risk than other types of promotional communications concerning investment companies, since it usually focuses on the most recent period covered by the report rather than containing promotional content that is intended to encourage future investments. Accordingly, FINRA proposes to exclude from the FINRA filing requirements the MDFP by adding an express exclusion for annual or semi-annual reports that have been filed with the SEC in compliance with applicable requirements.<sup>11</sup> FINRA believes that it would assist members' understanding of Rule 2210 expressly to clarify that annual and semi-annual reports that have been filed with the SEC are not subject to filing with FINRA. The rule already excludes prospectuses, fund profiles, offering circulars and similar documents that have been filed with the SEC. As such, FINRA believes it would be consistent to add shareholder reports that have been filed with the SEC to that list.

#### Offering Documents Concerning Unregistered Securities

Rule 2210(c)(7)(F) currently excludes from filing "prospectuses, preliminary prospectuses, fund profiles, offering circulars and similar documents that

(MDFP) portion of the report (as well as any supplemental sales material attached to or distributed with the report) with the Department.").

<sup>10</sup> See Section 30 of the Investment Company Act of 1940 and Rules 30a-1 and 30b1-1 thereunder.

<sup>11</sup> See proposed amendments to FINRA Rule 2210(c)(7)(F). To the extent that a member distributes or attaches registered investment company sales material along with the fund's shareholder report, such material would remain subject to filing under Rule 2210.

have been filed with the SEC or any state, or that is exempt from such registration . . ." (emphasis supplied). The filing exclusion is intended (and has been interpreted by FINRA) to exclude issuer-prepared offering documents concerning securities offerings that are exempt from registration.

Accordingly, FINRA is proposing to amend Rule 2210(c)(7)(F) to make this intent more clear, and to avoid any confusion concerning the phrase "or that is exempt from such registration." As revised, Rule 2210(c)(7)(F) would exclude from filing, among other things, "similar offering documents concerning securities offerings that are exempt from SEC or state registration requirements." While FINRA believes that this amendment will clarify this filing exclusion, it does not believe that it represents a substantive change to the current filing exclusion for unregistered securities' offering documents.

#### Backup Material for Investment Company Performance Rankings and Comparisons

A member that files a retail communication for a registered investment company that contains a fund performance ranking or performance comparison must include a copy of the ranking or comparison used in the retail communication.<sup>12</sup> When FINRA adopted this requirement, prior to the Internet, FINRA staff did not have ready access to the sources of rankings or comparisons. Today, this information typically is easily available online. FINRA therefore proposes to eliminate the requirement to file ranking and comparison backup material and instead expressly to require members to maintain back-up materials as part of their records.<sup>13</sup>

#### Generic Investment Company Communications

FINRA Rule 2210(c)(3)(A) requires members to file within 10 business days of first use retail communications "concerning" registered investment companies. FINRA proposes to revise this filing requirement to cover only retail communications that promote a specific registered investment company or family of registered investment companies. Thus, members would no longer be required to file generic investment company retail communications.

<sup>12</sup> See FINRA Rule 2210(c)(3)(A).

<sup>13</sup> See proposed amendments to FINRA Rules 2210(b)(4)(A)(vi) and 2210(c)(3)(A).

An example of such a generic communication would be a retail communication that describes different mutual fund types and features but does not discuss the benefits of a specific fund or fund family. This type of material typically is intended to educate the public about investment companies in general or the types of products that a member offers, and thus does not present the same risks of including potentially misleading information as promotional communications about specific funds or fund families.

#### Investment Analysis Tools

"Investment analysis tools" are interactive technological tools that produce simulations and statistical analyses that present the likelihood of various investment outcomes if certain investments are made or certain investment strategies or styles are undertaken. Pursuant to FINRA Rules 2210(c)(3)(C) and 2214(a), members that intend to offer an investment analysis tool must file templates for written reports produced by, or retail communications concerning, the tool, within 10 business days of first use. Rule 2214 also requires members to provide FINRA with access to the tool itself, and provide customers with specific disclosures when members communicate about the tool, use the tool or provide written reports generated by the tool.

Since Rule 2214 became effective in 2005,<sup>14</sup> FINRA has found that members have largely complied with the Rule's requirements applicable to templates for written reports produced by investment analysis tools and retail communications concerning such tools. FINRA does not believe that the filing requirements for these templates and retail communications are necessary given this history and in light of the investor protection afforded by other content standards and the requirement that members provide access to the tools and their output upon request of FINRA staff. Accordingly, FINRA proposes to eliminate the filing requirements for investment analysis tool report templates and retail communications concerning such tools and instead require members to provide FINRA staff with access to investment analysis tools upon request.<sup>15</sup>

#### Filing Exclusion for Templates

Members are not required to file retail communications that are based on templates that were previously filed

<sup>14</sup> See Notice to Members 04-86 (November 2004).

<sup>15</sup> See proposed amendments to FINRA Rules 2210(c)(3) and 2214(a).

with FINRA but changed only to update recent statistical or other non-narrative information.<sup>16</sup> However, members are required to re-file previously filed retail communications that are subject to filing under FINRA Rule 2210(c) to the extent that the member has updated any narrative information contained in the prior filing. Often these re-filed retail communications are templates for fact sheets concerning particular funds or products and provide quarterly information concerning a product's performance, portfolio holdings and investment objectives.

Through its review of updated fund fact sheets and other similar templates, FINRA has found that certain narrative information has not presented significant risk to investors, and that these narrative updates typically are consistent with applicable standards. In particular, narrative updates that are not predictive in nature and merely describe market events that occurred during the period covered by the communication, or that merely describe changes in a fund's portfolio, rarely have presented significant investor risks. In addition, members often will update narrative information concerning a registered investment company, such as a description of a fund's investment objectives, based on information that is sourced from the fund's regulatory documents filed with the SEC. In both cases, FINRA believes that the costs associated with filing these types of narrative updates exceed the investor benefits associated with FINRA staff review of these updates.

Accordingly, FINRA proposes to expand the template filing exclusion also to allow members to include updated non-predictive narrative descriptions of market events during the period covered by the communication and factual descriptions of portfolio changes without having to refile the template, as well as updated information that is sourced from a registered investment company's regulatory documents filed with the SEC.<sup>17</sup>

#### Bond Mutual Fund Volatility Ratings

FINRA Rule 2213 permits members to use communications that include ratings provided by independent third parties that address the sensitivity of the net asset value of an open-end management investment company's bond portfolio to changes in market conditions and the general economy, subject to a number of requirements. For

example, these communications must be accompanied or preceded by the bond fund's prospectus and contain specific disclosures. Members currently must file retail communications that include bond mutual fund volatility ratings at least 10 business days prior to first use, and withhold them from publication or circulation until any changes specified by FINRA have been made.<sup>18</sup>

FINRA believes that some of these requirements have discouraged members from including bond fund volatility ratings in their communications due to the significant compliance burdens associated with doing so, and the level of disclosures required to accompany such ratings. FINRA has found that, since Rule 2213 first became effective in 2000,<sup>19</sup> members have rarely, if ever, filed communications that contain bond fund volatility ratings. In general, in the few cases in which members filed such communications with FINRA, the staff has found that they have met applicable standards.

Given that bond fund volatility ratings may provide useful information to investors, and that Rule 2213 as currently drafted appears to have discouraged members from including these ratings in their communications, FINRA believes it is appropriate to revise the rule to reduce some of these burdens while continuing to include requirements that it believes will protect investors. Accordingly, FINRA proposes to modify some of Rule 2213's requirements.

Consistent with the filing requirements for other retail communications about specific registered investment companies, the proposal would no longer require a retail communication that includes a bond fund volatility rating to be accompanied or preceded by a prospectus for the fund, and would permit members to file these communications within 10 business days of first use rather than prior to use.<sup>20</sup>

FINRA believes that the requirement that any retail communication including a bond fund volatility rating be accompanied or preceded by a fund prospectus increases the burdens associated with these communications without adding commensurate investor protection. Except in rare circumstances due to operational hardship, all mutual

fund prospectuses are available online, and thus an investor can easily access the prospectus, if needed.

Similarly, FINRA believes that requiring members to file these retail communications at least 10 business days prior to use and to withhold them from publication or circulation until any changes specified by the Department have been made does not provide appreciably greater investor protection. According to FINRA, this pre-use filing requirement inhibits a member's ability to circulate retail communications containing volatility ratings in a timely manner. Moreover, members still would be required to file these communications within 10 business days of first use, so that if they contain misleading content, the Department staff can take appropriate measures to correct any problems, such as recommending changes to the communication, or directing the member to cease using the communication with the public. FINRA has found a post-use filing requirement to be an effective investor protection approach for most retail communications with similar risk profiles.<sup>21</sup>

The proposal also would streamline the content and disclosure requirements. In particular, the amendments would eliminate the requirements: (1) That all disclosures be contained in a separate Disclosure Statement; (2) to disclose all current bond mutual fund volatility ratings that have been issued with respect to the fund; (3) to explain the reason for any change in the current rating from the most recent prior rating; (4) to describe the criteria and methodologies used to determine the rating; (5) to include a statement that not all bond funds have volatility ratings; and (6) to include a statement that the portfolio may have changed since the date of the rating.

FINRA believes that many of these requirements are unnecessary in light of the content requirements that still will apply to such retail communications. For example, members still would not be permitted to refer to a volatility rating as a "risk" rating, and would have

<sup>21</sup> As a general matter, FINRA does not believe that retail communications that include bond fund volatility ratings present risks of investor harm that are comparable to other retail communications that require pre-use filing, such as retail communications that include self-created rankings or comparisons or retail communications concerning security futures. See FINRA Rule 2210(c)(2)(A) and (B). Retail communications that include self-created rankings or comparisons present a greater risk of being misleading than bond fund volatility ratings, since they are not created by an entity that is independent of the member. In addition, security futures are more complex and potentially more volatile than most bond mutual funds.

<sup>18</sup> FINRA Rules 2210(c)(2)(C) and 2213(b) and (c).

<sup>19</sup> See *Notice to Members* 00-23 (April 2000).

<sup>20</sup> See proposed amendments to FINRA Rules 2210(c) and 2213(b). This change relates only to Rule 2213 and does not affect a member's obligation to deliver a prospectus under the Securities Act or for Investment Company Act companies.

<sup>16</sup> See FINRA Rule 2210(c)(7)(B).

<sup>17</sup> See proposed amendments to FINRA Rule 2210(c)(7)(B).

to incorporate the most recently available rating and reflect information that, at a minimum, is current to the most recent calendar quarter end. The criteria and methodology used to determine the rating still would have to be based exclusively on objective, quantifiable factors, and such communications would have to include a link to, or Web site address for, a Web site that includes the criteria and methodology. Communications would have to provide the name of the entity that issued the rating, the most current rating and date for the rating, and whether consideration was paid for the rating, as well as a description of the types of risks the rating measures.

FINRA believes that, as long as the required disclosures are provided, it is not necessary that they appear in a separate Disclosure Statement. FINRA also believes it is unnecessary to disclose all other current volatility ratings assigned to the advertised fund, since this requirement is not imposed under other similar rules. For example, FINRA Rule 2214 allows members to provide fund ranking information without also requiring the member to disclose all rankings assigned by other ranking entities. The other disclosure requirements add little understanding about the rating presented, while adding voluminous text to the retail communication. In addition, if an investor does seek more information about the criteria and methodology used to create the rating, this information will be available via a hyperlink to a separate Web site.

#### *Proposed Partial Amendment No. 1*

In response to comments<sup>22</sup> (discussed below), FINRA has determined not to amend its current new member filing requirements, as set forth in FINRA Rule 2210(c)(1)(A), at this time. It has therefore deleted the proposed changes to FINRA Rule 2210(c)(1)(A). Although FINRA believes that it is a close balance between the investor protection benefits provided by pre-use review and the burden of complying with the existing rule, FINRA believes that it is more prudent to defer making the change to post-use filing of new member retail communications at this time. FINRA will continue to accumulate more data on the frequency and types of revisions required for new member retail communications before determining whether to consider any changes to this requirement in the future.<sup>23</sup>

<sup>22</sup> See PIABA Letter at 2.

<sup>23</sup> See FINRA Letter at 3.

### **III. Comment Summary and FINRA's Response**

As noted above, the Commission received five comment letters on the proposed rule change<sup>24</sup> and a response letter from FINRA.<sup>25</sup> As discussed in more detail below, four of the commenters generally supported the proposal, but had some suggestions for changes.<sup>26</sup> One commenter opposed the proposal.<sup>27</sup>

#### *Continuation of Retrospective Review*

While two commenters generally supported the proposal, both encouraged FINRA to continue its retrospective review of its rules governing communications with the public to address other areas.<sup>28</sup> One commenter recommended that FINRA update its rules governing social media, mobile devices, and electronic communications, to address the amount of disclosure FINRA requires in print advertising, and to eliminate to the extent possible differences among the rules governing broker-dealer and investment adviser communications, particularly with respect to communications containing projections or performance information.<sup>29</sup> Another commenter recommended that FINRA codify a set of clear disclosure standards for closed-end fund marketing materials and to eliminate the filing requirement for these communications.<sup>30</sup>

In its response, FINRA stated that it continues to consider additional action on its retrospective review of the communications rules, including those raised by commenters on this proposal.<sup>31</sup>

#### *New Member Filing Requirements*

FINRA Rule 2210(c)(1)(A) currently requires new FINRA members to file with FINRA retail communications used in any electronic or other public media at least 10 business days prior to use. This requirement extends for one year from the effective date of the firm's membership. This new firm filing requirement only applies to broadly disseminated retail communications, such as generally accessible Web sites, print media communications, and television and radio commercials. The initial proposal would have modified this requirement to permit new

<sup>24</sup> See *supra* note 4.

<sup>25</sup> See *supra* note 5.

<sup>26</sup> See Fidelity Letter, FOLIO Letter, ICI Letter, and SIFMA Letter.

<sup>27</sup> See PIABA Letter.

<sup>28</sup> See Fidelity Letter and ICI Letter.

<sup>29</sup> See Fidelity Letter.

<sup>30</sup> See ICI Letter.

<sup>31</sup> See FINRA Letter at 2.

members to file these retail communications within 10 business days of first use for a one-year period, rather than requiring these filings at least 10 business days prior to use.<sup>32</sup>

One commenter strongly opposed the proposed change to the new member filing requirement.<sup>33</sup> The commenter stated that the proposed change would eliminate the proactive investor protection that the current rule affords customers, and that post-use review of all new member retail communications by FINRA will not provide adequate investor protection for customers.<sup>34</sup> The commenter also argued that the pre-use filing requirement provides a deterrent effect to potential bad actors, and that a post-use filing requirement would embolden new members to prepare riskier retail communications.<sup>35</sup>

Another commenter supported the proposed change to the new member filing requirement from a pre-use to a post-use requirement, but argued that FINRA should go further and eliminate the filing requirement entirely in some circumstances.<sup>36</sup> This commenter asserted that other rules and requirements currently in place are sufficient to offer the important investor protections contemplated by the new member filing requirement, citing as an example FINRA's new member application process pursuant to NASD Rule 1013.<sup>37</sup> The commenter suggested that FINRA impose the filing requirement only on new members that do not have compliance or supervisory personnel with at least five years of experience directly related to sales practice requirements that would be responsible for reviewing and approving the firm's retail communications.<sup>38</sup> Alternatively, the commenter suggested narrowing the new member filing requirement to exclude generic retail communications and retail

<sup>32</sup> The proposed change also would delete as redundant current rule text that permits a new member to 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.

<sup>33</sup> See PIABA Letter at 1–3.

<sup>34</sup> See *id.* at 2–3.

<sup>35</sup> See PIABA Letter at 2–3. As FINRA stated in its response, "PIABA also criticized the proposed changes to the new member filing requirement based on the apparently mistaken belief that the proposal would differentiate its application between new member Web sites, and other widely disseminated retail communications." See FINRA Letter at 3 n.5. FINRA therefore clarified that "although an earlier version of the proposal contained such a distinction, the version FINRA filed with the Commission for comment did not." *Id.*

<sup>36</sup> See FOLIO Letter at 1–2.

<sup>37</sup> See *id.*

<sup>38</sup> See *id.*

communications that contain non-predictive narrative descriptions.<sup>39</sup>

In response to the suggestion by one commenter that FINRA eliminate the new member filing requirement in certain circumstances and narrow it in others, FINRA noted that the current rule already contains a mechanism to provide regulatory relief in the kinds of circumstances the commenter cited.<sup>40</sup> FINRA stated in its response that it is authorized conditionally or unconditionally to grant an exemption from the new member filing requirement for good cause shown.<sup>41</sup> Thus, if a member makes a persuasive case that the new member filing requirement should not apply to the firm, such as where the new firm is the successor to an existing firm and its compliance personnel have demonstrated familiarity with the communications rules, FINRA may consider granting an exemption from the filing requirement.<sup>42</sup> In addition, FINRA noted that even new members are not required to file retail communications where those communications do not make a financial or investment recommendation or otherwise promote a product or service of the member.<sup>43</sup> Thus, FINRA's view is that truly generic, non-promotional retail communications need not be filed under this requirement.<sup>44</sup>

After considering all of the comments, FINRA stated that it has determined not to amend its current new member filing requirements at this time.<sup>45</sup> Although FINRA believes that it is a close balance between the investor protection benefits provided by pre-use review and the burden of complying with the existing rule, FINRA believes that it is more prudent to defer making the change to post-use filing of new member retail communications at this time.<sup>46</sup> FINRA stated that it will continue to accumulate more data on the frequency and types of revisions required for new member retail communications before determining whether to consider any changes to this requirement in the future.<sup>47</sup>

#### *Investment Company Shareholder Reports*

FINRA currently requires members to file the management's discussion of

fund performance ("MDFP") portion of a registered investment company shareholder report if the report is distributed or made available to prospective investors. FINRA proposes to exclude from the FINRA filing requirements the MDFP by adding an express exclusion for annual or semi-annual reports that have been filed with the SEC in compliance with applicable requirements.

Two commenters supported this proposed change.<sup>48</sup> One commenter noted that this exclusion would make FINRA's rule less burdensome on asset management firms by eliminating redundant filing requirements.<sup>49</sup> Another commenter opposed this change on the ground that Commission staff does not fully review all regulatory filings made on the EDGAR system, which is where filings of fund shareholder reports are made.<sup>50</sup>

In its response, FINRA stated that it maintains that the MDFP portion of shareholder reports should be excluded from the filing requirements.<sup>51</sup> FINRA stated that it has found through its filing program that the MDFPs in shareholder reports rarely have raised issues requiring members to revise or withdraw reports from circulation.<sup>52</sup> FINRA acknowledged that Commission staff may not review all securities-related filings contemporaneous with their submission, but pointed out in its response that Commission staff can review higher risk communications as needed.<sup>53</sup> FINRA stated its belief that this change would not appreciably impact investor protection and would allow FINRA to allocate its staff resources more efficiently to focus on reviewing higher risk communications more expeditiously.<sup>54</sup>

#### *Generic Investment Company Communications*

FINRA Rule 2210(c)(3)(A) requires members to file within 10 business days of first use retail communications "concerning" registered investment companies. FINRA proposes to revise this filing requirement to cover only retail communications that promote a specific registered investment company or family of registered investment companies. Thus, members would no longer be required to file generic investment company retail communications.

Two commenters supported this proposed change.<sup>55</sup> However, one commenter requested that FINRA clarify how this filing exclusion interrelates with Securities Act Rule 482.<sup>56</sup> In response to this request, FINRA stated in its response that it intends the registered investment company filing requirement to apply to any retail communication that is governed by either Securities Act Rule 482 or Investment Company Act Rule 34b-1, or that otherwise promotes or recommends a specific registered investment company or family of registered investment companies.<sup>57</sup> To the extent that a retail communication qualifies as a generic investment company advertisement under Securities Act Rule 135a, FINRA stated that a member would not be required to file the retail communication.<sup>58</sup>

#### *Filing Exclusion for Templates*

Under current rules, members are not required to file retail communications that are based on templates that were previously filed with FINRA but changed only to update recent statistical or other non-narrative information.<sup>59</sup> However, members are required to re-file previously filed retail communications that are subject to filing under FINRA Rule 2210(c) to the extent that the member has updated narrative information contained in the prior filing.

FINRA's proposal would expand the template filing exclusion also to allow members to include updated, non-predictive narrative descriptions of market events that occurred during the period covered by the communication and factual descriptions of portfolio changes without having to re-file the template. Similarly, a template could include information that is sourced from a registered investment company's regulatory documents filed with the Commission without triggering a requirement to re-file.

Two commenters supported this proposed change, but recommended amending the proposal.<sup>60</sup> One of these commenters recommended that the exclusion cover any non-predictive narrative information that comes from either an independent data provider or is sourced from an investment company's regulatory documents filed

<sup>39</sup> See *id.*

<sup>40</sup> See FINRA Letter at 3.

<sup>41</sup> See FINRA Rule 2210(c)(9)(A).

<sup>42</sup> See FINRA Letter at 3.

<sup>43</sup> See *id.*; see also FINRA Rule 2210(c)(7)(C).

<sup>44</sup> See FINRA Letter at 3.

<sup>45</sup> See FINRA Letter at 3.

<sup>46</sup> See *id.*

<sup>47</sup> See *id.*

<sup>48</sup> See FINRA Letter at 4.

<sup>49</sup> See SIFMA Letter at 2.

<sup>50</sup> See PIABA Letter at 4.

<sup>51</sup> See FINRA Letter at 4.

<sup>52</sup> See *id.*

<sup>53</sup> See *id.*

<sup>54</sup> See *id.*

<sup>55</sup> See FOLIO Letter at 3; see also SIFMA Letter at 3.

<sup>56</sup> See SIFMA Letter at 3.

<sup>57</sup> See FINRA Letter at 4-5.

<sup>58</sup> See FINRA Letter at 5.

<sup>59</sup> See FINRA Rule 2210(c)(7)(B).

<sup>60</sup> See Fidelity Letter at 2-3; see also ICI Letter at 3-4.

with the Commission.<sup>61</sup> This commenter recommended that, at the very least, this filing exclusion cover non-predictive narrative information that is (1) purchased or licensed directly from a third-party data provider, and (2) sourced from a Commission document.<sup>62</sup>

The second commenter recommended that the filing exclusion cover modifications limited to narrative factual changes provided by any “ranking entity,” as such term is defined in FINRA Rule 2212(a).<sup>63</sup> The commenter also recommended that FINRA broaden the reference to “non-predictive narrative information that describes market events” to expressly permit commentary.<sup>64</sup> Finally, the commenter argued that otherwise the proposal could be unduly narrow and difficult for members to apply.<sup>65</sup>

One commenter opposed this change entirely, arguing that FINRA should review any narrative descriptions included in retail communications for misleading information.<sup>66</sup> The commenter cited several recent FINRA enforcement cases involving misleading retail communications as grounds for maintaining FINRA’s current template filing exclusion.<sup>67</sup>

In its response, FINRA disagreed that Rule 2210 should exclude from filing *any* template updates that are based on any non-predictive narrative information that is sourced from an independent data provider.<sup>68</sup> FINRA stated its belief that such a standard could potentially permit inclusion of non-predictive narrative information that is intended to promote future sales of a fund, which FINRA believes should be re-filed.<sup>69</sup> However, FINRA stated if a member updates a template based on information that is sourced from a registered investment company’s regulatory documents filed with the Commission, the update would qualify for this filing exclusion.<sup>70</sup> FINRA stated that this exclusion would apply even if an independent data provider supplies the information that is sourced from the Commission filings.<sup>71</sup>

Further, FINRA stated that it does not agree that the template filing exclusion should be based on whether narrative factual changes are provided by a

ranking entity as defined in Rule 2212.<sup>72</sup> FINRA stated its belief that the better test is whether the information is sourced from Commission filings, rather than basing it on the provider’s business model.<sup>73</sup>

FINRA stated that it does not agree that the template filing exclusion also should cover commentary.<sup>74</sup> As one commenter acknowledged, commentary often includes forward looking statements about the market or a particular fund.<sup>75</sup> Accordingly, FINRA believes these kinds of narrative updates should be re-filed.<sup>76</sup>

Finally, FINRA stated that it does not believe the enforcement cases cited by one commenter support its opposition to revising the template filing exclusion.<sup>77</sup> Those cases did not involve updates of templates, but rather instead involved misleading marketing materials that members would continue to be required to file even after the proposed change to the template filing exclusion.<sup>78</sup> FINRA noted that its members are already required to file mutual fund retail communications, and to the extent a member is using a retail communication that becomes misleading due to changes in market conditions, the member must either cease using the communication or revise the communication to make it accurate.<sup>79</sup> If the revision constitutes a material change to the retail communication, the member must re-file it.<sup>80</sup>

Moreover, FINRA noted, the FINRA Rule 2210 content standards apply regardless of whether a member re-files a retail communication with FINRA.<sup>81</sup> FINRA believes existing standards, even after this change to the template filing exclusion, strongly protect retail investors from receiving potentially misleading communications.<sup>82</sup> Accordingly, FINRA stated that it is not revising its proposed changes to the template filing exclusion.<sup>83</sup>

#### *Bond Fund Volatility Ratings*

FINRA Rule 2213 permits members to use communications that include ratings provided by independent third parties that address the sensitivity of the net asset value of a bond mutual fund’s

portfolio to changes in market conditions and the general economy, subject to a number of requirements. These requirements include that the communication be accompanied or preceded by the fund’s prospectus, that it be filed at least 10 business days prior to use with FINRA, and that it include a number of disclosures. FINRA has proposed to revise these requirements by no longer requiring such communications to be accompanied or preceded by a fund prospectus, by allowing members to file such communications within 10 business days of first use rather than 10 days prior to use, and by streamlining some of the content standards and required disclosures.

One commenter opposed these changes on the ground that recent enforcement actions involving the sale of bond funds demonstrate that bond funds should be highly regulated.<sup>84</sup> FINRA responded that although it agrees that bond funds and members’ sales of such funds should be effectively regulated, it disagrees that the proposed changes would undermine this goal.<sup>85</sup> FINRA noted that the commenter did not allege that any of its cited cases involved communications that included bond fund volatility ratings, and additionally pointed out that FINRA has not brought any enforcement actions involving violations of FINRA Rule 2213.<sup>86</sup>

In addition, FINRA stated that the proposed changes would not alter a FINRA member’s obligation to file retail communications concerning bond mutual funds.<sup>87</sup> FINRA stated that the only filing change would be that retail communications that included a bond fund volatility rating would have to be filed within 10 business days of first use, similar to any other retail communication concerning a specific fund or fund family, rather than at least 10 business days prior to use.<sup>88</sup> Finally, FINRA stated that Rule 2213 also would continue to impose content and disclosure requirements that will provide investors with significant information about the meaning and limitations of volatility ratings.<sup>89</sup>

#### **IV. Discussion and Commission Findings**

After careful review of the proposed rule change, as modified by Partial Amendment No. 1, the comment letters,

<sup>61</sup> See Fidelity Letter at 2–3.

<sup>62</sup> See *id.* at 2.

<sup>63</sup> See ICI Letter at 3.

<sup>64</sup> See *id.* at 4.

<sup>65</sup> See *id.*

<sup>66</sup> See PIABA Letter at 4–5.

<sup>67</sup> See *id.*

<sup>68</sup> See FINRA Letter at 6.

<sup>69</sup> See *id.*

<sup>70</sup> See *id.*

<sup>71</sup> See *id.*

<sup>72</sup> See *id.*

<sup>73</sup> See *id.*

<sup>74</sup> See *id.*

<sup>75</sup> See ICI Letter at 4 n.10.

<sup>76</sup> See FINRA Letter at 6.

<sup>77</sup> See FINRA Letter at 6.

<sup>78</sup> See *id.*

<sup>79</sup> See *id.*

<sup>80</sup> See FINRA Rule 2210(c)(7)(A).

<sup>81</sup> See FINRA Letter at 6.

<sup>82</sup> See *id.*

<sup>83</sup> See *id.*

<sup>84</sup> See PIABA Letter at 5–6.

<sup>85</sup> See FINRA Letter at 7.

<sup>86</sup> See FINRA Letter at 7.

<sup>87</sup> See *id.*

<sup>88</sup> See *id.*

<sup>89</sup> See *id.*

and FINRA's response to the comments, the Commission finds that the proposal, as modified by Partial Amendment No. 1, is consistent with the requirements of the Exchange Act and the rules and regulations thereunder that are applicable to a national securities association.<sup>90</sup> Specifically, the Commission finds that the rule change is consistent with Section 15A(b)(6) of the Exchange Act,<sup>91</sup> which requires, among other things, that FINRA rules 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.

As stated in the Notice, FINRA believes that the proposal will "enhance the efficiency" of its communications with the public rules "with no reduction in investor protection."<sup>92</sup> Specifically, FINRA "believes that the proposed rule change will improve efficiency and reduce regulatory burden by reducing the filing requirements applicable to retail communications distributed by members and streamlining the content and disclosure requirements for retail communications that include bond mutual fund volatility ratings, while maintaining necessary investor protections."<sup>93</sup> With respect to the proposal for amending the new member filing requirements in FINRA Rule 2210(c)(1)(A), FINRA stated in its response upon consideration of the comments that were filed in opposition to the proposal, that "it is more prudent to defer making the change to post-use filing of new member retail communications at this time."<sup>94</sup> It therefore filed Partial Amendment No. 1 on September 1, 2016, in which it proposed that the new member pre-use filing requirements in FINRA Rule 2210(c)(1)(A) remain unchanged.<sup>95</sup>

Taking into consideration the comments and FINRA's response and proposed partial amendment, the Commission believes that the proposal is consistent with the Exchange Act. The Commission believes that the proposal promotes regulatory efficiency by selectively streamlining content and disclosure requirements for retail communications without undermining strong regulatory protections for investors.

<sup>90</sup> In approving this rule change, the Commission has considered the rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>91</sup> 15 U.S.C. 78o-3(b)(6).

<sup>92</sup> Notice at 39081.

<sup>93</sup> Notice at 39084.

<sup>94</sup> FINRA Letter at 3.

<sup>95</sup> Partial Amendment No. 1.

The Commission further believes that FINRA's response, as discussed in more detail above, appropriately addressed commenters' concerns and adequately explained its reasons for modifying its proposal to maintain the current pre-use filing requirement for new member retail communications. The Commission believes that this modification responds to one of the primary concerns raised by the commenter opposing the proposal on the grounds that changing to a post-use filing requirement for new members would not provide adequate investor protection, and that a pre-use filing requirement has a deterrent effect on bad actors.<sup>96</sup> As noted above, FINRA plans to continue to "accumulate more data on the frequency and types of revisions required for new member retail communications before determining whether to consider any changes to this requirement in the future."<sup>97</sup> The Commission believes that the approach proposed by FINRA is appropriate and designed to protect investors and the public interest, consistent with Section 15A(b)(6) of the Exchange Act. For these reasons, the Commission finds that the proposed rule change is consistent with the Exchange Act and the rules and regulations thereunder.

#### V. Solicitation of Comments on Partial Amendment No. 1 to the Proposed Rule Change

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposal, as modified by Partial Amendment No. 1, is consistent with the Exchange 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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-FINRA-2016-018 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-2016-018. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will

<sup>96</sup> See PIABA Letter at 2-3.

<sup>97</sup> FINRA Letter at 3.

post all comments on the Commission's Internet Web site (<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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549-1090, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing will also 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-2016-018 and should be submitted on or before October 11, 2016.

#### VI. Accelerated Approval of Proposed Rule Change, as Modified by Partial Amendment No. 1

The Commission finds good cause to approve the proposed rule change, as modified by Partial Amendment No. 1, prior to the thirtieth day after the date of publication of notice of the amended proposal in the **Federal Register**. The revisions made to the proposal in Partial Amendment No. 1 will provide that the current pre-use filing requirement for new member retail communications remains unchanged, as currently set forth in FINRA Rule 2210(c)(1)(A). As noted above, the Commission believes that this modification responds to one of the primary concerns raised by the commenter opposing the proposal on the grounds that changing to a post-use filing requirement for new members would not provide adequate investor protection,<sup>98</sup> and notes that FINRA plans to continue to accumulate more data before determining whether to consider any changes to this requirement in the future.<sup>99</sup>

Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Exchange Act,<sup>100</sup> to approve the proposed rule change, as modified by

<sup>98</sup> See PIABA Letter at 2-3.

<sup>99</sup> See FINRA Letter at 3.

<sup>100</sup> 15 U.S.C. 78s(b)(2).

Partial Amendment No. 1, on an accelerated basis.

## VII. Conclusion

*It is therefore ordered* pursuant to Section 19(b)(2)<sup>101</sup> of the Exchange Act that the proposal (SR-FINRA-2016-018), as modified by Partial Amendment No. 1, be and hereby is approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>102</sup>

**Robert W. Errett,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-78831; File No. SR-NYSEARCA-2016-126]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Deadline for Implementing Rule 6.61(a)(2) and (3) Until September 30, 2016

September 13, 2016.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the “Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on September 6, 2016, NYSE Arca, Inc. (the “Exchange” or “NYSE Arca”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. 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

The Exchange proposes to extend the deadline for implementing Rule 6.61(a)(2) and (3) until September 30, 2016. The proposed rule change is available on the Exchange’s Web site at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, 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, the self-regulatory organization 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 those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

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

###### 1. Purpose

The Exchange is proposing to extend the deadline for implementing Rule 6.61(a)(2) and (3) until September 30, 2016. The Exchange has not met the current implementation deadline of July 31, 2016.

In March 2015, the Commission approved Rule 6.61, which provides a price protection risk mechanism for Market Maker quotes.<sup>4</sup> Rule 6.61 provides two layers of price protection to incoming Market Maker quotes, rejecting those Market Maker quotes that exceed certain parameters, as a risk mitigation tool.<sup>5</sup> The Exchange has implemented the first layer of price protection (the NBBO Reasonability Check) and had until one year from the date of the Approval Order to implement the second layer of protection (the Underlying Stock Price/Strike Price Check) pursuant to

<sup>4</sup> See Securities Exchange Act Release No. 74441 (March 4, 2015), 80 FR 12664 (March 10, 2015) (SR-NYSEArca-2014-150) (Approval Order); see also Securities Exchange Act Release No. 74018 (January 8, 2015), 80 FR 1982 (January 14, 2015) (SR-NYSEArca-2014-150) (Notice).

<sup>5</sup> The first layer of price protection assesses incoming sell quotes against the NBB and incoming buy quotes against the NBO (the “NBBO Price Reasonability Check”). Specifically, Rule 6.61(a)(1) provided that when an NBBO is available, a Market Maker quote would be rejected if it is priced a specified dollar amount or percentage through the contra-side NBBO. The second layer of price protection assesses the price of call or put bids against a specified benchmark (the “Underlying Stock Price/Strike Price Check”), per Rule 6.61(a)(2) and (3). This second layer of protection applies to bids in call options or put options when (1) there is no NBBO available, for example, during pre-opening or prior to conducting a re-opening after a trading halt, or (2) if the NBBO is so wide as to not reflect an appropriate price for the respective options series.

Commentary .01 to Rule 6.61, which was March 4, 2016.<sup>6</sup>

In March 2016, because the Exchange had not yet implemented the Underlying Stock Price/Strike Price Check, the Exchange extended the deadline to implement Rule 6.61(a)(2) and (3) until July 31, 2016 (the “July 31st Deadline”).<sup>7</sup> Subsequent to this extension, the Exchange modified Commentary .01 to Rule 6.61 to exclude from the Underlying Stock Price/Strike Price Check certain securities for which there was no reliable (or in some cases any) last sale data.<sup>8</sup> Although the Exchange had finalized the technology related to the Underlying Stock Price/Strike Price Check, because this technology was packaged in a larger technology release that is currently being rolled out, the Exchange was not able to implement the technology by the July 31st Deadline. The Exchange is in the process of implementing the technology release that includes the Underlying Stock Price/Strike Price Check and plans to complete this implementation no later than the end of September 2016. The Exchange believes the proposed extension of the July 31st Deadline until September 30, 2016 would provide the Exchange with sufficient time to implement the functionality related to the rule. Moreover, the proposed change would update the rule to reflect the extended deadline, thus making clear to investors and the public that the Underlying Stock Price/Strike Price Check is not yet implemented.<sup>9</sup>

###### 2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the

<sup>6</sup> See Securities Exchange Act Release No. 75156 (June 11, 2015), 80 FR 34756 (June 17, 2015) (SR-NYSEArca-2015-45).

<sup>7</sup> See Securities Exchange Act Release No. 77357 (March 14, 2016), 81 FR 14912 (March 18, 2016) (SR-NYSEARCA-2016-41).

<sup>8</sup> See Securities Exchange Act Release No. 77748 (April 29, 2016), 81 FR 27178 (May 5, 2016) (SR-NYSEARCA-2016-57).

<sup>9</sup> The Exchange has issued Trader Updates informing its market participants that the functionality related to the Underlying Stock Price/Strike Price Check is not yet available but is currently being implemented (together with the other technology updates with which it was packaged). See, e.g., Trader Updates regarding Enhancements to Risk Control Functionality in Enhanced Certification Environment, dated 6/6/16, available here, <https://www.nyse.com/publicdocs/nyse/notifications/trader-update/NYSE%20Amex%20and%20Arca%20%20Enhanced%20Risk%20Controls%20in%20Enhanced%20Cert.pdf> and regarding Risk Controls/Series Lookup Table Enhancements, dated 8/4/16, available here, <https://www.nyse.com/publicdocs/nyse/notifications/trader-update/NYSE%20Arca%20Options%20%20Risk%20Controls%20Release.pdf>.

<sup>101</sup> *Id.*

<sup>102</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.