

Communications With the Public

SEC Approves Amendments to Rules Governing Communications With the Public

Effective Date: January 9, 2017

Executive Summary

The SEC has approved amendments to FINRA rules governing communications with the public.¹ The amendments 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 rule text is attached as Attachment A.

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Background and Discussion

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.² 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, the report 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.

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Notice Type

- ▶ Rule Amendment

Suggested Routing

- ▶ Advertising
- ▶ Compliance
- ▶ Investment Companies
- ▶ Legal
- ▶ Operations
- ▶ Registered Representatives
- ▶ Senior Management

Key Topics

- ▶ Communications with the Public
- ▶ Supervision

Referenced Rules & Notices

- ▶ FINRA Rule 2210
- ▶ FINRA Rule 2213
- ▶ FINRA Rule 2214
- ▶ Notice to Members 99-79
- ▶ Notice to Members 00-23
- ▶ Notice to Members 04-86

Pursuant to these recommendations, FINRA is adopting amendments to the filing requirements in FINRA Rules 2210 and 2214 and to the content and disclosure requirements in FINRA Rule 2213.³

Amendments

Investment Company Shareholder Reports

FINRA currently requires firms 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.⁴ FINRA has required the MDFP to be filed because firms 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 firms 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,⁵ and the MDFP typically presents less investor risk than other types of 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, the amended rule excludes from the filing requirements annual or semi-annual reports that have been filed with the SEC in compliance with applicable requirements.⁶ The amendment is consistent with other filing exclusions already in the rule, including prospectuses, fund profiles, offering circulars and similar documents that have been filed with the SEC.

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 have been filed with the SEC or any state, **or that is exempt from such registration ...**" (emphasis supplied). FINRA has always intended for this provision to exclude issuer-prepared offering documents concerning securities offerings that are exempt from registration.

Amended Rule 2210(c)(7)(F) makes this intent more clear. As revised, Rule 2210(c)(7)(F) excludes from filing, among other things, “similar offering documents concerning securities offerings that are exempt from SEC or state registration requirements.” While the amendment clarifies this filing exclusion, it does not represent a substantive change to the current exclusion from filing under Rule 2210 for unregistered securities’ offering documents.⁷

Backup Material for Investment Company Performance Rankings and Comparisons

Current rules require a firm that files a retail communication for a registered investment company that contains a fund performance ranking or performance comparison to include a copy of the ranking or comparison used in the retail communication.⁸ 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. The amended rules therefore eliminate the requirement to file ranking and comparison backup material and instead expressly require firms to maintain back-up materials as part of their records.⁹

Generic Investment Company Communications

FINRA Rule 2210(c)(3)(A) requires firms to file within 10 business days of first use retail communications “concerning” registered investment companies. The amended filing requirement covers only retail communications that promote a specific registered investment company or family of registered investment companies. Thus, the amended rule no longer requires firms to file generic investment company retail communications.

An example of such a generic communication is a retail communication that describes different mutual fund types (*e.g.*, a description of “balanced mutual funds”) 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 firm offers, and thus does not present the same risks of including potentially misleading information as 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 particular investments are made or particular investment strategies or styles are undertaken. Pursuant to FINRA Rules 2210(c)(3)(C) and 2214(a), firms 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 firms to provide FINRA with access to the tool itself, and provide customers with specific disclosures when firms communicate about the tool, use the tool or provide written reports generated by the tool.

Since Rule 2214 became effective in 2005,¹⁰ FINRA has found that firms 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. Given this history and in light of the investor protection afforded by other content standards and the requirement that firms provide access to the tools and their output upon request of FINRA staff, the amended Rule 2214 eliminates the filing requirements for investment analysis tool report templates and retail communications concerning such tools and instead requires firms to provide FINRA staff with access to investment analysis tools upon request.¹¹

Filing Exclusion for Templates

Currently, firms 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.¹² However, firms are required to refile previously filed retail communications that are subject to filing under FINRA Rule 2210(c) to the extent that the firm has updated any narrative information contained in the prior filing. Often these refilled 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, firms often will update narrative information concerning a registered investment company, such as a description of a fund's investment objectives, based on information that comes from the fund's regulatory documents filed with the SEC.

Accordingly, the amended rule expands the template filing exclusion also to allow firms 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 comes from a registered investment company's regulatory documents filed with the SEC.¹³

This filing exclusion also applies to updates supplied by a third-party data provider, so long as its information comes from SEC filings. However, to the extent that a firm is relying on a third-party data provider to furnish these updates, the firm should obtain assurances from the data provider regarding the quality of the data and its consistency with the SEC source data.

Bond Mutual Fund Volatility Ratings

FINRA Rule 2213 permits firms 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. Firms 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.¹⁴

Despite the potential value to investors, FINRA has found that, since Rule 2213 first became effective in 2000,¹⁵ firms have rarely, if ever, filed communications that contain bond fund volatility ratings. In general, in the few cases in which firms filed such communications with FINRA, the staff has found that they have met applicable standards.

Amended Rule 2213 modifies the requirements to use bond fund volatility ratings while maintaining investor protections. Consistent with the filing requirements for other retail communications about specific registered investment companies, firms are no longer required to accompany or precede a retail communication that includes a bond fund volatility rating with a prospectus for the fund. Firms also may file these communications within 10 business days of first use rather than prior to use.¹⁶

The amendments also streamline the content and disclosure requirements. In particular, the amendments 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.

Endnotes

1. See Securities Exchange Act Release No. 78823 (September 13, 2016), 81 FR 64240 (September 19, 2016) (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).
2. See [Retrospective Rule Report, Communications with the Public](#), December 2014.
3. Stakeholders commenting on the retrospective rule review also recommended that FINRA revise Rule 2210's content standards to address other issues, such as the amount of disclosure required in communications with the public and the standards governing online, mobile and social media communications. FINRA is considering whether to provide additional guidance or propose additional changes to Rule 2210 in response to these comments.
4. 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 firm uses a shareholder report as sales material with prospective investors, the firm must file the management’s discussion of fund performance (MDFP) portion of the report (as well as any supplemental sales material attached to or distributed with the report) with the Department.”).
5. See Section 30 of the Investment Company Act of 1940 and Rules 30a-1 and 30b1-1 thereunder.
6. See amendments to FINRA Rule 2210(c)(7)(F). To the extent that a firm distributes or attaches registered investment company sales material along with the fund’s shareholder report, such material remains subject to filing under Rule 2210.
7. Firms may be required to file unregistered securities offering documents with FINRA pursuant to FINRA Rules 5122 or 5123.
8. See FINRA Rule 2210(c)(3)(A).
9. See amendments to FINRA Rules 2210(b)(4)(A)(vi) and 2210(c)(3)(A).
10. See [Notice to Members 04-86](#) (November 2004).
11. See amendments to FINRA Rules 2210(c)(3)(C) and 2214(a).
12. See FINRA Rule 2210(c)(7)(B).
13. See amendments to FINRA Rule 2210(c)(7)(B).
14. FINRA Rules 2210(c)(2)(C) and 2213(b) and (c).
15. See [Notice to Members 00-23](#) (April 2000).
16. See amendments to FINRA Rules 2210(c) and 2213(b). This change relates only to Rule 2213 and does not affect a firm’s obligation to deliver a prospectus for shares issued by companies registered under the Securities Act of 1933 or the Investment Company Act of 1940.

ATTACHMENT A

Below is the text of the rule change. New language is underlined; deletions are in brackets.

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2000. DUTIES AND CONFLICTS

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2200. COMMUNICATIONS AND DISCLOSURES

2210. Communications with the Public

(a) No Change.

(b) Approval, Review and Recordkeeping

(1) through (3) No Change.

(4) Recordkeeping

(A) Members must maintain all retail communications and institutional communications for the retention period required by SEA Rule 17a-4(b) and in a format and media that comply with SEA Rule 17a-4. The records must include:

(i) through (iii) No Change.

(iv) information concerning the source of any statistical table, chart, graph or other illustration used in the communication; [and]

(v) for any retail communication for which principal approval is not required pursuant to paragraph (b)(1)(C), the name of the member that filed the retail communication with the Department, and a copy of the corresponding review letter from the Department; and

(vi) for any retail communication that includes or incorporates a performance ranking or performance comparison of a registered investment company, a copy of the ranking or performance used in the retail communication.

(B) No Change.

(c) Filing Requirements and Review Procedures

(1) No Change.

(2) Requirement to File Certain Retail Communications Prior to First Use

At least 10 business days prior to first use or publication (or such shorter period as the Department may allow), a member must file the following retail communications with the Department and withhold them from publication or circulation until any changes specified by the Department have been made:

(A) through (B) No Change.

[(C) Retail communications concerning bond mutual funds that include or incorporate bond mutual fund volatility ratings, as defined in Rule 2213.]

(3) Requirement to File Certain Retail Communications

Within 10 business days of first use or publication, a member must file the following communications with the Department:

(A) Retail communications [concerning] that promote or recommend a specific registered investment company or family of registered investment companies (including mutual funds, exchange-traded funds, variable insurance products, closed-end funds, and unit investment trusts) not included within the requirements of paragraphs (c)(1) or (c)(2). [The filing of any retail communication that includes or incorporates a performance ranking or performance comparison of the investment company with other investment companies must include a copy of the ranking or comparison used in the retail communication.]

(B) No Change.

[(C) Any template for written reports produced by, or retail communications concerning, an investment analysis tool, as such term is defined in Rule 2214.]

[(D)C] Retail communications concerning collateralized mortgage obligations registered under the Securities Act.

[(E)D] Retail communications concerning any security that is registered under the Securities Act 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, not included within the requirements of paragraphs (c)(1), (c)(2) or subparagraphs (A) through [(D)C] of paragraph (c)(3).

(4) through (6) No Change.

(7) Exclusions from Filing Requirements

The following communications are excluded from the filing requirements of paragraphs (c)(1) through (c)(4):

(A) No Change.

(B) Retail communications that are based on templates that were previously filed with the Department the changes to which are limited to:

(i) updates of more recent statistical or other non-narrative information; and

(ii) non-predictive narrative information that describes market events during the period covered by the communication or factual changes in portfolio composition or is sourced from a registered investment company's regulatory documents filed with the SEC.

(C) through (E) No Change.

(F) Prospectuses, preliminary prospectuses, fund profiles, offering circulars, annual or semi-annual reports and similar documents that have been filed with the SEC or any state in compliance with applicable requirements, [or that is] similar offering documents concerning securities offerings that are exempt from [such] SEC and state registration requirements, and free writing prospectuses that are exempt from filing with the SEC, except that an investment company prospectus published pursuant to Securities Act Rule 482 and a free writing prospectus that is required to be filed with the SEC pursuant to Securities Act Rule 433(d)(1)(ii) will not be considered a prospectus for purposes of this exclusion.

(G) through (O) No Change.

(8) through (9) No Change.

(d) through (g) No Change.

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2213. Requirements for the Use of Bond Mutual Fund Volatility Ratings

(a) No Change.

(b) Prohibitions on Use

Members and persons associated with a member may distribute a retail communication that includes [use] a bond mutual fund volatility rating [only in a communication that is accompanied or preceded by a prospectus for the bond mutual fund (“supplemental sales literature”) and] only when the following requirements are satisfied:

(1) No Change.

(2) The retail communication[supplemental sales literature] incorporates the most recently available rating and reflects information that, at a minimum, is current to the most recently completed calendar quarter ended prior to use.

(3) The criteria and methodology used to determine the rating must be based exclusively on objective, quantifiable factors. The rating and the [D]disclosure [Statement] that accompanies the rating must be clear, concise, and understandable.

(4) The retail communication[supplemental sales literature] conforms to the disclosure requirements described in paragraph (c).

(5) No Change.

(c) Disclosure Requirements

[(1) Supplemental sales literature containing a bond mutual fund volatility rating shall include a Disclosure Statement containing all the information required by this Rule. The Disclosure Statement may also contain any additional information that is relevant to an investor’s understanding of the rating.]

[(2) Supplemental sales literature containing a bond mutual fund volatility rating shall contain all current bond mutual fund volatility ratings that have been issued with respect to the fund. Information concerning multiple ratings may be combined in the Disclosure Statement, provided that the applicability of the information to each rating is clear.]

[(3)1] [All bond mutual fund volatility ratings shall be contained within the text of the Disclosure Statement.] The following disclosures shall be provided with respect to each [such] bond mutual fund volatility rating:

(A) the name of the entity that issued the rating;

(B) the most current rating and date of the current rating[, with an explanation of the reason for any change in the current rating from the most recent prior rating];

(C) a link to, or website address for, a website that includes the criteria and methodologies used to determine the rating;

[(C)D] a description of the rating in narrative form, containing the following disclosures:

(i) a statement that there is no standard method for assigning ratings;

[(ii) a description of the criteria and methodologies used to determine the rating;]

[(iii) a statement that not all bond funds have volatility ratings;]

(ii[v]) whether consideration was paid in connection with obtaining the issuance of the rating;

(iii[v]) a description of the types of risks the rating measures (e.g., short-term volatility); and

[(vi) a statement that the portfolio may have changed since the date of the rating; and]

(iv[ii]) a statement that there is no guarantee that the fund will continue to have the same rating or perform in the future as rated.

2214. Requirements for the Use of Investment Analysis Tools

(a) General Considerations

This Rule provides a limited exception to Rule 2210(d)(1)(F). No member may imply that FINRA endorses or approves the use of any investment analysis tool or any recommendation based on such a tool. A member that offers or intends to offer an investment analysis tool under this Rule (whether customers use the member's tool independently or with assistance from the member) must[, within 10 business days of first use, (1)] provide FINRA's Advertising Regulation Department ("Department") access to the investment analysis tool upon request[and, (2) pursuant to Rule 2210(c)(3)(C), file with the Department any template for written reports produced by, or retail communications concerning, the tool].

(b) through (d) No Change.

• • • **Supplementary Material:** -----

.01 through .07 No Change.
