

Required fields are shown with yellow backgrounds and asterisks.

Page 1 of * 143	SECURITIES AND EXCHANGE COMMISSION WASHINGTON, D.C. 20549 Form 19b-4	File No.* SR - 2016 - * 018 Amendment No. (req. for Amendments *)
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Filing by Financial Industry Regulatory Authority  
Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial * <input checked="" type="checkbox"/>	Amendment * <input type="checkbox"/>	Withdrawal <input type="checkbox"/>	Section 19(b)(2) * <input checked="" type="checkbox"/>	Section 19(b)(3)(A) * <input type="checkbox"/>	Section 19(b)(3)(B) * <input type="checkbox"/>
Pilot <input type="checkbox"/>	Extension of Time Period for Commission Action * <input type="checkbox"/>	Date Expires * <input type="text"/>	Rule <input type="checkbox"/> 19b-4(f)(1) <input type="checkbox"/> 19b-4(f)(4) <input type="checkbox"/> 19b-4(f)(2) <input type="checkbox"/> 19b-4(f)(5) <input type="checkbox"/> 19b-4(f)(3) <input type="checkbox"/> 19b-4(f)(6)		

Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010	Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934
Section 806(e)(1) * <input type="checkbox"/>	Section 806(e)(2) * <input type="checkbox"/>
	Section 3C(b)(2) * <input type="checkbox"/>

Exhibit 2 Sent As Paper Document <input type="checkbox"/>	Exhibit 3 Sent As Paper Document <input type="checkbox"/>
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**Description**

Provide a brief description of the action (limit 250 characters, required when Initial is checked \*).

Proposed Rule Change to Amend 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)

**Contact Information**

Provide the name, telephone number, and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the action.

First Name \* Philip    Last Name \* Shaikun  
 Title \* Vice President and Associate General Counsel  
 E-mail \* philip.shaikun@finra.org  
 Telephone \* (202) 728-8451    Fax (202) 728-8264

**Signature**

Pursuant to the requirements of the Securities Exchange Act of 1934,

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

(Title \*)  
 Senior Vice President and Deputy General Counsel

Date 05/25/2016  
 By Patrice Gliniecki  
 (Name \*)

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

Patrice Gliniecki,

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFF website.

**Form 19b-4 Information \***

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The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

**Exhibit 1 - Notice of Proposed Rule Change \***

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 1A- Notice of Proposed Rule Change, Security-Based Swap Submission, or Advance Notice by Clearing Agencies \***

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change, security-based swap submission, or advance notice being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications**

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Exhibit Sent As Paper Document

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

**Exhibit 3 - Form, Report, or Questionnaire**

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Exhibit Sent As Paper Document

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

**Exhibit 4 - Marked Copies**

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

**Exhibit 5 - Proposed Rule Text**

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The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

**Partial Amendment**

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

**1. Text of the Proposed Rule Change**

(a) Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act,” “Exchange Act” or “SEA”),<sup>1</sup> Financial Industry Regulatory Authority, Inc. (“FINRA”) is filing with the Securities and Exchange Commission (“SEC” or “Commission”) 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 text of the proposed rule change is attached as Exhibit 5.

(b) Not applicable.

(c) Not applicable.

**2. Procedures of the Self-Regulatory Organization**

At its meeting on April 15, 2015, the FINRA Board of Governors authorized the filing of the proposed rule change with the SEC; no other action by FINRA is necessary for the filing of the proposed rule change.

If the Commission approves the proposed rule change, FINRA will announce the implementation 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 no later than 180 days following publication of the Regulatory Notice announcing Commission approval.

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

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

(a) Purpose

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>2</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.

Proposed Amendments

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

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<sup>2</sup> See Retrospective Rule Report, Communications with the Public, December 2014.

disseminated retail communications, such as generally accessible websites, print media communications, and television and radio commercials.

While FINRA believes 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, 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 website 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 website. Such a delay may hinder its ability to communicate important information to its existing and prospective customers.

FINRA believes it can 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 has 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 proposes 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>3</sup>

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<sup>3</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.

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>4</sup> FINRA has 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>5</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

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<sup>4</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 (MDFP) portion of the report (as well as any supplemental sales material attached to or distributed with the report) with the Department.").

<sup>5</sup> See Section 30 of the Investment Company Act of 1940 and Rules 30a-1 and 30b1-1 thereunder.

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>6</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. 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 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,

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<sup>6</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.

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>7</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>8</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

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<sup>7</sup> See FINRA Rule 2210(c)(3)(A).

<sup>8</sup> See proposed amendments to FINRA Rules 2210(b)(4)(A)(vi) and 2210(c)(3)(A).



companies. Thus, members would no longer be required to file generic investment company retail communications.

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>9</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

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<sup>9</sup> See Notice to Members 04-86 (November 2004).

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>10</sup>

#### Filing Exclusion for Templates

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>11</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

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<sup>10</sup> See proposed amendments to FINRA Rules 2210(c)(3) and 2214(a).

<sup>11</sup> See FINRA Rule 2210(c)(7)(B).

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>12</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

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<sup>12</sup> See proposed amendments to FINRA Rule 2210(c)(7)(B).

withhold them from publication or circulation until any changes specified by FINRA have been made.<sup>13</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>14</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

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<sup>13</sup> FINRA Rules 2210(c)(2)(C) and 2213(b) and (c).

<sup>14</sup> See Notice to Members 00-23 (April 2000).

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>15</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. 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

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<sup>15</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.

requirement to be an effective investor protection approach for most retail communications with similar risk profiles.<sup>16</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 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,

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<sup>16</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.

or website address for, a website 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 separate website.

As noted in Items 2 of this filing, if the Commission approves the proposed rule change, FINRA will announce the implementation 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 no later than 180 days following publication of the Regulatory Notice announcing Commission approval.

(b) Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>17</sup> which requires, among other things, that FINRA rules

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<sup>17</sup> 15 U.S.C. 78o-3(b)(6).

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 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.

**4. Self-Regulatory Organization's Statement on Burden on Competition**

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. FINRA has undertaken an economic impact assessment, as set forth below, to analyze the regulatory need for the proposed rulemaking, its potential economic impacts, including anticipated costs and benefits, and the alternatives FINRA considered in assessing how to best meet its regulatory objectives.

Economic Impact Assessment

A. Regulatory Need

As discussed previously, based on the retrospective review of rules governing communications with the public, FINRA has identified several areas where updating the rules would better provide information that may be useful to investors while maintaining important investor protections.

B. Economic Baseline

The economic baseline used to evaluate the impact of the proposed amendments is the current regulatory framework. This baseline serves as the primary point of



comparison for assessing economic impacts, including the incremental benefits and costs of the proposed rule change. To better understand the members affected by this proposal and the filings by these members, FINRA reviewed the filing history and its comments on the communications filed in 2014. Based on this review, 770 members filed communications with FINRA in 2014, and approximately 40% to 50% of these members filed communications specific to the requirements in this proposal.

In 2014, 79 members filed communications pursuant to the new firm filing requirement, 183 filed investment company shareholder reports, 155 filed backup material for investment company performance rankings and comparisons, 51 filed communications associated with investment analysis tools, 218 filed updated fund fact sheets or other similar templates, and three filed communications that included bond mutual fund volatility ratings.<sup>18</sup> Approximately 58% of the members that filed communications specific to the requirements in this proposal were small, whereas approximately 19% and 23% of the members were mid-sized and large, respectively.<sup>19</sup> In 2014, these members filed approximately 300 communications pursuant to the new firm filing requirement, 5,000 investment company shareholder reports, 13,500 filings of backup material for investment company performance rankings and comparisons, 590

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<sup>18</sup> FINRA cannot precisely identify the number of members that filed generic investment company communications or the number of such filings. However, based on experience and review of filings in 2014, FINRA believes that the number of members that filed generic communications was approximately the same as the number of members that filed updated fund fact sheets or other similar templates.

<sup>19</sup> Based on FINRA By-Law, Article I (Definitions), members with 150 or fewer registered persons are classified as small, members with 151-499 persons are classified as mid-size, and members with 500 or more persons are classified as large.

filings related to investment analysis tools, and approximately 23,800 filings of applicable templates. These filings were largely concentrated amongst a few members that filed frequently. For example, the 20 members with the highest number of filings overall accounted for over 50% of the filings related to this proposal.

### C. Economic Impacts

The proposed amendments would impact members that are subject to the filing, content and disclosure requirements in this proposal. As discussed above, approximately 40% to 50% of the 770 members that in 2014 filed communications specific to the requirements in this proposal. These members would be impacted directly by the proposed amendments.

#### i. Anticipated Benefits

The amendments will benefit members by reducing their costs associated with the filing requirements in this proposal. These cost savings would include savings on filing fees from the proposed elimination or reduction in the scope of certain filing requirements.

Based on review of communication filings in 2014 and historical experience with such filings, FINRA preliminarily estimates that, as a result of the proposed amendments, there would be a reduction in the filings of investment company shareholder reports of 5,000 filings per year, and a potential decline in the filings of generic investment company communications of approximately 3,000 filings per year. FINRA further estimates that the anticipated decline in filings related to investment analysis tools and filings of templates would be approximately 500 and 13,000 filings per year,

respectively.<sup>20</sup> Overall, FINRA estimates that as a result of the proposed amendments, the total communications filings would be reduced by 21,500 filings per year.

Accordingly, based on an average filing fee of \$185 in 2014, FINRA preliminarily estimates that the proposed amendments would reduce the filing fees for members by approximately \$4 million per year.<sup>21</sup> In addition to this reduction in filing fees, members would likely also benefit from a decrease in other direct costs associated with filings, such as staff, systems and infrastructure costs, or third-party legal and consulting fees associated with the requirements applicable to this proposal. Since these costs account for a significant proportion of members' overall direct costs, any reduction in these costs as a result of the proposed amendments could be material. For example, based on the survey results from the assessment phase of FINRA's retrospective rule review, FINRA estimates that the direct costs other than filing fees (such as staffing, systems and infrastructure costs, third-party legal and consulting fees) account for more than 90% of the overall advertising-related compliance costs for most members that file communications.<sup>22</sup> Accordingly, the overall reduction in direct costs associated with

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<sup>20</sup> Based on staff experience, FINRA believes that some members would continue to file communications even after the elimination of applicable filing requirements. FINRA's estimates for reduction in number of filings attempt to account for such voluntary filings.

<sup>21</sup> As discussed above, the relevant communication filings are largely concentrated amongst a few members that file frequently. Accordingly, the anticipated benefits, including reduction in filing fees and other direct costs associated with filing, would also largely accrue to these frequent filers.

<sup>22</sup> As part of the assessment phase of its retrospective review of FINRA's communications with the public rules, the staff conducted a survey of the entire membership to seek feedback on the effectiveness and efficiency of the rules, including direct and indirect costs associated with the current rules. Based on the survey responses, FINRA estimates that for approximately 52% of the members that file communications with FINRA, direct costs other than filing fees, such as

communication filings could be larger than the anticipated reduction in filing fees discussed above. Moreover, the proposed elimination or reduction in the scope of certain filing requirements may also reduce disruption in members' advertising efforts associated with these filings. In addition, the streamlined disclosure and content requirements for the presentation of bond fund volatility ratings in communications may save members additional costs associated with creating and reviewing disclosure.

The proposed amendments may generate benefits to the public as they may also encourage members to communicate additional valuable information to investors. For example, the elimination of the costs associated with the filing requirement for generic, educational communications regarding investment companies may encourage members to provide more frequent and timely information to investors. Similarly, the changes to the template exclusion from the filing requirement for investment company communications may enable members to provide investors with more timely explanations of market events as well as changes in a fund's portfolio, particularly for those firms that voluntarily file all retail communications prior to use and wait to receive the staff's response letter before distributing retail communications (instead of filing retail communications within 10 days of first use as required). Under the expanded filing exception for templates, it is likely that these firms may distribute the updated communications without choosing to file them, thus allowing them to communicate with investors sooner.

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staff, systems and infrastructure costs, or third-party legal and consulting fees, account for more than 90% of their overall direct costs.

ii. Anticipated Costs

Members that are subject to the filing, content and disclosure requirements in this proposal would likely incur costs associated with updating their policies and procedures. These costs would include training their advertising review and other staff associated with communications with the public. Members may also need to make updates to systems to reflect changes in the filing requirements. FINRA, however, anticipates that these costs would likely be minimal relative to the cost savings from the proposed amendments. FINRA would also incur costs associated with updating its Advertising Regulation Electronic Files (AREF) system as well as training the relevant staff on the amendments in the proposal.

iii. Other Economic Impacts

FINRA also considered the potential negative impacts of the proposed amendments to investors. FINRA believes that the proposed exclusions and streamlining of filing requirements would not diminish investor protection because the applicable communications pose little risk to investors. For example, investment company shareholder reports, generic investment company retail communications, and non-predictive narrative descriptions about market events in report templates generally are low-risk communications.

Some members choose to file some mutual fund advertising materials on a voluntary basis. Members that choose to do so base their decision on business needs and not FINRA requirements. The proposed rule change would not limit the ability of members to continue to make voluntary filings if they should deem them to be valuable.

#### D. Alternatives

In considering how to best meet its regulatory objectives, FINRA considered alternatives to particular features of this proposal. For example, FINRA considered narrowing the new member filing requirement to cover only public websites since new members primarily reach out to their existing and potential customers by developing websites. As discussed in more detail below, PIABA raised concerns about potential investor harm if FINRA only reviews new members' websites without reviewing other types of public media advertising, such as television and radio commercials and newspaper advertisement. FINRA reviewed the communications filing history and its comments on the communications filed by new members and found that a higher proportion of new member communications require revisions to be compliant with the applicable standards, compared to all filed communications. As a result, to maintain the same level of investor protection, FINRA has determined not to narrow the new member filing requirement to public websites.

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

##### Background

In May 2015, FINRA published Regulatory Notice 15-16 (the "Notice"), requesting comment on proposed amendments that would revise the filing requirements in FINRA Rule 2210 and FINRA Rule 2214 and the content and disclosure requirements in FINRA Rule 2213 (the "Notice proposal"). A copy of the Notice is attached as Exhibit 2a. The comment period expired on July 2, 2015. FINRA received 11 comments in response to the Notice. All but one commenter supported the proposal. A list of the commenters in response to the Notice is attached as Exhibit 2b, and copies of the

comment letters received in response to the Notice are attached as Exhibit 2c.<sup>23</sup> A summary of the comments and FINRA's response is provided below.

Continuation of Retrospective Review

While many comments supported the proposal, some commenters recommended that FINRA continue its retrospective review of the communications rules to address other issues. Commenters urged FINRA to update the rules governing social media, mobile devices and electronic communications,<sup>24</sup> performance advertising,<sup>25</sup> the amount of disclosure required in print advertising,<sup>26</sup> the content standards under FINRA Rule 2210(d),<sup>27</sup> and options communications.<sup>28</sup>

Commenters also recommended that FINRA harmonize the differences between its communications rules and SEC rules governing investment adviser communications, particularly with respect to rules governing projections and performance information,<sup>29</sup> and that FINRA update its electronic filing system to allow members to file materials in other than PDF format.<sup>30</sup> Wells Fargo suggested that FINRA clarify what constitutes a “public appearance” under Rule 2210(f)(3). The ICI urged FINRA to codify clear

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<sup>23</sup> See Exhibit 2b for a list of abbreviations assigned to commenters.

<sup>24</sup> See CAI, Fidelity, SIFMA, TD Ameritrade, and Vanguard.

<sup>25</sup> See TD Ameritrade.

<sup>26</sup> See Fidelity and TD Ameritrade.

<sup>27</sup> See FSI.

<sup>28</sup> See TD Ameritrade.

<sup>29</sup> See Fidelity and Wells Fargo.

<sup>30</sup> See CAI.

disclosure standards for retail communications concerning closed-end funds and eliminate the filing requirement for these communications. The CAI recommended that FINRA take a more risk-based approach of differentiating communications that should be filed and reviewed, and those that should not.

While FINRA appreciates these recommendations, FINRA does not believe it is necessary to address all of these issues as part of this proposed rule change. The amendments that FINRA has proposed in this filing are only the first step in addressing the results of the assessment phase of its retrospective review of the communications rules. FINRA continues to consider additional rule changes related to the areas raised by commenters and will address those topics as part of its future proposed rule changes, as appropriate.

#### New Member Filing Requirement

In addition to changing the filing requirement for new members from a pre-use to a post-use requirement, the Notice proposal would have narrowed the types of retail communications subject to this requirement. Currently new members must file all retail communications used in electronic or other public media, including radio and television advertisements, newspaper and magazine ads, and public websites. The Notice proposal would have narrowed the new member filing requirement to cover only public websites.

PIABA urged FINRA not to narrow the current new member filing requirements. PIABA stated that if FINRA reviews only new members' websites without reviewing other types of public media advertising, such as television and radio commercials and newspaper advertisements, investors potentially could be harmed. PIABA also noted that



pre-use filing offers more investor protection than post-use filing, since pre-use filing allows FINRA staff to review communications prior to their distribution.

While the deficiencies noted by FINRA staff on new members' filed communications is still relatively low, the staff does find that a higher percentage of new members' communications require revisions to be compliant with applicable standards as compared with all communications filed with FINRA. Accordingly, FINRA has determined not to narrow the scope of public media communications required to be filed by new members.

Nevertheless, FINRA still believes it is appropriate to allow new members to file these communications on a post-use rather than a pre-use basis. In this regard, a post-use filing requirement allows new members to create and alter their public media communications in a timely manner (such as a change to a new member's website) without the need to wait for FINRA staff review before doing so. In addition, new members still would be required to approve public media communications prior to use, and such communications would remain subject to the communications rules' content standards. FINRA believes this revision appropriately balances the need to protect investors with making its communications rules less burdensome and resource-consuming for members.

#### Filing Exclusion for Shareholder Reports

FINRA currently requires members to file the MDFP portion of registered investment company shareholder reports. The Notice proposal would have amended FINRA Rule 2210(c)(7)(F) to exclude from filing annual and semi-annual shareholder reports that have been filed with the SEC.

Two commenters supported this proposed change on the ground that members are already required to file these reports with the SEC, and filing the MDFP with FINRA is therefore redundant and unnecessary.<sup>31</sup> The ICI noted that the proposed exclusion is somewhat ambiguous, since it appears to apply only if the report has been filed with the SEC prior to or perhaps contemporaneously with making the report available to prospective investors. The ICI noted that SEC rules require funds to file their reports with the SEC “not later than 10 days after the transmission to stockholders.”<sup>32</sup>

PIABA opposed this change. PIABA asserted that SEC staff rarely reviews shareholder reports filed with the SEC given the volume of filings it receives on a daily basis, and that therefore FINRA should continue to require the MDFP to be filed and reviewed by FINRA staff.

FINRA agrees that this proposed change would not require members to file fund shareholder reports prior to or contemporaneously with making the reports available to prospective investors, as long as the reports are filed in compliance with SEC rule requirements. To clarify this intent, FINRA is modifying the proposed amendment to Rule 2210(c)(7)(F) to specify that such reports must be filed with the SEC “in compliance with applicable requirements.”

FINRA 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. FINRA also notes that, while the SEC may not review all securities-related filings contemporaneous with their submission, the staff can review higher risk

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<sup>31</sup> See ICI and Vanguard.

<sup>32</sup> See Investment Company Act Rule 30b2-1(a).

communications as needed. FINRA believes that removing this filing requirement would not harm investors and would allow FINRA to allocate its staff resources more efficiently to focus on reviewing higher risk communications more expeditiously.

#### Backup Ranking Data

The Notice proposal would have eliminated the current requirement to include a copy of an investment company performance ranking or comparison used in any retail communication that contains such a ranking or comparison. TD Ameritrade supported the elimination of this requirement given that this information typically is available online. PIABA opposed this change, apparently believing that it would completely eliminate the requirement to file retail communications that contain performance rankings or comparisons, rather than merely eliminating the requirement to file the backup data.

FINRA continues to believe this change is appropriate and will relieve members of the additional burden of having to file backup ranking data, given the online availability of such data. The proposal will not eliminate the requirement to file retail communications that contain performance rankings or comparisons. In addition, the proposal would require members to maintain the backup materials for inspection. Accordingly, FINRA believes PIABA's concerns are misplaced.

#### Generic Investment Company Communications

Commenters generally supported the proposal to revise the filing requirement for retail communications concerning registered investment companies to cover only those communications that promote or recommend a specific registered investment company or family of registered investment companies.<sup>33</sup>

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<sup>33</sup> See CAI, TD Ameritrade, and Vanguard.

The CAI had a number of recommendations for changes and clarifications. First, it asked FINRA to confirm that the mere mention of the name of an investment company does not necessarily constitute the promotion or recommendation of the investment company, and that this determination needs to be made based on the full context of the communication. Second, it requested that FINRA clarify that the proposed change would exclude from filing generic retail communications concerning variable annuity contracts that do not promote or recommend a particular contract.

Third, it noted that this proposed change might have the unintended effect of increasing compliance costs for members, since members that create generic investment company communications would no longer file them, and thus other members that use these communications would no longer be able to rely on the principal approval exception contained in FINRA Rule 2210(b)(1)(C).<sup>34</sup> The CAI recommended that FINRA revise Rule 2210(b)(1)(C) to create an exception from the principal approval requirements for generic retail communications created by a third party, even if the third party has not filed it with FINRA. The CAI also suggested that FINRA consider creating a principal approval exception for any third-party communication that is reviewed and approved by another member.

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<sup>34</sup> Rule 2210(b)(1)(C) provides that the principal approval requirements do not apply to a retail communication if (i) another member has filed it with FINRA and received a letter from FINRA stating that it appears consistent with applicable standards, and (ii) the member using it in reliance upon this exception has not materially altered it and will not use it in a manner inconsistent with the conditions contained in the FINRA review letter.

The IPA recommended that FINRA create a similar filing exclusion for retail communications concerning unlisted real estate investment trusts (REITs) and direct participation programs (DPPs) that do not promote or recommend a particular product.

The determination of whether a retail communication promotes or recommends a specific registered investment company or family of investment companies will always be a facts-and-circumstances analysis. Accordingly, FINRA does not believe it would be productive to speculate whether particular types of retail communications that mention the name of a specific investment company would have to be filed.

The filing requirement for retail communications concerning registered investment companies applies to communications concerning mutual funds, exchange-traded funds, variable insurance products, closed-end funds, and unit investment trusts.<sup>35</sup> Accordingly, by its terms, this filing requirement would not apply to a retail communication concerning a variable annuity contract unless it promoted or recommended a specific contract or family of such contracts (e.g., a retail communication concerning variable contracts that promoted or recommended a specific insurance company).

FINRA declines to revise the exception from the principal approval requirements for retail communications under FINRA Rule 2210(b)(1)(C). Part of the reason for this exception is that communications covered by this provision must have been filed with FINRA and received a letter stating that the communication appears consistent with applicable standards. FINRA does not believe an exception that excludes this filing requirement would offer the same level of investor protection.

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<sup>35</sup> See FINRA Rule 2210(c)(3)(A).

FINRA also declines to create another filing exclusion for generic retail communications concerning REITs or DPPs. A filing exclusion for retail communications concerning REITs is unnecessary, since FINRA Rule 2210 currently does not require retail communications concerning REITs to be filed. FINRA believes that DPPs often are more complex and less familiar to retail investors than registered investment companies; accordingly FINRA believes that a filing requirement for generic retail communications concerning DPPs still makes sense in light of the investor protection offered by this requirement.

#### Investment Analysis Tools

TD Ameritrade supported the proposed elimination of the current filing requirement for report templates and retail communications concerning investment analysis tools. However, it recommended that FINRA also eliminate the disclosure requirements in FINRA Rule 2214(c) for retail communications that promote investment analysis tools.<sup>36</sup> TD Ameritrade also stated that FINRA staff has inappropriately applied Rule 2214 to retirement planning calculators.

FINRA does not believe it is necessary to revise Rule 2214(c) as suggested. Rule 2214.06 already provides that a retail communication that contains only an incidental

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<sup>36</sup> FINRA Rule 2214(c) requires written reports generated by investment analysis tools and related retail communications to: (1) describe the criteria and methodology used, including the tool's limitations and key assumptions; (2) explain that results may vary with each use and over time; (3) if applicable, describe the universe of investments considered in the analysis, explain how the tool determines which securities to select, disclose if the tool favors certain securities and, if so, explain the reason for the selectivity, and state that other investments not considered may have characteristics similar or superior to those being analyzed; and (4) display a specific legend regarding the hypothetical nature of the projections created by the tool.

reference to an investment analysis tool need not include the disclosures required by Rule 2214(c). In addition, Rule 2214.06 provides that if a retail communication refers to an investment analysis tool in more detail but does not provide access to the tool or the results generated by the tool, the retail communication may exclude some of the disclosures required by Rule 2214(c). FINRA believes this provision already provides appropriate flexibility and regulatory relief for retail communications concerning investment analysis tools.

As for the comment that FINRA staff has inappropriately applied current Rule 2214 to retirement planning calculators, FINRA believes that these concerns are best addressed through discussions with FINRA staff rather than through a proposed change to Rule 2214.

#### Template Filing Exclusion

Multiple commenters supported the proposed change to the current filing exclusion for templates contained in FINRA Rule 2210(c)(7)(B), which currently does not require a member to file a retail communication that is based on a template that was previously filed with FINRA and where the changes are limited to updates of more recent statistical and other non-narrative information.<sup>37</sup> The Notice proposal would have allowed a member that had previously filed a retail communication template also to update non-predictive narrative information that describes market events during the period covered by the communication or factual changes in portfolio composition.

The CAI recommended that FINRA allow members to make non-material changes to narrative disclosures, as well as updates to non-predictive descriptions of

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<sup>37</sup> See CAI, ICI, and TD Ameritrade.

market events and market commentary. Two other commenters recommended that the filing exclusion for templates be revised to allow members to include other non-predictive narrative information, provided that it comes from either an independent data provider or is sourced from an investment company's regulatory documents filed with the SEC.<sup>38</sup>

PIABA opposed the proposed change to the template filing exclusion, arguing that funds sometimes write misleading descriptions of market events to explain losses in a fund's net asset value. PIABA gave as an example of this practice a 2007 FINRA enforcement action involving a fund fact sheet.

FINRA Rule 2210(c)(7)(A) already contains a filing exclusion for retail communications that previously were filed with FINRA and that are used without material change. Accordingly, FINRA does not believe it is necessary to revise the proposed change to Rule 2210(c)(7)(B) to allow non-material changes.

FINRA agrees that it makes little sense for members to refile previously filed templates if the only changes to the template are sourced from an investment company's regulatory documents filed with the SEC. For example, if a fund alters the description of its investment objectives in its prospectus and files these changes with the SEC, and a member wants to make a corresponding change to a previously filed fact sheet concerning the fund, there is little need to file such an update with FINRA.

Accordingly, FINRA is revising its proposed changes to the template filing exclusion also to cover updated information that is sourced from an investment

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<sup>38</sup> See Fidelity and ICI. The ICI suggested that this revision only cover data received from "ranking entities" as that term is defined in FINRA Rule 2212, rather than any third-party data provider.



company's regulatory documents filed with the SEC. FINRA declines to expand this filing exclusion also to cover any information that comes from an independent data provider regardless of its source, as that information is not subject to the same level of regulatory scrutiny as information in documents required by SEC rules. Therefore, if a narrative change to a template is not sourced from SEC filings, FINRA believes that such changes should require the member to refile the template, even if this information comes from an independent third-party data provider.

FINRA recognizes that it is always possible that a member will use this filing exclusion to include non-predictive narrative information that is misleading in nature. Nevertheless, FINRA has found over the years from reviewing thousands of template updates that non-predictive narrative information concerning market events or portfolio composition has rarely generated comments from the staff and generally has been low-risk in nature. Based on this experience, FINRA believes the proposed changes to the template filing exclusion will improve staff efficiency without sacrificing investor protection. Moreover, any updates to templates remain subject to Rule 2210's content standards. Accordingly, if a member did prepare a misleading update to a template, FINRA could still reach that conduct and bring an action for violation of the communications with the public rules.

#### Bond Fund Volatility Ratings

PIABA urged FINRA not to modify Rule 2213's requirements applicable to retail communications that include a bond mutual fund volatility rating. PIABA argued that past FINRA enforcement actions involving the sale of bond funds demonstrate that bond funds should be more highly regulated.

FINRA disagrees with this comment. The proposed changes to Rule 2213 will not eliminate the filing requirement for any retail communication concerning bond funds, regardless of whether such filing includes a volatility rating. Even with the changes, members will still be required to file retail communications that contain a bond fund volatility rating within 10 business days of first use. Moreover, as revised, Rule 2213 would still require members to include many disclosures concerning the risks and limitations of such ratings. Accordingly, FINRA believes that revised Rule 2213 still would offer ample protection to investors and involve FINRA staff review of such communications.

**6. Extension of Time Period for Commission Action**

FINRA does not consent at this time to an extension of the time period for Commission action specified in Section 19(b)(2) of the Act.<sup>39</sup>

**7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)**

Not applicable.

**8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission**

Not applicable.

**9. Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act**

Not applicable.

**10. Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act**

Not applicable.

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<sup>39</sup> 15 U.S.C. 78s(b)(2).

**11. Exhibits**

Exhibit 1. Completed notice of proposed rule change for publication in the Federal Register.

Exhibit 2a. FINRA Regulatory Notice 15-16 (May 2015)

Exhibit 2b. List of comments received in response to FINRA Regulatory Notice 15-16.

Exhibit 2c. Copies of comments received in response to FINRA Regulatory Notice 15-16.

Exhibit 5. Text of the proposed rule change.

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34- ; File No. SR-FINRA-2016-018)

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), 2213 (Requirements for the Use of Bond Mutual Fund Volatility Ratings), and 2214 (Requirements for the Use of Investment Analysis Tools)

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on , 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 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 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).

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

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

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

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>3</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.

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<sup>3</sup> See [Retrospective Rule Report, Communications with the Public](#), December 2014.

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.

### Proposed Amendments

#### 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 websites, print media communications, and television and radio commercials.

While FINRA believes 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, 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 website 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 website. Such a delay may hinder its ability to communicate important information to its existing and prospective customers.

FINRA believes it can 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 has 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 proposes 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>4</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>5</sup> FINRA has 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

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<sup>4</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>5</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 (MDFP) portion of the report (as well as any supplemental sales material attached to or distributed with the report) with the Department.").

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>6</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>7</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. 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.

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<sup>6</sup> See Section 30 of the Investment Company Act of 1940 and Rules 30a-1 and 30b1-1 thereunder.

<sup>7</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.



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). 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>8</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

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<sup>8</sup> See FINRA Rule 2210(c)(3)(A).

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>9</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.

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,

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<sup>9</sup> See proposed amendments to FINRA Rules 2210(b)(4)(A)(vi) and 2210(c)(3)(A).

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>10</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>11</sup>

#### Filing Exclusion for Templates

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>12</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

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<sup>10</sup> See Notice to Members 04-86 (November 2004).

<sup>11</sup> See proposed amendments to FINRA Rules 2210(c)(3) and 2214(a).

<sup>12</sup> See FINRA Rule 2210(c)(7)(B).

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>13</sup>

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<sup>13</sup> See proposed amendments to FINRA Rule 2210(c)(7)(B).

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>14</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>15</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

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<sup>14</sup> FINRA Rules 2210(c)(2)(C) and 2213(b) and (c).

<sup>15</sup> See Notice to Members 00-23 (April 2000).

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>16</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. 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

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<sup>16</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.

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>17</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 to incorporate the most recently available rating and reflect information that,

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<sup>17</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.

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 website address for, a website 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 separate website.

If the Commission approves the proposed rule change, FINRA will announce the implementation 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 no later than 180 days following publication of the Regulatory Notice announcing Commission approval.



2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>18</sup> 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 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.

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

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. FINRA has undertaken an economic impact assessment, as set forth below, to analyze the regulatory need for the proposed rulemaking, its potential economic impacts, including anticipated costs and benefits, and the alternatives FINRA considered in assessing how to best meet its regulatory objectives.

Economic Impact Assessment

1. Regulatory Need

As discussed previously, based on the retrospective review of rules governing communications with the public, FINRA has identified several areas where updating the

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<sup>18</sup> 15 U.S.C. 78o-3(b)(6).

rules would better provide information that may be useful to investors while maintaining important investor protections.

## 2. Economic Baseline

The economic baseline used to evaluate the impact of the proposed amendments is the current regulatory framework. This baseline serves as the primary point of comparison for assessing economic impacts, including the incremental benefits and costs of the proposed rule change. To better understand the members affected by this proposal and the filings by these members, FINRA reviewed the filing history and its comments on the communications filed in 2014. Based on this review, 770 members filed communications with FINRA in 2014, and approximately 40% to 50% of these members filed communications specific to the requirements in this proposal.

In 2014, 79 members filed communications pursuant to the new firm filing requirement, 183 filed investment company shareholder reports, 155 filed backup material for investment company performance rankings and comparisons, 51 filed communications associated with investment analysis tools, 218 filed updated fund fact sheets or other similar templates, and three filed communications that included bond mutual fund volatility ratings.<sup>19</sup> Approximately 58% of the members that filed communications specific to the requirements in this proposal were small, whereas

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<sup>19</sup> FINRA cannot precisely identify the number of members that filed generic investment company communications or the number of such filings. However, based on experience and review of filings in 2014, FINRA believes that the number of members that filed generic communications was approximately the same as the number of members that filed updated fund fact sheets or other similar templates.

approximately 19% and 23% of the members were mid-sized and large, respectively.<sup>20</sup> In 2014, these members filed approximately 300 communications pursuant to the new firm filing requirement, 5,000 investment company shareholder reports, 13,500 filings of backup material for investment company performance rankings and comparisons, 590 filings related to investment analysis tools, and approximately 23,800 filings of applicable templates. These filings were largely concentrated amongst a few members that filed frequently. For example, the 20 members with the highest number of filings overall accounted for over 50% of the filings related to this proposal.

### 3. Economic Impacts

The proposed amendments would impact members that are subject to the filing, content and disclosure requirements in this proposal. As discussed above, approximately 40% to 50% of the 770 members that in 2014 filed communications specific to the requirements in this proposal. These members would be impacted directly by the proposed amendments.

#### i. Anticipated Benefits

The amendments will benefit members by reducing their costs associated with the filing requirements in this proposal. These cost savings would include savings on filing fees from the proposed elimination or reduction in the scope of certain filing requirements.

Based on review of communication filings in 2014 and historical experience with such filings, FINRA preliminarily estimates that, as a result of the proposed amendments,

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<sup>20</sup> Based on FINRA By-Law, Article I (Definitions), members with 150 or fewer registered persons are classified as small, members with 151-499 persons are classified as mid-size, and members with 500 or more persons are classified as large.

there would be a reduction in the filings of investment company shareholder reports of 5,000 filings per year, and a potential decline in the filings of generic investment company communications of approximately 3,000 filings per year. FINRA further estimates that the anticipated decline in filings related to investment analysis tools and filings of templates would be approximately 500 and 13,000 filings per year, respectively.<sup>21</sup> Overall, FINRA estimates that as a result of the proposed amendments, the total communications filings would be reduced by 21,500 filings per year.

Accordingly, based on an average filing fee of \$185 in 2014, FINRA preliminarily estimates that the proposed amendments would reduce the filing fees for members by approximately \$4 million per year.<sup>22</sup> In addition to this reduction in filing fees, members would likely also benefit from a decrease in other direct costs associated with filings, such as staff, systems and infrastructure costs, or third-party legal and consulting fees associated with the requirements applicable to this proposal. Since these costs account for a significant proportion of members' overall direct costs, any reduction in these costs as a result of the proposed amendments could be material. For example, based on the survey results from the assessment phase of FINRA's retrospective rule review, FINRA estimates that the direct costs other than filing fees (such as staffing, systems and infrastructure costs, third-party legal and consulting fees) account for more

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<sup>21</sup> Based on staff experience, FINRA believes that some members would continue to file communications even after the elimination of applicable filing requirements. FINRA's estimates for reduction in number of filings attempt to account for such voluntary filings.

<sup>22</sup> As discussed above, the relevant communication filings are largely concentrated amongst a few members that file frequently. Accordingly, the anticipated benefits, including reduction in filing fees and other direct costs associated with filing, would also largely accrue to these frequent filers.

than 90% of the overall advertising-related compliance costs for most members that file communications.<sup>23</sup> Accordingly, the overall reduction in direct costs associated with communication filings could be larger than the anticipated reduction in filing fees discussed above. Moreover, the proposed elimination or reduction in the scope of certain filing requirements may also reduce disruption in members' advertising efforts associated with these filings. In addition, the streamlined disclosure and content requirements for the presentation of bond fund volatility ratings in communications may save members additional costs associated with creating and reviewing disclosure.

The proposed amendments may generate benefits to the public as they may also encourage members to communicate additional valuable information to investors. For example, the elimination of the costs associated with the filing requirement for generic, educational communications regarding investment companies may encourage members to provide more frequent and timely information to investors. Similarly, the changes to the template exclusion from the filing requirement for investment company communications may enable members to provide investors with more timely explanations of market events as well as changes in a fund's portfolio, particularly for those firms that voluntarily file all retail communications prior to use and wait to receive the staff's response letter before distributing retail communications (instead of filing retail communications within 10 days of first use as required). Under the expanded filing

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<sup>23</sup> As part of the assessment phase of its retrospective review of FINRA's communications with the public rules, the staff conducted a survey of the entire membership to seek feedback on the effectiveness and efficiency of the rules, including direct and indirect costs associated with the current rules. Based on the survey responses, FINRA estimates that for approximately 52% of the members that file communications with FINRA, direct costs other than filing fees, such as staff, systems and infrastructure costs, or third-party legal and consulting fees, account for more than 90% of their overall direct costs.

exception for templates, it is likely that these firms may distribute the updated communications without choosing to file them, thus allowing them to communicate with investors sooner.

ii. Anticipated Costs

Members that are subject to the filing, content and disclosure requirements in this proposal would likely incur costs associated with updating their policies and procedures. These costs would include training their advertising review and other staff associated with communications with the public. Members may also need to make updates to systems to reflect changes in the filing requirements. FINRA, however, anticipates that these costs would likely be minimal relative to the cost savings from the proposed amendments. FINRA would also incur costs associated with updating its Advertising Regulation Electronic Files (AREF) system as well as training the relevant staff on the amendments in the proposal.

iii. Other Economic Impacts

FINRA also considered the potential negative impacts of the proposed amendments to investors. FINRA believes that the proposed exclusions and streamlining of filing requirements would not diminish investor protection because the applicable communications pose little risk to investors. For example, investment company shareholder reports, generic investment company retail communications, and non-predictive narrative descriptions about market events in report templates generally are low-risk communications.

Some members choose to file some mutual fund advertising materials on a voluntary basis. Members that choose to do so base their decision on business needs and

not FINRA requirements. The proposed rule change would not limit the ability of members to continue to make voluntary filings if they should deem them to be valuable.

#### 4. Alternatives

In considering how to best meet its regulatory objectives, FINRA considered alternatives to particular features of this proposal. For example, FINRA considered narrowing the new member filing requirement to cover only public websites since new members primarily reach out to their existing and potential customers by developing websites. As discussed in more detail below, PIABA raised concerns about potential investor harm if FINRA only reviews new members' websites without reviewing other types of public media advertising, such as television and radio commercials and newspaper advertisement. FINRA reviewed the communications filing history and its comments on the communications filed by new members and found that a higher proportion of new member communications require revisions to be compliant with the applicable standards, compared to all filed communications. As a result, to maintain the same level of investor protection, FINRA has determined not to narrow the new member filing requirement to public websites.

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

##### Background

In May 2015, FINRA published Regulatory Notice 15-16 (the "Notice"), requesting comment on proposed amendments that would revise the filing requirements in FINRA Rule 2210 and FINRA Rule 2214 and the content and disclosure requirements in FINRA Rule 2213 (the "Notice proposal"). A copy of the Notice is attached as Exhibit 2a. The comment period expired on July 2, 2015. FINRA received 11 comments in

response to the Notice. All but one commenter supported the proposal. A list of the commenters in response to the Notice is attached as Exhibit 2b, and copies of the comment letters received in response to the Notice are attached as Exhibit 2c.<sup>24</sup> A summary of the comments and FINRA's response is provided below.

#### Continuation of Retrospective Review

While many comments supported the proposal, some commenters recommended that FINRA continue its retrospective review of the communications rules to address other issues. Commenters urged FINRA to update the rules governing social media, mobile devices and electronic communications,<sup>25</sup> performance advertising,<sup>26</sup> the amount of disclosure required in print advertising,<sup>27</sup> the content standards under FINRA Rule 2210(d),<sup>28</sup> and options communications.<sup>29</sup>

Commenters also recommended that FINRA harmonize the differences between its communications rules and SEC rules governing investment adviser communications, particularly with respect to rules governing projections and performance information,<sup>30</sup> and that FINRA update its electronic filing system to allow members to file materials in

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<sup>24</sup> See Exhibit 2b for a list of abbreviations assigned to commenters.

<sup>25</sup> See CAI, Fidelity, SIFMA, TD Ameritrade, and Vanguard.

<sup>26</sup> See TD Ameritrade.

<sup>27</sup> See Fidelity and TD Ameritrade.

<sup>28</sup> See FSI.

<sup>29</sup> See TD Ameritrade.

<sup>30</sup> See Fidelity and Wells Fargo.



other than PDF format.<sup>31</sup> Wells Fargo suggested that FINRA clarify what constitutes a “public appearance” under Rule 2210(f)(3). The ICI urged FINRA to codify clear disclosure standards for retail communications concerning closed-end funds and eliminate the filing requirement for these communications. The CAI recommended that FINRA take a more risk-based approach of differentiating communications that should be filed and reviewed, and those that should not.

While FINRA appreciates these recommendations, FINRA does not believe it is necessary to address all of these issues as part of this proposed rule change. The amendments that FINRA has proposed in this filing are only the first step in addressing the results of the assessment phase of its retrospective review of the communications rules. FINRA continues to consider additional rule changes related to the areas raised by commenters and will address those topics as part of its future proposed rule changes, as appropriate.

#### New Member Filing Requirement

In addition to changing the filing requirement for new members from a pre-use to a post-use requirement, the Notice proposal would have narrowed the types of retail communications subject to this requirement. Currently new members must file all retail communications used in electronic or other public media, including radio and television advertisements, newspaper and magazine ads, and public websites. The Notice proposal would have narrowed the new member filing requirement to cover only public websites.

PIABA urged FINRA not to narrow the current new member filing requirements. PIABA stated that if FINRA reviews only new members’ websites without reviewing

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<sup>31</sup> See CAI.

other types of public media advertising, such as television and radio commercials and newspaper advertisements, investors potentially could be harmed. PIABA also noted that pre-use filing offers more investor protection than post-use filing, since pre-use filing allows FINRA staff to review communications prior to their distribution.

While the deficiencies noted by FINRA staff on new members' filed communications is still relatively low, the staff does find that a higher percentage of new members' communications require revisions to be compliant with applicable standards as compared with all communications filed with FINRA. Accordingly, FINRA has determined not to narrow the scope of public media communications required to be filed by new members.

Nevertheless, FINRA still believes it is appropriate to allow new members to file these communications on a post-use rather than a pre-use basis. In this regard, a post-use filing requirement allows new members to create and alter their public media communications in a timely manner (such as a change to a new member's website) without the need to wait for FINRA staff review before doing so. In addition, new members still would be required to approve public media communications prior to use, and such communications would remain subject to the communications rules' content standards. FINRA believes this revision appropriately balances the need to protect investors with making its communications rules less burdensome and resource-consuming for members.

#### Filing Exclusion for Shareholder Reports

FINRA currently requires members to file the MDFP portion of registered investment company shareholder reports. The Notice proposal would have amended

FINRA Rule 2210(c)(7)(F) to exclude from filing annual and semi-annual shareholder reports that have been filed with the SEC.

Two commenters supported this proposed change on the ground that members are already required to file these reports with the SEC, and filing the MDFP with FINRA is therefore redundant and unnecessary.<sup>32</sup> The ICI noted that the proposed exclusion is somewhat ambiguous, since it appears to apply only if the report has been filed with the SEC prior to or perhaps contemporaneously with making the report available to prospective investors. The ICI noted that SEC rules require funds to file their reports with the SEC “not later than 10 days after the transmission to stockholders.”<sup>33</sup>

PIABA opposed this change. PIABA asserted that SEC staff rarely reviews shareholder reports filed with the SEC given the volume of filings it receives on a daily basis, and that therefore FINRA should continue to require the MDFP to be filed and reviewed by FINRA staff.

FINRA agrees that this proposed change would not require members to file fund shareholder reports prior to or contemporaneously with making the reports available to prospective investors, as long as the reports are filed in compliance with SEC rule requirements. To clarify this intent, FINRA is modifying the proposed amendment to Rule 2210(c)(7)(F) to specify that such reports must be filed with the SEC “in compliance with applicable requirements.”

FINRA has found through its filing program that the MDFPs in shareholder reports rarely have raised issues requiring members to revise or withdraw reports from

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<sup>32</sup> See ICI and Vanguard.

<sup>33</sup> See Investment Company Act Rule 30b2-1(a).

circulation. FINRA also notes that, while the SEC may not review all securities-related filings contemporaneous with their submission, the staff can review higher risk communications as needed. FINRA believes that removing this filing requirement would not harm investors and would allow FINRA to allocate its staff resources more efficiently to focus on reviewing higher risk communications more expeditiously.

#### Backup Ranking Data

The Notice proposal would have eliminated the current requirement to include a copy of an investment company performance ranking or comparison used in any retail communication that contains such a ranking or comparison. TD Ameritrade supported the elimination of this requirement given that this information typically is available online. PIABA opposed this change, apparently believing that it would completely eliminate the requirement to file retail communications that contain performance rankings or comparisons, rather than merely eliminating the requirement to file the backup data.

FINRA continues to believe this change is appropriate and will relieve members of the additional burden of having to file backup ranking data, given the online availability of such data. The proposal will not eliminate the requirement to file retail communications that contain performance rankings or comparisons. In addition, the proposal would require members to maintain the backup materials for inspection. Accordingly, FINRA believes PIABA's concerns are misplaced.

#### Generic Investment Company Communications

Commenters generally supported the proposal to revise the filing requirement for retail communications concerning registered investment companies to cover only those

communications that promote or recommend a specific registered investment company or family of registered investment companies.<sup>34</sup>

The CAI had a number of recommendations for changes and clarifications. First, it asked FINRA to confirm that the mere mention of the name of an investment company does not necessarily constitute the promotion or recommendation of the investment company, and that this determination needs to be made based on the full context of the communication. Second, it requested that FINRA clarify that the proposed change would exclude from filing generic retail communications concerning variable annuity contracts that do not promote or recommend a particular contract.

Third, it noted that this proposed change might have the unintended effect of increasing compliance costs for members, since members that create generic investment company communications would no longer file them, and thus other members that use these communications would no longer be able to rely on the principal approval exception contained in FINRA Rule 2210(b)(1)(C).<sup>35</sup> The CAI recommended that FINRA revise Rule 2210(b)(1)(C) to create an exception from the principal approval requirements for generic retail communications created by a third party, even if the third party has not filed it with FINRA. The CAI also suggested that FINRA consider creating

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<sup>34</sup> See CAI, TD Ameritrade, and Vanguard.

<sup>35</sup> Rule 2210(b)(1)(C) provides that the principal approval requirements do not apply to a retail communication if (i) another member has filed it with FINRA and received a letter from FINRA stating that it appears consistent with applicable standards, and (ii) the member using it in reliance upon this exception has not materially altered it and will not use it in a manner inconsistent with the conditions contained in the FINRA review letter.

a principal approval exception for any third-party communication that is reviewed and approved by another member.

The IPA recommended that FINRA create a similar filing exclusion for retail communications concerning unlisted real estate investment trusts (REITs) and direct participation programs (DPPs) that do not promote or recommend a particular product.

The determination of whether a retail communication promotes or recommends a specific registered investment company or family of investment companies will always be a facts-and-circumstances analysis. Accordingly, FINRA does not believe it would be productive to speculate whether particular types of retail communications that mention the name of a specific investment company would have to be filed.

The filing requirement for retail communications concerning registered investment companies applies to communications concerning mutual funds, exchange-traded funds, variable insurance products, closed-end funds, and unit investment trusts.<sup>36</sup> Accordingly, by its terms, this filing requirement would not apply to a retail communication concerning a variable annuity contract unless it promoted or recommended a specific contract or family of such contracts (e.g., a retail communication concerning variable contracts that promoted or recommended a specific insurance company).

FINRA declines to revise the exception from the principal approval requirements for retail communications under FINRA Rule 2210(b)(1)(C). Part of the reason for this exception is that communications covered by this provision must have been filed with FINRA and received a letter stating that the communication appears consistent with

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<sup>36</sup> See FINRA Rule 2210(c)(3)(A).

applicable standards. FINRA does not believe an exception that excludes this filing requirement would offer the same level of investor protection.

FINRA also declines to create another filing exclusion for generic retail communications concerning REITs or DPPs. A filing exclusion for retail communications concerning REITs is unnecessary, since FINRA Rule 2210 currently does not require retail communications concerning REITs to be filed. FINRA believes that DPPs often are more complex and less familiar to retail investors than registered investment companies; accordingly FINRA believes that a filing requirement for generic retail communications concerning DPPs still makes sense in light of the investor protection offered by this requirement.

#### Investment Analysis Tools

TD Ameritrade supported the proposed elimination of the current filing requirement for report templates and retail communications concerning investment analysis tools. However, it recommended that FINRA also eliminate the disclosure requirements in FINRA Rule 2214(c) for retail communications that promote investment analysis tools.<sup>37</sup> TD Ameritrade also stated that FINRA staff has inappropriately applied Rule 2214 to retirement planning calculators.

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<sup>37</sup> FINRA Rule 2214(c) requires written reports generated by investment analysis tools and related retail communications to: (1) describe the criteria and methodology used, including the tool's limitations and key assumptions; (2) explain that results may vary with each use and over time; (3) if applicable, describe the universe of investments considered in the analysis, explain how the tool determines which securities to select, disclose if the tool favors certain securities and, if so, explain the reason for the selectivity, and state that other investments not considered may have characteristics similar or superior to those being analyzed; and (4) display a specific legend regarding the hypothetical nature of the projections created by the tool.

FINRA does not believe it is necessary to revise Rule 2214(c) as suggested. Rule 2214.06 already provides that a retail communication that contains only an incidental reference to an investment analysis tool need not include the disclosures required by Rule 2214(c). In addition, Rule 2214.06 provides that if a retail communication refers to an investment analysis tool in more detail but does not provide access to the tool or the results generated by the tool, the retail communication may exclude some of the disclosures required by Rule 2214(c). FINRA believes this provision already provides appropriate flexibility and regulatory relief for retail communications concerning investment analysis tools.

As for the comment that FINRA staff has inappropriately applied current Rule 2214 to retirement planning calculators, FINRA believes that these concerns are best addressed through discussions with FINRA staff rather than through a proposed change to Rule 2214.

#### Template Filing Exclusion

Multiple commenters supported the proposed change to the current filing exclusion for templates contained in FINRA Rule 2210(c)(7)(B), which currently does not require a member to file a retail communication that is based on a template that was previously filed with FINRA and where the changes are limited to updates of more recent statistical and other non-narrative information.<sup>38</sup> The Notice proposal would have allowed a member that had previously filed a retail communication template also to

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<sup>38</sup> See CAI, ICI, and TD Ameritrade.



update non-predictive narrative information that describes market events during the period covered by the communication or factual changes in portfolio composition.

The CAI recommended that FINRA allow members to make non-material changes to narrative disclosures, as well as updates to non-predictive descriptions of market events and market commentary. Two other commenters recommended that the filing exclusion for templates be revised to allow members to include other non-predictive narrative information, provided that it comes from either an independent data provider or is sourced from an investment company's regulatory documents filed with the SEC.<sup>39</sup>

PIABA opposed the proposed change to the template filing exclusion, arguing that funds sometimes write misleading descriptions of market events to explain losses in a fund's net asset value. PIABA gave as an example of this practice a 2007 FINRA enforcement action involving a fund fact sheet.

FINRA Rule 2210(c)(7)(A) already contains a filing exclusion for retail communications that previously were filed with FINRA and that are used without material change. Accordingly, FINRA does not believe it is necessary to revise the proposed change to Rule 2210(c)(7)(B) to allow non-material changes.

FINRA agrees that it makes little sense for members to refile previously filed templates if the only changes to the template are sourced from an investment company's regulatory documents filed with the SEC. For example, if a fund alters the description of its investment objectives in its prospectus and files these changes with the SEC, and a

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<sup>39</sup> See Fidelity and ICI. The ICI suggested that this revision only cover data received from "ranking entities" as that term is defined in FINRA Rule 2212, rather than any third-party data provider.

member wants to make a corresponding change to a previously filed fact sheet concerning the fund, there is little need to file such an update with FINRA.

Accordingly, FINRA is revising its proposed changes to the template filing exclusion also to cover updated information that is sourced from an investment company's regulatory documents filed with the SEC. FINRA declines to expand this filing exclusion also to cover any information that comes from an independent data provider regardless of its source, as that information is not subject to the same level of regulatory scrutiny as information in documents required by SEC rules. Therefore, if a narrative change to a template is not sourced from SEC filings, FINRA believes that such changes should require the member to refile the template, even if this information comes from an independent third-party data provider.

FINRA recognizes that it is always possible that a member will use this filing exclusion to include non-predictive narrative information that is misleading in nature. Nevertheless, FINRA has found over the years from reviewing thousands of template updates that non-predictive narrative information concerning market events or portfolio composition has rarely generated comments from the staff and generally has been low-risk in nature. Based on this experience, FINRA believes the proposed changes to the template filing exclusion will improve staff efficiency without sacrificing investor protection. Moreover, any updates to templates remain subject to Rule 2210's content standards. Accordingly, if a member did prepare a misleading update to a template, FINRA could still reach that conduct and bring an action for violation of the communications with the public rules.

Bond Fund Volatility Ratings

PIABA urged FINRA not to modify Rule 2213's requirements applicable to retail communications that include a bond mutual fund volatility rating. PIABA argued that past FINRA enforcement actions involving the sale of bond funds demonstrate that bond funds should be more highly regulated.

FINRA disagrees with this comment. The proposed changes to Rule 2213 will not eliminate the filing requirement for any retail communication concerning bond funds, regardless of whether such filing includes a volatility rating. Even with the changes, members will still be required to file retail communications that contain a bond fund volatility rating within 10 business days of first use. Moreover, as revised, Rule 2213 would still require members to include many disclosures concerning the risks and limitations of such ratings. Accordingly, FINRA believes that revised Rule 2213 still would offer ample protection to investors and involve FINRA staff review of such communications.

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](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 Robert W. Errett, Deputy 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 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-2016-018 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.<sup>40</sup>

Robert W. Errett

Deputy Secretary

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<sup>40</sup> 17 CFR 200.30-3(a)(12).

# Regulatory Notice

15-16

## Communications With the Public

### FINRA Requests Comment on Proposed Amendments to Rules Governing Communications With the Public

Comment Period Expires: July 2, 2015

#### Executive Summary

FINRA is soliciting comment on proposed amendments to the FINRA rules governing communications with the public. The proposed amendments 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 text is attached as Attachment A.

Questions concerning this *Notice* should be directed to:

- ▶ Joseph E. Price, Senior Vice President, Corporate Financing/Advertising Regulation, at (240) 386-4623;
- ▶ Thomas A. Pappas, Vice President, Advertising Regulation, at (240) 386-4553; or
- ▶ Joseph P. Savage, Vice President and Counsel, Regulatory Policy, at (240) 386-4534.

#### Action Requested

FINRA encourages all interested parties to comment on the proposal. Comments must be received by July 2, 2015.

Comments must be submitted through one of the following methods:

- ▶ Emailing comments to [pubcom@finra.org](mailto:pubcom@finra.org); or

#### May 2015

##### Notice Type

- ▶ Request for Comment

##### Suggested Routing

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

##### Key Topic(s)

- ▶ Advertising
- ▶ Communications with the Public
- ▶ Supervision

##### Referenced Rules & Notices

- ▶ FINRA Rule 2210
- ▶ FINRA Rule 2213
- ▶ FINRA Rule 2214

► Mailing comments in hard copy to:

Marcia E. Asquith  
Office of the Corporate Secretary  
FINRA  
1735 K Street, NW  
Washington, DC 20006-1506

To help FINRA process comments more efficiently, persons should use only one method to comment on the proposal.

Important Notes: All comments received in response to this *Notice* will be made available to the public on the FINRA website. In general, FINRA will post comments as they are received.<sup>1</sup>

Before becoming effective, a proposed rule change must be authorized for filing with the Securities and Exchange Commission (SEC) by the FINRA Board of Governors, and then must be filed with the SEC pursuant to Section 19(b) of the Securities Exchange Act of 1934 (SEA).<sup>2</sup>

## Background and Discussion

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>3</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 a combination of rule proposals, guidance and administrative measures.

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.<sup>4</sup>

## Proposed Amendments

### New Firm Communications

New FINRA member firms currently are required 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 websites, print media communications, and television and radio commercials.

The new firm filing requirement predates the Internet, and today new firms primarily reach customers and potential customers through websites. Accordingly, the review of these websites has become the most important objective of this filing requirement. FINRA's comments on new firm filings typically focus on their websites, particularly the websites of new firms with novel or unusual business models. FINRA also believes that the requirement for new firms to file their retail communications at least 10 business days prior to use unnecessarily delays firms' abilities to communicate with the public without a corresponding investor protection benefit beyond what post-use review would provide.

Accordingly, FINRA proposes to narrow the new firm filing requirement by requiring new firms to file only their websites and material changes to their websites within 10 business days of first use for a one-year period. FINRA intends to continue to review new firms' communications for adherence with applicable standards by focusing on new firms' websites after they are filed with FINRA, and reviewing applicants' websites as part of the new firm application process.

### **Investment Company Shareholder Reports**

FINRA has required firms to file the manager'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 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, and thus FINRA has considered the MDFP to be subject to the filing requirement for investment company retail communications. Registered investment companies are also required to file their annual and semi-annual shareholder reports with the SEC.<sup>5</sup>

Because investment companies already must file shareholder reports with the SEC, and because the MDFP typically presents less investor risk than other types of promotional communications concerning investment companies, FINRA proposes to exclude shareholder reports that have been filed with the SEC from the filing requirements. 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.

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

Firms that file 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. 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 available online. FINRA therefore proposes to eliminate the requirement to file ranking and comparison backup material and instead expressly to require firms to maintain back-up materials as part of their records.



### **Generic Investment Company Communications**

Firms must file within 10 business days of first use retail communications “concerning” registered investment companies. FINRA proposes to exclude from the filing requirements generic investment company retail communications that do not promote a particular fund or fund family. An example might include a 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 firm offers, and thus does not present the same risks of including potentially misleading information as promotional communications about specific funds or fund families. FINRA is proposing to require instead the filing of retail communications that “promote or recommend a specific registered investment company or family of registered investment companies.”

### **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. 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. They also must provide FINRA with access to the tool itself, and provide customers with specific disclosures when they communicate about the tool, use the tool or provide written reports generated by the tool. 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, FINRA proposes to eliminate the filing requirements for investment analysis tool report templates and retail communications concerning such tools.

### **Filing Exclusion for Templates**

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. FINRA proposes to expand 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.

### **Bond Mutual Fund Volatility Ratings**

Firms may use retail 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.

Accordingly, FINRA proposes to modify some of the rule's requirements. Consistent with the filing requirements for other retail communications about specific registered investment companies, the proposal would permit firms to file these communications within 10 business days of first use rather than prior to use. The proposal also would streamline the content and disclosure requirements and eliminate the requirement that the rating could only be included in a retail communication that accompanies or is preceded by the bond fund's prospectus.

## Economic Impact Assessment

The assessment phase of FINRA's retrospective review of the communications with the public rules concluded that these rules have been largely effective in meeting their investor protection goals but there are several areas where the investor protection benefits may not align with the associated economic costs. For example, the views expressed by the stakeholders during the assessment suggested that certain filing requirements (*e.g.*, prior to use filing requirements for new members, filings of investment company shareholder reports or generic investment company communications, and filing requirements for investment analysis tools) may be too broad and the direct and indirect costs associated with such filings may be unnecessarily large.

The amendments in this rule proposal are intended to address opportunities to better align the protections to investors with the associated risks of the activities and the costs of compliance.

The proposed amendments would impact firms that are subject to the filing, content and disclosure requirements in this proposal. Approximately 770 firms filed communications material with FINRA in 2014. FINRA estimates that about 80 to 90 percent of these firms filed communications specific to the requirements in this proposal. These firms would be directly impacted by the proposed amendments.

## Anticipated Benefits

The amendments will benefit firms by reducing their costs associated with the specific requirements in this proposal. These cost savings would include savings on filing fees from the proposed elimination or reduction in the scope of certain filing requirements.

FINRA reviewed the communications filing history and related comments on the material filed in 2014. Based on this review, FINRA preliminarily estimates that, as a result of the proposed amendments, there would be a reduction in filings of new member communications of approximately 300 filings per year, a decrease in the filings of

investment company shareholder reports of 5,000 filings per year, and a potential decline in the filings of generic investment company communications of approximately 3,000 filings per year. FINRA further estimates that the anticipated decline in filings related to investment analysis tools and filings of templates would be approximately 500 and 13,000 filings per year, respectively. Overall, FINRA estimates that as a result of the proposed amendments, the total communications material filed would decline by 21,800 filings per year. Accordingly, based on an average filing fee of \$185 in 2014, FINRA estimates that the proposed amendments would reduce the filing fees for firms by approximately \$4 million per year.

In addition to this reduction in filing fees, firms would likely also benefit from a decrease in other direct costs associated with filings, such as staff, systems and infrastructure costs, or third-party consulting fees associated with the requirements applicable to this proposal.

The proposed amendments may also enable firms to communicate additional valuable information to investors (*e.g.*, educational information about mutual funds in general or bond mutual fund volatility ratings), reduce disruption in the firms' marketing activities associated with filings of low-risk communications, and reduce barriers to entry for new firms by streamlining the filing requirement associated with new firm communications.

The ability to provide additional educational material that permits investors to better understand the relative risks, costs, strategies and historical performance of mutual funds may generate a benefit to the public.

### **Anticipated Costs**

Firms that are subject to the filing, content and disclosure requirements in this proposal would likely incur costs associated with updating their policies and procedures. These costs would include training their advertising review and other staff. Firms may also need to update their systems to reflect changes in the filing requirements. FINRA, however, anticipates that these costs would likely be minimal relative to the cost savings from the proposed amendments.

FINRA would also incur costs associated with updating its internal systems as well as training the relevant staff on the amendments in the proposal.

### Other Economic Impacts

The proposed exclusions and streamlining of filing requirements would not diminish investor protection because the applicable communications are either already subject to other regulatory reviews or pose little risk to investors, or FINRA believes that investors can still be protected through a post-use rather than a pre-use filing requirement. For example, investment company shareholder reports are already filed with the SEC and subject to regulatory review, and generic investment company retail communications or non-predictive narrative descriptions about market events in report templates are low-risk communications. Accordingly, excluding such communications from the filing requirements would not compromise investor protection.

FINRA notes that some firms choose to file some mutual fund communications on a voluntary basis. Firms that choose to do so base their decision on business needs and not FINRA requirements. This proposal would not limit the ability of firms to continue to make voluntary filings if they should deem them to be valuable.

### Request for Comment

FINRA requests comment on all aspects of the proposed amendments to the rules governing communications with the public, including the appropriate scope of these amendments and potential impacts on member firms, associated persons and the public. FINRA requests that commenters provide empirical data or other factual support for their comments whenever possible. FINRA specifically requests comments concerning the following issues:

- ▶ In addition to the economic impacts identified in this proposal, are there other significant sources of impacts, including direct or indirect costs and benefits, of the proposed amendments? What are these economic impacts and what factors contribute to them? Please provide data or other supporting evidence.
- ▶ Do firms anticipate altering the delivery method or content of their communications material as a result of the proposed amendments? If so, how would the firms alter their communications with the public?
- ▶ Are there other alternative approaches FINRA should consider to accomplish the goals described in this proposal? If so, what are those alternatives and why are they better suited?
- ▶ Will firms continue to file communications voluntarily? What is an estimate of the amount of materials that might continue to be filed voluntarily? Why might firms continue to file materials that would be exempt from filing under this proposal?

## Endnotes

1. FINRA will not edit personal identifying information, such as names or email addresses, from submissions. Person should submit only information that they wish to make publicly available. *See Notice to Members 03-73* (November 2003) (Online Availability of Comments) for more information.
2. *See* SEA Section 19 and rules thereunder. After a proposed rule change is filed with the SEC, the proposed rule change generally is published for public comment in the Federal Register. Certain limited types of proposed rule changes, however, take effect upon filing with the SEC. *See* SEA Section 19(b)(3) and SEA Rule 19b-4.
3. *See [Retrospective Rule Report, Communications with the Public](#)*, December 2014.
4. 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, the standards applicable to the presentation of performance, and the standards governing online, mobile and social media communications. FINRA is considering whether to propose additional changes to Rule 2210 in response to these comments.
5. *See* Section 30 of the Investment Company Act of 1940 and Rules , 30b1-1 and 30b2-1 thereunder.

## ATTACHMENT A

Below is the text of the proposed rule change. Proposed new language is underlined; proposed deletions are in brackets.

\* \* \* \* \*

### 2000. DUTIES AND CONFLICTS

\* \* \* \* \*

### 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) a copy of the communication and the dates of first and (if applicable) last use of such communication;
- (ii) the name of any registered principal who approved the communication and the date that approval was given;
- (iii) in the case of a retail communication or an institutional communication that is not approved prior to first use by a registered principal, the name of the person who prepared or distributed the communication;
- (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) Members must maintain all correspondence in accordance with the record-keeping requirements of Rules 3110.09 and 4511.

**(c) Filing Requirements and Review Procedures**

**(1) Requirement for Certain Members to File Retail Communications**

(A) For a period of one year beginning on the date reflected in the Central Registration Depository (CRD®) system as the date that FINRA membership became effective, the member must file with the Department [at least] within 10 business days [prior to] of first use [any retail communication that is published or used in any electronic or other public media, including] any generally accessible website[, newspaper, magazine or other periodical, radio, television, telephone or audio recording, video display, signs or billboards, motion pictures, or telephone directories (other than routine listings). To the extent any retail communication that is subject to this filing requirement is a free writing prospectus that has been filed with the SEC pursuant to Securities Act Rule 433(d)(1)(ii), the member may file such retail communication within 10 business days of first use rather than at least 10 business days prior to first use].

(B) Notwithstanding the foregoing provisions, if the Department determines that a member has departed from the standards of this Rule, it may require that such member file all communications, or the portion of such member's communications that is related to any specific types or classes of securities or services, with the Department at least 10 business days prior to first use. The Department will notify the member in writing of the types of communications to be filed and the length of time such requirement is to be in effect. Any filing requirement imposed under this subparagraph will take effect 21 calendar days after service of the written notice, during which time the member may request a hearing under Rules 9551 and 9559.

**(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) Retail communications concerning registered investment companies (including mutual funds, exchange-traded funds, variable insurance products, closed-end funds and unit investment trusts) that include or incorporate performance rankings or performance comparisons of the investment company with other investment companies when the ranking or comparison category is not generally published or is the creation, either directly or indirectly, of the investment company, its underwriter or an affiliate. Such filings must include a copy of the data on which the ranking or comparison is based.

(B) Retail communications concerning security futures. The requirements of this paragraph (c)(2)(B) shall not be applicable to:

(i) retail communications concerning security futures that are submitted to another self-regulatory organization having comparable standards pertaining to such retail communications; and

(ii) retail communications in which the only reference to security futures is contained in a listing of the services of a member.

[(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) Retail communications concerning public direct participation programs (as defined in Rule 2310).

[(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) Filing of Television or Video Retail**

If a member has filed a draft version or “story board” of a television or video retail communication pursuant to a filing requirement, then the member also must file the final filmed version within 10 business days of first use or broadcast.

#### **(5) Date of First Use and Approval Information**

A member must provide with each filing the actual or anticipated date of first use, the name, title and Central Registration Depository (CRD<sup>®</sup>) number of the registered principal who approved the retail communication, and the date that the approval was given.

#### **(6) Spot-Check Procedures**

In addition to the foregoing requirements, each member’s written (including electronic) communications may be subject to a spot-check procedure. Upon written request from the Department, each member must submit the material requested in a spot-check procedure within the time frame specified by the Department.

#### **(7) Exclusions from Filing Requirements**

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

(A) Retail communications that previously have been filed with the Department and that are to be used without material change.

(B) Retail communications that are based on templates that were previously filed with the Department the changes to which are limited to updates of more recent statistical or other non-narrative information and non-predictive narrative information that describes market events during the period covered by the communication or factual changes in portfolio composition.

(C) Retail communications that do not make any financial or investment recommendation or otherwise promote a product or service of the member.

(D) Retail communications that do no more than identify a national securities exchange symbol of the member or identify a security for which the member is a registered market maker.

(E) Retail communications that do no more than identify the member or offer a specific security at a stated price.

(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, or that is exempt from such registration, 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) Retail communications prepared in accordance with Section 2(a)(10)(b) of the Securities Act, as amended, or any rule thereunder, such as Rule 134, and announcements as a matter of record that a member has participated in a private placement, unless the retail communications are related to publicly offered direct participation programs or securities issued by registered investment companies.

(H) Press releases that are made available only to members of the media.

(I) Any reprint or excerpt of any article or report issued by a publisher (“reprint”), provided that:

(i) the publisher is not an affiliate of the member using the reprint or any underwriter or issuer of a security mentioned in the reprint that the member is promoting;

(ii) neither the member using the reprint nor any underwriter or issuer of a security mentioned in the reprint has commissioned the reprinted article or report; and

(iii) the member using the reprint has not materially altered its contents except as necessary to make the reprint consistent with applicable regulatory standards or to correct factual errors.

(J) Correspondence.

(K) Institutional communications.

(L) Communications that refer to types of investments solely as part of a listing of products or services offered by the member.

(M) Retail communications that are posted on an online interactive electronic forum.

(N) Press releases issued by closed-end investment companies that are listed on the New York Stock Exchange (NYSE) pursuant to section 202.06 of the NYSE Listed Company Manual (or any successor provision).

(O) Research reports as defined in NASD Rule 2711 that concern securities that are listed on a national securities exchange, other than research reports required to be filed with the Commission pursuant to Section 24(b) of the Investment Company Act.

#### **(8) Communications Deemed Filed with FINRA**

Although the communications described in paragraphs (c)(7)(H) through (K) are excluded from the foregoing filing requirements, investment company communications described in those paragraphs shall be deemed filed with FINRA for purposes of Section 24(b) of the Investment Company Act and Rule 24b-3 thereunder.

#### **(9) Filing Exemptions**

(A) Pursuant to the Rule 9600 Series, FINRA may exempt a member from the pre-use filing requirements of paragraph (c)(1)(A) for good cause shown.

(B) Pursuant to the Rule 9600 Series, FINRA may conditionally or unconditionally grant an exemption from paragraph (c)(3) for good cause shown after taking into consideration all relevant factors, to the extent such exemption is consistent with the purposes of the Rule, the protection of investors, and the public interest.

(d) through (g) No Change.

\* \* \* \* \*

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

### (a) Definition of Bond Mutual Fund Volatility Ratings

For purposes of this Rule and any interpretation thereof, the term “bond mutual fund volatility rating” is a description issued by an independent third party relating to the sensitivity of the net asset value of a portfolio of an open-end management investment company that invests in debt securities to changes in market conditions and the general economy, and is based on an evaluation of objective factors, including the credit quality of the fund’s individual portfolio holdings, the market price volatility of the portfolio, the fund’s performance, and specific risks, such as interest rate risk, prepayment risk, and currency risk.

### (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) The rating does not identify or describe volatility as a “risk” rating.
- (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 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) The entity that issued the rating provides detailed disclosure on its rating methodology to investors through a toll-free telephone number, a website, or both.

### (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 [and, (2) pursuant to Rule 2210(c)(3)(D), 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.

\* \* \* \* \*

**Exhibit 2b**

**Alphabetical List of Written Comments**

1. David T. Bellaire, Esq., Financial Services Institute (“FSI”) (July 2, 2015)
2. Dorothy Donohue, Investment Company Institute (“ICI”) (July 2, 2015)
3. Alexander C. Gavis, Fidelity Investments (“Fidelity”) (July 2, 2015)
4. Susan Krawczyk and Clifford Kirsch, Sutherland Asbill & Brennan LLP (“CAI”) (July 2, 2015)
5. Robert J. McCarthy, Wells Fargo Advisors, LLC (“Wells Fargo”) (July 1, 2015)
6. Joseph C. Peiffer, Public Investors Arbitration Bar Association (“PIABA”)(July 2, 2015)
7. W.J. Sampson, TD Ameritrade, Inc. (“TD Ameritrade”) (July 1, 2015)
8. Kevin Shields, Investment Program Association (“IPA”) (July 1, 2015)
9. Danielle Nicholson Smith, T. Rowe Price Investment Services, Inc. (“T. Rowe Price”) (June 29, 2015)
10. Heidi Stam, The Vanguard Group (“Vanguard”) (June 29, 2015)
11. Kevin Zambrowicz and Stephen Vogt, Securities Industry and Financial Markets Association (“SIFMA”) (July 2, 2015)

## Exhibit 2c

**VIA ELECTRONIC MAIL**

July 2, 2015

Marcia E. Asquith  
 Office of the Corporate Secretary  
 FINRA  
 1735 K Street, NW  
 Washington, DC 20006-1506

**Re: Regulatory Notice 15-16: Communications With the Public**

Ms. Asquith:

On May 18, 2015 the Financial Industry Regulatory Authority (FINRA) published Regulatory Notice 15-16, a request for comment on proposed amendments to the FINRA rules governing Communications with the Public (Proposed Amendments).<sup>1</sup> The Notice follows a December 2014 report published by FINRA concluding that, while the rules have met their intended investor protection objections, they could benefit from some updating to better align investor protection benefits and economic impacts.<sup>2</sup> The report was based on meetings with members and comments received in response to Regulatory Notice 14-14, published April 8, 2014, a retrospective rule review seeking comment on FINRA's Communications with the Public rules to assess their effectiveness and efficiency.<sup>3</sup>

The Financial Services Institute<sup>4</sup> (FSI) appreciates the opportunity to comment on this important proposal. FSI applauds FINRA's utilization of economic impact assessment and cost-benefit analysis to improve proposed and existing rules. Retrospective rule review is vital to increasing the transparency and accountability of SRO rulemaking, and will ensure that FINRA's rules remain relevant and are appropriately designed to achieve their objectives. The Proposed Amendments will reduce regulatory filing expenses while maintaining robust investor protections, and demonstrate a strong commitment by FINRA to balance these important goals. FSI supports the Proposed Amendments, and looks forward to providing feedback on future changes to the content standards of FINRA's Communications with the Public rules.<sup>5</sup>

<sup>1</sup> FINRA Regulatory Notice 15-16 (May 2015); available at [http://www.finra.org/sites/default/files/notice\\_doc\\_file\\_ref/Regulatory\\_Note\\_15-16.pdf](http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory_Note_15-16.pdf).

<sup>2</sup> FINRA Retrospective Rule Review Report: Communications with the Public (December 2014); available at <https://www.finra.org/sites/default/files/p602011.pdf>.

<sup>3</sup> FINRA Regulatory Notice 14-14 (April 2014); available at <http://www.finra.org/sites/default/files/NoticeDocument/p479810.pdf>.

<sup>4</sup> The Financial Services Institute, Voice of Independent Broker-Dealers and Independent Financial Advisors, was formed on January 1, 2004. Our members are broker-dealers, often dually registered as federal investment advisers, and their independent contractor registered representatives. FSI has 100 Broker-Dealer member firms that have more than 138,000 affiliated registered representatives serving more than 14 million American households. FSI also has more than 35,000 Financial Advisor members.

<sup>5</sup> See RN 15-16 note 4 at p.8 ("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



### Background on FSI Members

The independent broker-dealer (IBD) community has been an important and active part of the lives of American investors for more than 30 years. The IBD business model focuses on comprehensive financial planning services and unbiased investment advice. IBD firms also share a number of other similar business characteristics. They generally clear their securities business on a fully disclosed basis; primarily engage in the sale of packaged products, such as mutual funds and variable insurance products; take a comprehensive approach to their clients' financial goals and objectives; and provide investment advisory services through either affiliated registered investment adviser firms or such firms owned by their registered representatives. Due to their unique business model, IBDs and their affiliated financial advisers are especially well positioned to provide middle-class Americans with the financial advice, products, and services necessary to achieve their financial goals and objectives.

In the U.S., approximately 201,000 independent financial advisers – or approximately 64 percent of all practicing registered representatives – operate in the IBD channel.<sup>6</sup> These financial advisers are self-employed independent contractors, rather than employees of the IBD firms. These financial advisers provide comprehensive and affordable financial services that help millions of individuals, families, small businesses, associations, organizations, and retirement plans with financial education, planning, implementation, and investment monitoring. Clients of independent financial advisers are typically “main street America” – it is, in fact, almost part of the “charter” of the independent channel. The core market of advisers affiliated with IBDs is comprised of clients who have tens and hundreds of thousands as opposed to millions of dollars to invest. Independent financial advisers are entrepreneurial business owners who typically have strong ties, visibility, and individual name recognition within their communities and client base. Most of their new clients come through referrals from existing clients or other centers of influence.<sup>7</sup> Independent financial advisers get to know their clients personally and provide them investment advice in face-to-face meetings. Due to their close ties to the communities in which they operate their small businesses, we believe these financial advisers have a strong incentive to make the achievement of their clients' investment objectives their primary goal.

FSI is the advocacy organization for IBDs and independent financial advisers. Member firms formed FSI to improve their compliance efforts and promote the IBD business model. FSI is committed to preserving the valuable role that IBDs and independent advisers play in helping Americans plan for and achieve their financial goals. FSI's primary goal is to ensure our members operate in a regulatory environment that is fair and balanced. FSI's advocacy efforts on behalf of our members include industry surveys, research, and outreach to legislators, regulators, and policymakers. FSI also provides our members with an appropriate forum to share best practices in an effort to improve their compliance, operations, and marketing efforts.

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communications with the public, the standards applicable to the presentation of performance, and the standards governing online, mobile and social media communications. FINRA is considering whether to propose additional changes to Rule 2210 in response to these comments.”)

<sup>6</sup> Cerulli Associates at <http://www.cerulli.com/>.

<sup>7</sup> These “centers of influence” may include lawyers, accountants, human resources managers, or other trusted advisers.

### Comments

FSI appreciates the opportunity to submit comments on the Proposed Amendments. FSI's comment letter in response to Regulatory Notice 14-14 highlighted several areas where the Communications with the Public rules could be improved. The Proposed Amendments address some of these concerns while simultaneously ensuring that FINRA's regulatory requirements balance efficiency with robust investor protection. FSI supports these changes, and encourages FINRA to continue pursuing changes to other areas of the Communications with the Public rules, including the content standards in FINRA Rule 2210(d).

### Request for Comment:

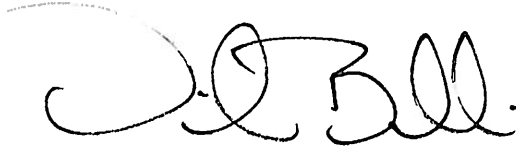
- 1. In addition to the economic impacts identified in this proposal, are there other significant sources of impacts, including direct or indirect costs and benefits, of the proposed amendments? What are these economic impacts and what factors contribute to them? Please provide data or other supporting evidence.**
  - FSI believes that FINRA has correctly and thoroughly identified the most significant costs and benefits associated with the Proposed Amendments. A particularly important benefit identified by FINRA is the benefit the amendments will have for investors. By reducing the cost of filing educational material regarding clients' investment options, the firms and financial advisors will be able to more efficiently make these materials available to investors.
- 2. Do firms anticipate altering the delivery method or content of their communications material as a result of the proposed amendments? If so, how would the firms alter their communications with the public?**
  - While the Proposed Amendments will reduce the costs associated with providing important retail communications to investors, challenges remain relating to certain areas of the Communications with the Public rules, such as the content standards under FINRA Rule 2210(d). FSI looks forward to providing input on proposed changes to these rules.
- 3. Are there other alternative approaches FINRA should consider to accomplish the goals described in this proposal? If so, what are those alternatives and why are they better suited?**
  - FSI supports the approaches advanced in the Proposed Amendments, which seek to address inefficiencies with the current Communications with the Public rules. FSI also appreciates the concurrent release of additional guidance published in Regulatory Notice 15-17. The Proposed Amendments and additional guidance will help clarify ambiguities and address inefficiencies in the application of these rules.
- 4. Will firms continue to file communications voluntarily? What is an estimate of the amount of materials that might continue to be filed voluntarily? Why might firms continue to file materials that would be exempt from filing under this proposal?**
  - Members will continue to file communications with FINRA voluntarily in instances where the retail communication could be considered to "promote or recommend a specific registered investment company or family of registered investment companies." As firms create policies and marketing materials that incorporate the Proposed Amendments, firms are likely to reduce voluntary filing of materials in instances where the language in the Proposed Amendments clearly indicate that the materials are exempted from filing requirements.

Conclusion

We are committed to constructive engagement in the regulatory process and, therefore, welcome the opportunity to work with FINRA on this and other important regulatory efforts.

Thank you for your consideration of our comments. Should you have any questions, please contact me at (202) 803-6061.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. T. Bellaire". The signature is fluid and cursive, with a large initial "D" and "T" followed by "Bellaire".

David T. Bellaire, Esq.  
Executive Vice President & General Counsel



1401 H Street, NW, Washington, DC 20005-2148, USA  
202/326-5800 [www.ici.org](http://www.ici.org)

July 2, 2015

Marcia E. Asquith  
Office of the Corporate Secretary  
FINRA  
1735 K Street, NW  
Washington, DC 20006-1506

Re: Communications with the Public,  
FINRA Regulatory Notice 15-16 (May 2015)

Dear Ms. Asquith:

The Investment Company Institute<sup>1</sup> appreciates the opportunity to comment on FINRA's proposed amendments to certain of its rules governing communications with the public.<sup>2</sup> FINRA's Proposal follows from FINRA's 2014 retrospective review of these and a few other communications with the public rules, which was intended to assess their effectiveness and efficiency.<sup>3</sup> We support FINRA's Proposal. If adopted, it should reduce burdens on FINRA member firms related to the filing

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<sup>1</sup> The Investment Company Institute (ICI) is a leading, global association of regulated funds, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's U.S. fund members manage total assets of \$18.2 trillion and serve more than 90 million U.S. shareholders.

<sup>2</sup> FINRA has specifically proposed amendments to FINRA Rule 2210 (Communications with the Public), FINRA Rule 2213 (Requirements for the Use of Bond Mutual Fund Volatility Ratings), and FINRA Rule 2214 (Requirements for the Use of Investment Analysis Tools) (collectively, the "Rules"). *FINRA Requests Comment on Proposed Amendments to Rules Governing Communications With the Public*, FINRA Regulatory Notice 15-16 (May 2015) (the "Proposal").

<sup>3</sup> FINRA Regulatory Notice 14-14, *FINRA Requests Comment on the Effectiveness and Efficiency of its Communications with the Public Rules* (April 2014), available at [www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p479810.pdf](http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p479810.pdf). FINRA specifically sought comment on FINRA Rule 2210, FINRA Rule 2212 (Use of Investment Company Rankings in Retail Communications), FINRA Rule 2213, FINRA Rule 2214, FINRA Rule 2215 (Communications with the Public Regarding Securities Futures), and FINRA Rule 2216 (Communications with the Public Regarding Collateralized Mortgage Obligations).

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of registered investment company advertisements and sales literature, without an attendant reduction in investor protection. In addition, we recommend that the Proposal be enhanced further to:

- Clarify that a firm may rely on the proposed FINRA filing exclusion for shareholder reports if the firm files them in compliance with applicable SEC requirements.
- Further expand the proposed filing exclusion for retail communications based on templates previously filed with FINRA (the “templates exclusion”) to also include updates to: (i) narrative information that is based on disclosure contained in certain SEC filings (*e.g.*, fund prospectuses); (ii) narrative factual information provided by a “ranking entity;” and (iii) market- and investment-related commentary.
- For closed-end funds, codify a set of clear disclosure standards tailored to their retail communications and eliminate the current filing requirement.

#### **I. Background on the Retrospective Rule Review**

FINRA announced this retrospective rule review in April 2014. In the initial “assessment” phase, FINRA staff solicited input from affected parties (*e.g.*, industry members) and experts and assessed

the existence of duplicative, inconsistent or ineffective regulatory obligations; whether market or other conditions have changed to suggest there are ways to improve the efficiency or effectiveness of a regulatory obligation without loss of investor protections; and potential gaps in the regulatory framework.<sup>4</sup>

In December 2014, FINRA published a Retrospective Rule Review Report (the “Report”), which represented the culmination of the assessment phase.<sup>5</sup> Overall, the Report concluded:

FINRA staff believes that the rules have largely been effective in meeting their intended investor protection objectives. However, the staff believes that the rules and FINRA’s administration of them may benefit from some updating and recalibration to better align the investor protection benefits and the economic impacts.

Among other things, FINRA staff recommended aligning the filing requirements and review process applicable to retail communications with the relative risk of the communications.

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<sup>4</sup> *Id.*

<sup>5</sup> The Report is available at [www.finra.org/sites/default/files/p602011.pdf](http://www.finra.org/sites/default/files/p602011.pdf).

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ICI has been strongly supportive of FINRA's retrospective rule review. ICI submitted a comment letter in May 2014 that offered several comments and recommendations to enhance the effectiveness of these rules while still respecting their investor protection aims, including recommendations related to electronic media, investment analysis tools, streamlining advertisements, consistency and timeliness of the review process, and regulation of closed-end funds' advertisements.<sup>6</sup>

## II. Description of the Proposal

FINRA's Proposal, released in May 2015, is an early public step in the "action" phase of this retrospective rule review<sup>7</sup> and would generally serve to lessen current filing obligations for FINRA member firms. Among other things, the Proposal would:

- Eliminate firms' FINRA filing obligation for shareholder reports filed with the SEC.<sup>8</sup>
- Expand the templates exclusion to allow firms to include updated non-predictive narrative descriptions of market events and factual changes in portfolio composition without having to refile the template.<sup>9</sup>
- Require newly registered FINRA firms to file only their websites and material changes to them within 10 business days of first use.<sup>10</sup>
- Eliminate the current obligation to file backup ranking or comparison information and replace it with an internal recordkeeping requirement.<sup>11</sup>

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<sup>6</sup> Letter from Dorothy Donohue, Acting General Counsel, Investment Company Institute, to Marcia Asquith, Office of the Corporate Secretary, FINRA, dated May 23, 2014, available at [www.finra.org/sites/default/files/NoticeComment/p519148.pdf](http://www.finra.org/sites/default/files/NoticeComment/p519148.pdf).

<sup>7</sup> We look forward to additional action items that may be forthcoming from FINRA. In particular, we request that FINRA continue to evaluate and consider ways of implementing comments received in response to the retrospective rule review with respect to the content, interpretation, and administration of the rules.

<sup>8</sup> Currently, FINRA requires firms to file the manager'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> Currently, firms are not required to file retail communications that are based on templates that were previously filed with FINRA if changed only to update recent statistical or other non-narrative information. Rule 2210(c)(7)(B).

<sup>10</sup> Currently, newly registered FINRA firms are required to file with FINRA retail communications used in any electronic or other public media at least 10 business days prior to use. Rule 2210(c)(1)(A).

<sup>11</sup> Currently, firms that file 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. Rule 2210(c)(3)(A).

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- Narrow the general filing requirement for registered investment companies to cover only retail communications “that promote or recommend a specific registered investment company or family of registered investment companies... .”<sup>12</sup>
- Eliminate the filing requirement for investment analysis tool<sup>13</sup> templates and related retail communications.<sup>14</sup>

### III. ICI Comments on the Proposal

We support FINRA’s Proposal. In crafting it, FINRA has demonstrated care in respecting the Rules’ investor protection aims while also removing unnecessary costly burdens on FINRA member firms. As explained more fully below, we particularly support the elimination of the (FINRA) filing requirement for shareholder reports and the expansion of the templates exclusion. We recommend one technical change to the shareholder report exclusion and certain additional modifications to the templates exclusion. We also reiterate our support for a filing exclusion for closed-end funds’ retail communications.

#### A. The Proposed Filing Exclusion for Investment Company Shareholder Reports

We support the proposed amendment to Rule 2210(c)(7)(F), which would exclude from FINRA’s filing requirements funds’ annual and semi-annual shareholder reports that have been filed with the SEC. This is a change that the ICI has long supported,<sup>15</sup> and we strongly support its inclusion in the Proposal. From a technical perspective, however, we believe there is a potential ambiguity in this proposed provision. Read literally, one might conclude that the exclusion is available only if a fund files its shareholder report with the SEC prior to or perhaps contemporaneously with making the report

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<sup>12</sup> Currently, firms must file within 10 business days of first use retail communications “concerning” registered investment companies, a broader requirement. Rule 2210(c)(3)(A).

<sup>13</sup> Rule 2214(b) defines an investment analysis tool as “an interactive technological tool that produces 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, thereby serving as an additional resource to investors in the evaluation of the potential risks and returns of investment choices.”

<sup>14</sup> Currently, 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 2210(c)(3)(C).

<sup>15</sup> See, e.g., Letter from Dorothy M. Donohue, Senior Associate Counsel, Investment Company Institute, to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, dated December 7, 2011 (maintaining that, because fund shareholder reports are subject to extensive SEC regulation and are filed with the SEC, they are deserving of the same FINRA filing exclusion as fund prospectuses and certain other documents).

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available to prospective investors.<sup>16</sup> But under the applicable SEC rule, funds must file their shareholder reports with the SEC “not later than 10 days *after* the transmission to stockholders... .”<sup>17</sup> (emphasis added) We believe FINRA’s intent was to provide a blanket exclusion from FINRA filing requirements for shareholder reports, provided they are filed in a timely manner with the SEC. The precise timing of filing with the SEC (compared to that of the initial distribution) would not seem to matter. Therefore, we recommend that FINRA amend this provision further to make clear that funds may rely on this new exclusion for their reports (and parts thereof) provided those reports are filed in compliance with applicable SEC requirements.

### **B. The Proposed Changes to the Filing Exclusion for Templates**

We support the proposed amendment to the filing exclusion for templates.<sup>18</sup> This aspect of the Proposal clearly follows from FINRA staff’s recommendation in the Report to “align [ ] the filing requirements and review process with the relative risk of the communications.” We recommend expanding the exclusion in a few respects that would further advance this FINRA staff objective. First, we believe that it would be consistent with the tenor of this exclusion, particularly as proposed to be amended, to permit a registered fund to exclude from filing a template modified to conform its content to that appearing in a fund’s prospectus (as updated) or other documents that have been filed with the SEC. For instance, if a fund updates its risk disclosure, changes the description of an investment strategy, or updates information about portfolio managers in connection with an annual update of its prospectus (or as necessary throughout the course of the year), we recommend permitting the fund to make corresponding revisions to its template-based retail communications without triggering a new filing obligation. Registered funds’ registration statements are subject to detailed SEC requirements,<sup>19</sup> and they (and all of their subsequent amendments) are filed with the SEC.

We also recommend that FINRA exclude from filing those templates with modifications limited to narrative factual changes provided by any “ranking entity.”<sup>20</sup> Ranking entities are independent, recognizable entities that provide periodically updated information for inclusion in some

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<sup>16</sup> A fund could make available its shareholder report to prospective shareholders through a mailing (including e-mail) or by posting it on a website.

<sup>17</sup> Rule 30b2-1(a) under the Investment Company Act of 1940.

<sup>18</sup> See *supra*, note 9 and accompanying text.

<sup>19</sup> See, e.g., SEC Forms N-1A (registration statement for open-end funds) and N-2 (registration statement for closed-end funds). Open-end funds update their registration statements at least annually.

<sup>20</sup> For this purpose, the definition of “ranking entity” could be the same as that found in Rule 2212(a), *i.e.* “any entity that provides general information about investment companies to the public, that is independent of the investment company and its affiliates, and whose services are not procured by the investment company or any of its affiliates to assign the investment company a ranking.”



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funds' templates. As with changes that firms make to templates to conform them to certain SEC-filed documents, these types of changes are also frequent and rather mechanistic in nature.

Finally, we believe that the reference to "non-predictive narrative information that describes market events" in the proposed templates exclusion, depending on how it is construed, could be unduly narrow and difficult for member firms to apply. Our specific concerns are that:

- (i) these narratives are often a mix of *fact and commentary* regarding market events and fund performance and positioning; and
- (ii) commentary may have elements that could be deemed "predictive," even though it is consistent with content standards such as Rule 2210(d)(1)(F).<sup>21</sup>

Because of the difficulty in disentangling descriptions of market events from this type of commentary, and the absence of a clear benefit in requiring firms to do so, we recommend broadening this provision to expressly permit commentary, which would remain subject to Rule 2210's content standards. The upshot of this expansion is that funds could provide in their templates, and update without re-filing, commentary similar to the MDFP included in their shareholder reports. FINRA states in the Proposal that the MDFP "typically presents less investor risk than other types of promotional communications concerning investment companies..." and, as noted above, is proposing that shareholder reports be excluded from filing with FINRA. We agree with this assessment and policy determination, and believe that a similar determination with respect to templates would be appropriate.

A revised version of the templates exclusion, incorporating all of our recommended changes outlined above, is attached.

Our understanding is that under current FINRA staff practice, any time a firm makes the kinds of changes described above to a fact sheet (or similar types of template-based communications), that fact sheet must be re-filed with FINRA. Many of our members produce fact sheets and similar communications for a great number of funds, and update them frequently in a number of routine ways, with only some of those ways covered by this exclusion (even as proposed to be amended). When updates to a piece fall into the categories outlined above, we do not believe that re-filing that piece is necessary for investor protection, given that (i) the changes still would be subject to Rule 2210's principal review and approval requirements, and (ii) FINRA still would have the ability to review such templates through spot checks or targeted examinations, and to take action against members for

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<sup>21</sup> Rule 2210(d)(1)(F) states that "[c]ommunications may not predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast...."



**Attachment**

**Recommended Revisions to FINRA Rule 2210(c)(7)(B)**

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

- (i) more recent statistical or other non-narrative information;
- (ii) narrative information that describes market events and provides related commentary about those events or the investment, including factual changes in portfolio composition, during the period covered by the communication;
- (iii) narrative information that is based on the materials described in Rule 2210(c)(7)(F); or
- (iv) narrative factual information provided by any 'ranking entity,' as defined in Rule 2212(a).

Alexander C. Gavis  
Senior Vice President &  
Deputy General Counsel

Fidelity Investments  
FMR LLC Legal Department  
200 Seaport Blvd., V7A, Boston, MA 02210



By Electronic Mail ([pubcom@finra.org](mailto:pubcom@finra.org))

July 2, 2015

Ms. Marcia E. Asquith  
Office of the Corporate Secretary  
FINRA  
1735 K Street, NW  
Washington, DC 20006-1506

***RE: Proposed Amendments to Rules Governing Communications with the Public  
(Regulatory Notice 15-16)***

Dear Ms. Asquith:

Fidelity Investments<sup>1</sup> appreciates the opportunity to comment on the proposed amendments to the Financial Industry Regulatory Authority's ("FINRA's") rules governing communications with the public.<sup>2</sup> The proposed amendments are a first step by FINRA in implementing the recommendations of its *Retrospective Rule Review Report*, published in December 2014.<sup>3</sup>

Fidelity supported FINRA's retrospective review of the communications rules, and we provided extensive comments regarding how certain aspects of the rules (which were first enacted in 1980) could be updated to address current communications preferences of investors.<sup>4</sup> To that end, FINRA states 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 economic impacts."<sup>5</sup> In considering updates to rules regarding filing obligations, FINRA analyzed many categories of communications materials, looking for filing obligations that are overbroad relative to the investor protections that they provide. This approach has led to proposed amendments that, if adopted, will

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<sup>1</sup> Fidelity is one of the world's largest providers of financial services. The firm is a leading provider of investment management, retirement planning, portfolio guidance, brokerage, benefits outsourcing and many other financial products and services to more than 20 million individuals and institutions, as well as through 5,000 financial intermediary firms.

<sup>2</sup> *Regulatory Notice 15-16* (May 2015) ("proposed amendments").

<sup>3</sup> *FINRA Communications with the Public, Retrospective Rule Review Report* (Dec. 2014).

<sup>4</sup> See *Letter from Alexander C. Gavis, Fidelity Investments, to Ms. Marcia E. Asquith, Office of the Corporate Secretary, FINRA*, dated May 23, 2014.

<sup>5</sup> *Regulatory Notice 15-16*, at p.2.



Ms. Marcia E. Asquith

July 2, 2015

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permit FINRA staff to focus its resources on categories of communications that may involve greater risks to investors. Accordingly, Fidelity strongly supports these proposed amendments.

While the proposed amendments are a good step forward, as discussed below, we recommend that FINRA provide broader relief from filing for narrative information that is updated in previously filed templates in retail communications. Proposed Rule 2210(c)(7)(B) includes an exception from the filing requirements for “[r]etail communications that are based on templates that were previously filed with the Department the changes to which are limited to updates of more recent statistical or other non-narrative information and non-predictive narrative information that describes market events during the period covered by the communication or factual changes in portfolio composition.”<sup>6</sup> While we strongly support FINRA’s efforts to alleviate the burdens associated with filing of non-predictive narrative information that describes market events or factual changes in portfolio composition, we recommend that FINRA extend this exclusion to cover additional types of narrative information.

Fidelity and other member firms provide detailed statistical and narrative information about mutual funds to retail and retirement plan investors for use in understanding and comparing different investment options that may be available to them. These communications are often described as “fund fact sheets,” and they are usually distributed in printed brochures and made available through websites and mobile apps. Fund fact sheets contain statistical data and specific narrative sections that include information about the portfolio advisor/manager(s), benchmarks, investment risks and investment strategies and objectives. This narrative information is broader than “information that describes market events during the time period covered” or “factual changes in portfolio composition.” For firms like Fidelity that support mutual fund supermarkets, with proprietary and non-proprietary funds, the number of fund fact sheets made available to investors can run into the thousands.

Data and narrative information is typically sourced either from third-party vendors, such as Morningstar or Lipper (and updated regularly), or from the member firms’ database of proprietary fund information. Templates for these fact sheets are initially filed with FINRA. Data that is regularly updated or refreshed in the fact sheets is not filed with FINRA as it changes, since this process is exempted from filing under FINRA’s previous interpretive guidance.<sup>7</sup> Changes to narrative information, which are frequently provided as updates in third-party data feeds, may be filed by member firms with FINRA, often in lengthy batches of filings.

Similar to statistical updates, these filings do not generally raise investor protection concerns, as the updates are either sourced directly from third-party vendor databases (the source of which is

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<sup>6</sup> *Regulatory Notice* 15-16, at p. 13 (emphasis in original text).

<sup>7</sup> See *Interpretive Letter to Forrest R. Foss, T. Rowe Price Associates, Inc.* (Jan. 2002), at <https://www.finra.org/industry/interpretive-letters/january-28-2002-1200am>.



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directly from funds' prospectuses and other regulatory documents) or are sourced by the member directly from a database of proprietary fund information (the source of which is also the funds' prospectuses and other regulatory documents filed with the SEC).<sup>8</sup> We understand that these filings are subject to limited or no review by FINRA staff in that they are regularly occurring mechanistic filings in the form of spreadsheets often running hundreds of pages.<sup>9</sup>

Fidelity recommends that FINRA revise the proposed rule to accommodate dynamic updating of narrative language changes within templates without filing, when (1) the original template was filed with FINRA, and (2) the narrative information is sourced either from an independent data provider or directly from an investment company's prospectus or other applicable regulatory documents that are filed with the SEC. By allowing the data to come from an investment company or affiliate, the rule would not favor the purchasing of such data from independent data providers when the data originated from the investment company. Accordingly, we propose the following revisions to the proposed rule language:

Retail communications that are based on templates that were previously filed with the Department the changes to which are limited to updates of more recent statistical or other non-narrative information, and non-predictive narrative information that describes market events during the period covered by the communication, factual changes in portfolio composition, or other non-predictive narrative information, provided such narrative information comes either from an independent data provider or is sourced from an investment company's regulatory documents filed with the SEC.

\* \* \*

While the proposed amendments are limited to addressing member firms' filing requirements, we urge FINRA to examine and address additional communications regulations that have an impact on the delivery of clear and compelling communications to investors. In our previous comment letters, we recommended that FINRA focus on principle based disclosure solutions across all forms of communications including those through social media and mobile and wearable devices, as well as addressing regulations and policies that have affected the amount of disclosure in print advertising. We also additionally recommend that FINRA continue to focus on differences among broker-dealer

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<sup>8</sup> Registration statements (including prospectuses) of mutual funds are filed with the SEC, updated annually and subject to specific SEC disclosure rules and regulations. Further, although this narrative material would not be filed with FINRA, it would still be subject to the principal review and approval requirements of rule 2210 and spot checks and targeted examinations by FINRA staff.

<sup>9</sup> Further, in some instances if there are changes within an updated statistical and narrative data file from a third-party vendor, it may be more efficient for the member firm simply to file the entire data file rather than to isolate the narrative descriptions (the new words, sentences, paragraphs) that may have changed in order to put them into a separate filing.



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and investment advisor communications regulations particularly in the areas of predictions, projections and performance information.

Fidelity appreciates the opportunity to comment on FINRA's proposed rule amendments. If you have any questions about any of these comments or need additional information, please feel free to contact the undersigned or Joe DeAngelis or Scott Maylander at 617-563-7000.

Sincerely yours,

*/s/ Alexander C. Gavis*

Alexander C. Gavis  
Senior Vice President & Deputy General Counsel

Copies to:

Mr. Robert Colby, Chief Legal Officer  
Mr. Thomas Selman, Executive Vice President  
Mr. Joseph Price, Senior Vice President  
Mr. Thomas Pappas, Vice President and Director  
Mr. Joseph Savage, Vice President and Counsel  
Ms. Amy Sochard, Senior Director  
Financial Industry Regulatory Authority



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202.383.0100 Fax 202.637.3593  
[www.sutherland.com](http://www.sutherland.com)

July 2, 2015

**VIA ELECTRONIC MAIL**

Marcia E. Asquith  
Office of the Corporate Secretary  
FINRA  
1735 K Street, NW  
Washington, DC 20006-1506

**Re: FINRA Regulatory Notice 15-16  
Communications With the Public: FINRA Requests Comment on  
Proposed Amendments to Rules Governing Communications With the  
Public**

Dear Ms. Asquith:

We are submitting this letter on behalf of the Committee of Annuity Insurers (the "Committee"),<sup>1</sup> in response to Regulatory Notice 15-16, *Communications With the Public: FINRA Requests Comment on Proposed Amendments to Rules Governing Communications With the Public* (the "Notice"), issued by the Financial Industry Regulatory Authority, Inc. ("FINRA") on May 18, 2015.<sup>2</sup>

The Notice proposes amendments to FINRA's communications rules as a follow-up to certain findings developed during FINRA's retrospective review of the FINRA rule set for communications with the public. The retrospective review was launched by Regulatory Notice 14-14, *Retrospective Rule Review: FINRA Requests Comment on the Effectiveness of its Communications with the Public Rules*, which was issued by FINRA on April 8, 2014.<sup>3</sup> The

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<sup>1</sup> The Committee was formed in 1982 to address legislative and regulatory issues relevant to the annuity industry and to participate in the development of securities, banking, and tax policies regarding annuities. For three decades, the Committee has played a prominent role in shaping government and regulatory policies with respect to annuities, working with and advocating before the SEC, CFTC, FINRA, IRS, Treasury, Department of Labor, as well as the NAIC and relevant Congressional committees. Today the Committee is a coalition of many of the largest and most prominent issuers of annuity contracts. The Committee's member companies represent more than 80% of the annuity business in the United States. A list of the Committee's member companies is attached as Appendix A.

<sup>2</sup> FINRA Regulatory Notice 15-16, available at [https://www.finra.org/sites/default/files/notice\\_doc\\_file\\_ref/Regulatory\\_Notice\\_15-16.pdf](https://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory_Notice_15-16.pdf).

<sup>3</sup> FINRA Regulatory Notice 14-14, available at <https://www.finra.org/sites/default/files/NoticeDocument/p479810.pdf>.



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findings were ultimately published in a December 2014 report (the “Report”) on the assessment phase of the retrospective review.<sup>4</sup>

The Notice proposes amendments to communications with the public rule set – FINRA Rules 2210, 2213, and 2214 – to revise filing requirements for investment company communications among other things. The Committee is generally supportive of the proposed amendments, but seeks clarification regarding the proposed amendments as they would affect generic investment company communications and the template filing exclusion. The Committee continues to strongly support FINRA’s initiative to modernize its communications with the public rule set and hopes to engage in further dialogue with FINRA as this modernization process continues.

## COMMITTEE COMMENTS

The Committee appreciates the opportunity to submit its comments in response to the Notice. The paragraphs below offer the Committee’s comments generally on the filing requirements embedded in the communications with the public rule set, as well as comments on specific provisions of the proposed amendments.

### General Comments

Improved Effectiveness of Advertising Filing and Review Process. The Committee believes that FINRA should consider additional rule changes to the current general requirement that all variable product and mutual fund retail communications be filed with FINRA’s Advertising Regulation Department (the “Department”) with a view to differentiating between those warranting the Department’s review and those that do not. A more risk-based approach to the filing requirements would allow FINRA to deploy its advertising review resources more strategically, which could include spot-checking material related to various types of securities products that the Department believes may present risks to investors, with more attention paid to those products that present a higher degree of risk. This approach would be consistent with FINRA’s examination program and guidance concerning member supervisory systems and compliance programs. In this regard, the Committee believes that FINRA should conduct further assessments of the costs imposed by the requirement to file all such pieces as compared to the investor protections afforded by the requirement. In offering this comment, the Committee acknowledges that the general requirement to file all variable product and mutual fund retail communications stems from certain provisions of the federal securities laws, which exempt such communications from SEC filing requirements if they are filed with FINRA. Nevertheless, the Committee believes that it is critical for FINRA to consider this issue in order to meaningfully achieve the objectives of the retrospective rule review.

Continuation of the Retrospective Review. It is the Committee’s understanding that the topics addressed in the Notice constitute a sub-set of the issues that emerged during the course of the retrospective review of the communications with the public rule set and were deemed relatively easy to address through rulemaking. The Committee appreciates FINRA’s efforts to

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<sup>4</sup> FINRA Retrospective Rule Review Report, available at <https://www.finra.org/sites/default/files/p602011.pdf>.

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quickly address the issues selected for consideration in the proposals presented in the Notice. The Committee urges FINRA to continue to consider further rule changes to address other issues identified in the course of the retrospective review. For example, the increasing reliance on digital (including mobile) communications and the evolution of websites into more dynamic and interactive tools for informing customers about products and services, which were noted in many of the comments submitted when FINRA launched its retrospective review, deserve continued attention, analysis, and dialogue between FINRA and the broker-dealer community.

The Committee would also like to encourage FINRA to continue modifying its rules and updating its electronic filing system in connection with recent technological innovations, particularly with respect to allowing members to file materials in other than PDF format and adopting more consistent standards for review.

### **Specific Comments**

Generic Investment Company Communications. FINRA Rule 2210(c)(3)(A) currently requires members to file with FINRA within 10 business days of first use or publication any retail communication concerning registered investment companies. The Notice proposes to limit this filing requirement to investment company retail communications that “promote or recommend a specific registered investment company or family of registered investment companies,” with the effect that generic investment company retail communications would no longer need to be filed with FINRA.

The Committee supports this proposed change, which would effectively exclude generic investment company retail communications from the filing requirement, but believes that additional guidance should be provided with respect to the type of retail communications that would be considered to promote or recommend an investment company. Specifically, the Committee requests that FINRA confirm that the mere mention of the name of an investment company in and of itself does not necessarily constitute the promotion or recommendation of such investment company and that the determination of whether a communication constitutes the promotion or recommendation of an investment company needs to be made with consideration of the full context of the piece. In addition, it is not entirely clear that generic investment company communications would encompass generic retail communications for variable annuity contracts that do not promote a particular variable annuity contract. The Committee therefore requests that FINRA confirm that generic communications for variable annuity contracts also would not be subject to the filing requirement.

Principal Approval of Third-Party Communications. The Committee also requests that, in connection with moving forward with an effective filing exception for generic investment company communications, FINRA consider the collateral consequences for member firms currently relying on FINRA Rule 2210(b)(1)(C) for an exemption from the principal approval requirement for a retail communication furnished by another member firm (i.e., “third-party communications”). This exemption provides that the principal approval requirement does not apply with regard to a retail communication proposed to be used by a member firm if another member has (1) filed the retail communication with FINRA and has received a letter from the Department stating that it appears to be consistent with applicable standards, and (2) the member

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using it in reliance upon the previous filing and approval has not materially altered it and will not use it in a manner that is inconsistent with the conditions of the Department's letter. In this regard, the exemption from the principal approval requirement is premised on the third-party communication having been filed with FINRA. The Committee anticipates that many of the communications that could qualify as generic investment company communications would be third-party communications (i.e., retail communications provided by one member firm to another member firm for the latter's use with its retail customers). The Committee is concerned that, if FINRA moves forward with a revised filing requirement that excepts generic investment company communications as proposed, the exception could have the unintended effect of increasing compliance costs for member firms in the case of generic communications that would be third party-communications. In particular, each of those member firms proposing to use a third-party communication would need to comply with the principal approval requirement (with the effect that multiple firms would conduct a review of the same communication). Accordingly, the Committee requests that FINRA address this consequence in connection with moving forward with the proposal to except generic investment company communications from the filing requirement. As one potential solution, FINRA could revise paragraph (b)(1)(C) of FINRA Rule 2210 to exempt from the principal approval requirement any generic investment company communication for a member using the communication if that communication has been approved by a principal with another member firm that has furnished the communication. Also, more broadly, FINRA should consider the principal approval requirement on a comprehensive basis, and should consider removing the principal approval requirement for any communications that have been previously reviewed and approved by a principal with another member firm.

Filing Exclusion for Templates. FINRA Rule 2210(c)(7)(B) currently excludes from the requirement to file with FINRA any retail communication that is based on templates previously filed with the Department and has changes limited to updates of more recent statistical or other non-narrative information. FINRA proposes to expand this filing exclusion for templates to allow the inclusion of updated non-predictive narrative descriptions of market events during the period covered by the communication and factual descriptions of portfolio changes without the revised template becoming subject to the filing requirement.

The Committee supports this proposed expansion of the filing exclusion for templates, but believes that FINRA should provide additional flexibility with respect to the type of changes to narrative information that could be made in reliance on the filing exception. More specifically, the Committee urges FINRA to expand the template filing exclusion to allow firms to make non-material changes more broadly to narrative disclosures, as well as updates to non-predictive narrative descriptions of market events. This would ease member compliance costs and release FINRA resources for other matters, while not compromising investor protection.



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**CONCLUSION**

The Committee appreciates the opportunity to offer these comments on the Notice and FINRA's initiative in conducting the retrospective review. Please do not hesitate to contact Susan Krawczyk (202.383.0917, [susan.krawczyk@sutherland.com](mailto:susan.krawczyk@sutherland.com)) or Clifford Kirsch (212.389.5052, [clifford.kirsch@sutherland.com](mailto:clifford.kirsch@sutherland.com)) if you have any questions regarding this letter.

Respectfully submitted,

**SUTHERLAND ASBILL & BRENNAN LLP**

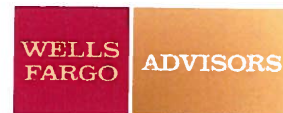
BY:  BTM  BTM

**FOR THE COMMITTEE OF ANNUITY INSURERS**

**Appendix A**

**THE COMMITTEE OF ANNUITY INSURERS**

AIG Life & Retirement  
Allianz Life  
Allstate Financial  
Ameriprise Financial  
Athene USA  
AXA Equitable Life Insurance Company  
Fidelity Investments Life Insurance Company  
Genworth Financial  
Global Atlantic Life and Annuity Companies  
Great American Life Insurance Co.  
Guardian Insurance & Annuity Co., Inc.  
Jackson National Life Insurance Company  
John Hancock Life Insurance Company  
Life Insurance Company of the Southwest  
Lincoln Financial Group  
MassMutual Financial Group  
Metropolitan Life Insurance Company  
Nationwide Life Insurance Companies  
New York Life Insurance Company  
Northwestern Mutual Life Insurance Company  
Ohio National Financial Services  
Pacific Life Insurance Company  
Protective Life Insurance Company  
Prudential Insurance Company of America  
Symetra Financial Corporation  
The Transamerica companies  
TIAA-CREF  
USAA Life Insurance Company  
Voya Financial, Inc.



**Wells Fargo Advisors, LLC**  
Regulatory Policy  
One North Jefferson Avenue  
St. Louis, MO 63103  
HO004-095  
314-955-2156 (t)  
314-955-2928 (f)

**Member FINRA/SIPC**

July 1, 2015

**Via E-mail:** *pubcom@finra.org*

Ms. Marcia E. Asquith  
Office of the Corporate Secretary  
FINRA  
1735 K Street, NW  
Washington, DC 20006-1506

**RE: Regulatory Notice 15-16: Communications with the Public – FINRA Requests Comment on Proposed Amendments to Rules Governing Communications with the Public**

Dear Ms. Asquith:

Wells Fargo Advisors, LLC (“WFA”) appreciates the opportunity to comment on the Financial Industry Regulatory Authority’s (“FINRA”) Proposed Amendments to Rules Governing Communications with the Public, set forth in Regulatory Notice 15-16 (the “Proposal”).<sup>1</sup>

WFA is a dually registered broker-dealer and investment advisor that administers approximately \$1.4 trillion in client assets. It employs approximately 15,189 full-service financial advisors in branch offices in all 50 states and 3,472 licensed financial specialists in 6,610 retail bank branches in 39 states.<sup>2</sup> WFA is a non-bank affiliate of Wells Fargo &

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<sup>1</sup> Regulatory Notice 15-16, Communications with the Public – FINRA Requests Comment on Proposed Amendments to Rules Governing Communications with the Public (May 2015).

[http://www.finra.org/sites/default/files/notice\\_doc\\_file\\_ref/Regulatory\\_Notice\\_15-16.pdf](http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory_Notice_15-16.pdf)

<sup>2</sup> Wells Fargo & Company (“Wells Fargo”) is a diversified financial services company providing banking, insurance, investments, mortgage and consumer and commercial finance throughout the United States of America and internationally. Wells Fargo has 275,000 team members across more than 80 businesses.

*Marcia E. Asquith*

*July 1, 2015*

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Company (“Wells Fargo”), whose broker-dealer and asset management affiliates comprise one of the largest retail wealth management, brokerage and retirement providers in the United States. WFA and its affiliates help millions of customers of varying means and investment needs obtain the advice and guidance they need to achieve financial goals. Furthermore, WFA offers access to a full range of investment products and services that retail investors need to pursue these goals.

## **I. BACKGROUND**

In April 2014, via Regulatory Notice 14-14 (“Notice”), FINRA launched a retrospective rule review<sup>3</sup> of its communications with the public rules to assess their effectiveness and efficiency. WFA, along with other industry participants, submitted comments requesting that FINRA clarify a number of these rules as well as re-evaluate many of their communication filing requirements. We recognize that the Proposal contains a number of rule amendments in response to these comments. Specifically, these amendments exclude or eliminate a number of filing requirements contained within FINRA Rule 2210(c) which had become duplicative and/or unnecessary. For example, the filing requirements for investment analysis tool report templates and exclusion of generic investment company retail communications that do not promote a particular fund or fund family have been eliminated.

## **II. WFA SUPPORT OF THE PROPOSAL**

WFA applauds FINRA’s efforts to ensure their rules continue to operate effectively and meet their intended objectives by undertaking this retrospective review of its rules and commends FINRA for issuing this Proposal. WFA strongly supports the proposed amendments contained in the Proposal, which contains several improvements to the rules.

FINRA has requested specific comment for the potential impact and cost assessment the Proposal may have on the respective Member. WFA does not believe the Proposal will result in increased costs; rather, the exclusion or elimination of certain filings will likely decrease costs. WFA does not anticipate a need to alter its delivery method or the content of their communications with the public material in order to comply with the Proposal, nor does WFA believe that FINRA needs to consider alternative approaches in order to accomplish the goals outlined within the Proposal. WFA will continue to voluntarily file communications as necessary and believes compliance with FINRA’s communications with the public rules will be less burdensome for industry participants while retaining investor protection.

## **III. OPPORTUNITY FOR ADDITIONAL CLARIFICATION**

WFA requests consideration of the following items to provide further clarification of the FINRA communications with the public rules to add to their effectiveness:

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<sup>3</sup> Regulatory Notice 14-14 Retrospective Rule Review – FINRA Requests Comment on the Effectiveness and Efficiency of its Communications with the Public Rules.  
<http://www.finra.org/sites/default/files/NoticeDocument/p479810.pdf>

*Marcia E. Asquith*

*July 1, 2015*

*Page 3*

**A. Revise FINRA Rule 2210(d)(1)(F)**

FINRA Rule 2210(d)(1)(F) prohibits communications that predict or project performance. This is inconsistent with the SEC investment adviser standard promulgated under Rule 206(4)-1 of the Investment Advisors Act of 1940. The SEC standard permits predictions and projections which have a reasonable basis and an adequate explanation of any assumptions underlying the predictions. WFA believes the prohibition in 2210(d)(1)(F) is unduly restrictive and can prevent customers from receiving necessary information to assess and compare products. WFA suggests revising 2210(d)(1)(F) to align with Rule 206(4)-1.

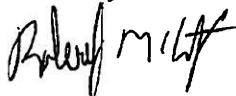
**B. Clarify the requirements for public appearances by associated persons in FINRA Rule 2210(f)(3)**

In FINRA Rule 2210(f)(3), FINRA explains the firm's public appearance procedures "must provide for the education and training of associated persons who make public appearances..." The Rule, however, does not define what constitutes a "public appearance." WFA feels that without a clear understanding of what constitutes a public appearance, it is difficult to determine which events fall under the scope of this Rule. Further, the Rule is specifically applicable to "associated persons." WFA seeks clarification on what constitutes an "associated person" for purposes of the education and training requirements. Are a firm's home office personnel subject to public appearance requirements?

**IV. CONCLUSION**

WFA appreciates the opportunity to comment on FINRA's Proposal and commends FINRA's continuing efforts in assessing the impact and usefulness of their rules. We look forward to further clarification of the communications with the public rules in future guidance. Please feel free to contact me with any questions or comments.

Sincerely,



Robert J. McCarthy  
Director of Regulatory Policy





**PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION**

2415 A Wilcox Drive | Norman, OK 73069  
Toll Free (888) 621-7484 | Fax (405) 360-2063  
www.piaba.org

July 2, 2015

Via Email Only

Marcia E. Asquith  
Office of the Corporate Secretary  
FINRA  
1735 K Street, NW  
Washington, DC 20006-1506  
pubcom@finra.org

Re: *Regulatory Notice 15-16, Proposed Rule Changes for FINRA Rules 2210, 2214, and 2213 Regarding Communications with the Public*

Dear Ms. Asquith:

I write on behalf of the Public Investors Arbitration Bar Association ("PIABA"), an international bar association comprised of attorneys who represent investors in securities arbitrations. Since its formation in 1990, PIABA has promoted the interests of the public investor in all securities and commodities arbitration forums, while also advocating for public education regarding investment fraud and industry misconduct. Our members and their clients have a strong interest in rules promulgated by the Financial Industry Regulatory Authority ("FINRA") to govern the conduct of securities firms and their representatives. In particular, our members and their clients have a strong interest in FINRA rules relating to the information provided to investors.

In Notice 15-16, FINRA seeks comment regarding changes to Rules 2210, 2214, and 2213 regarding communications with the public. As detailed below, PIABA opposes these rule proposals, as they relax FINRA's regulatory oversight and could harm investors.

*New Firm Communications*

For a one year period (from the effective date of a new FINRA member firm's membership), FINRA rules currently require that all new firm file with FINRA "any retail communication that is published or used in any electronic or other public media . . ." at least 10 business days prior to the first use of communication. FINRA is proposing to drop this requirement, because it predates the internet and FINRA believes that member firms primarily reach customers and potential customers through the firms' websites. FINRA also believes that the long-standing requirement of filing retail communications 10 business days before using them "unnecessarily delays firms' abilities to communicate with the public" and there is no benefit to investors that cannot be accomplished by FINRA's post-use review of communications.

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*Officers and Directors*

President: Joseph C. Peiffer, LA  
EVP/President-Elect: Hugh D. Berkson, OH  
Secretary: Andrew Stoltmann, IL  
Treasurer: Marnie C. Lambert, OH

Robert S. Banks, Jr., OR  
Jason Doss, GA  
Samuel B. Edwards, TX  
Christopher J. Gray, NY

Scott C. Ilgenfritz, FL  
William A. Jacobson, NY  
Richard A. Lewins, TX  
Mark E. Maddox, IN

Angela H. Magary, MA  
Peter J. Mougey, FL  
Jeffrey R. Sonn, FL  
Robin S. Ringo, *Executive Director*

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FINRA claims that the changes it is proposing are the result of a “retrospective review” of its rules regarding communications with the public that it launched in April 2014, the results of which were published by FINRA in a report in December 2014. The report found that the rules “could benefit from some updating to better align the investor protection benefits and the economic impacts.”

Rather than “aligning the investor protections benefits” with “the economic impacts” (or anything else for that matter), under the proposed rule changes FINRA eliminates the pro-active investor protection the current rule affords customers. If the proposed rule goes into effect, new FINRA member firms would not have to obtain any FINRA pre-approval for common retail communications such as those in newspapers, magazines, or other periodicals and/or those on the radio, television, telephone or audio recording, video display, signs or billboards or motion pictures. Instead, FINRA will only pre-approve the use of one form of retail communication – a firm’s website.

Of course, as FINRA well knows, not every customer or potential customer uses the internet as the primary source of information about financial advisors, brokerage firms or investments. Indeed, the “National Senior Investor Initiative” report that was released in April 2015, by the SEC and FINRA illustrates the different forms of communications that reach and are relied on by one segment of investors – seniors. The report contains the observations from examinations conducted by the SEC Office of Compliance Inspections and Examinations and FINRA as part of their “collaborative effort” to determine and report on issues pertinent to “senior investors” (age 65 and older).

In the “Marketing and Communications” section of the report, the SEC and FINRA observed that firms promoted senior-related investment themes “through various channels such as **brochures, print and electronic advertisement, newspaper columns, radio and television commercials, and seminars.**”<sup>1</sup> Yet, under the proposed rule changes, FINRA will not review and approve any such communications prior to them going to senior investors. Moreover, with regard to certain communications (radio shows and seminars), the SEC and FINRA examinations revealed potential rule violations such as misleading advertisements and failure to properly supervise the content of the shows, as well as potential failure to comply with a firm’s written supervisory procedures for seminar materials.<sup>2</sup>

“Post-use” review of all retail communications (other than websites) by FINRA will not provide adequate investor protection for customers who lose their life savings after investing with a broker from an unknown start-up firm with flashy television or radio ads or a fancy seminar presentation. Further, it is not clear that FINRA can effectively regulate advertising on a post-use basis. For example, according to the large defense firm, Sutherland Asbill & Brennan LLP (“Sutherland”), FINRA disciplinary actions in 2013 reflected a

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<sup>1</sup>See <http://www.sec.gov/ocie/reportspubs/sec-finra-national-senior-investor-initiative-report.pdf>, p. 13 (last visited on June 24, 2015) (emphasis added).

<sup>2</sup>*Id.* at 13-15.

Marcia E. Asquith  
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Page 3

troubling enforcement trend – an “incredible slowdown in the amount of fines imposed in advertising cases.”<sup>3</sup>

This stood out to Sutherland because advertising had been on its “Top Enforcement Issues” list in 2010-2012 (based on the amounts of fines assessed), and yet in 2013, there was a seventy-three percent (73%) decrease in the total fines assessed in advertising cases (even though there were 53 cases in 2013 and only 50 in 2012).<sup>4</sup> Although advertising returned to Sutherland’s “Top Enforcement Issues” list for FINRA disciplinary actions in 2014, there were only 31 advertising disciplinary cases.<sup>5</sup> It simply does not seem to be in the investing public’s interest to rely on FINRA to effectively regulate retail communications only after-the-fact.

In light of the importance of the existing retail communication rules, and the real potential for greater harm to investors without those rules, FINRA should not eliminate the need for pre-use oversight of all but one form of retail communication. FINRA has not provided sufficient evidence that brokerage firms will save enough money if they are not required to file for pre-use approval of retail communications to outweigh the resulting harm to investors who could have been protected by the current rule. Further, if it is too much of a financial burden on a new firm to comply with existing industry rules related to pre-use approval of communications with the public, then perhaps that firm should not be in the brokerage industry at this time.

#### *Investment Company Shareholder Reports*

FINRA currently requires firms to file the manager’s discussion of fund performance (“MDFP”) portion of a registered investment company’s shareholder report if it to be made available or distributed to potential investors. FINRA has required the filing of MDFPs and treated them like any other retail communication even though shareholder reports are also required to be filed with the SEC. FINRA is proposing to specifically exclude MDFPs from the filing requirements of the retail communications rules if the shareholder’s report containing the MDFP has been filed with the SEC. FINRA’s rationale for this proposed rule change seems to be that the MDFP “presents less investor risk than other types of promotional communications” and excluding MDFPs would be consistent with the fact that FINRA has previously excluded other similar types of documents from the filing requirements.

In order for the proposed rule to offer any investor protection whatsoever, FINRA has to assume that the SEC adequately reviews regulatory filings when they are received and that the SEC will bring improper retail

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<sup>3</sup>See <http://www.sutherland.com/NewsCommentary/Press-Releases/161244/Annual-Sutherland-Analysis-of-FINRA-Sanctions-Shows-27-Decrease-in-Fines-Number-of-Cases-Nearly-Identical>. Sutherland generally only includes in its review those cases that resulted in fines of \$200,000 or more.

<sup>4</sup> *Id.*

<sup>5</sup>See <http://www.sutherland.com/NewsCommentary/Press-Releases/170501/Annual-Sutherland-Analysis-of-FINRA-Sanctions-Reveals-Blockbuster-Year-in-Fines-for-FINRA-but-Decrease-in-the-Number-of-Cases>. Sutherland did note that the large increase in amounts fined in 2014 (to \$17.2 million) was largely attributable to a \$15 million research analyst and research report case which included allegations related to improper promotions at IPO road shows. *Id.*

Marcia E. Asquith  
July 2, 2015  
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communications to FINRA's attention. The problem with these assumptions is that the SEC does not fully review all regulatory filings made on the EDGAR system, which is where such filings would be made.

On May 28, 2015, Reuters reported that the SEC "does not fact check or make corrections to filings," which makes sense if the SEC receives approximately 4,000 filings per day.<sup>6</sup> The Reuters article was prompted by a letter that Senator Charles Grassley, from Iowa, sent to the SEC about his concern with a "systemic vulnerability" exposed with the EDGAR system when a fraudster was able to use the EDGAR site to file documents that reflected a phony takeover bid for Avon Products Inc.<sup>7</sup>

In light of FINRA's estimate that the proposed rule change would result in a decrease of 5,000 filings **per year** and the estimate that the SEC receives 4,000 filings **per day**, which it does not meaningfully review, in order for investors to be protected, FINRA just needs to do its job. The SEC is not an acceptable substitute under the circumstances.

#### *Investment Company Performance Rankings and Comparisons*

FINRA rules currently require firms to file retail communications for registered investment companies that contain fund performance rankings or comparisons. FINRA is proposing to drop this requirement, because this information is now available online. Under the proposed rule, FINRA would require the firm to maintain the rankings or comparisons in its own files.

Again, this proposed rule is simply a way for FINRA to shirk its responsibilities of protecting the investors. If FINRA continues to require firms to provide these rankings or comparisons, FINRA can analyze whether these rankings are accurately represented or misleading. Such rankings and comparisons are tools that investors often use when shopping around for different investment products (such as mutual funds or annuities), and FINRA should closely monitor these communications with the investing public. This proposed rule flies in the face of investor protection.

Moreover, if investment companies are already required to provide retail communications to FINRA, it should not be that much of an extra burden to provide those performance rankings or comparisons. As such, FINRA should not enact this proposed rule.

#### *Filing Exclusion for Templates*

Under the current rules, firms are not required to file retail communications that were previously filed with FINRA but changed only to update recent statistical or non-narrative information. FINRA proposes to expand this exemption and allow firms to include "non-predictive" narrative descriptions of market events covered by the communication without needing to re-file the template.

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<sup>6</sup> See <http://www.reuters.com/article/2015/05/28/senate-sec-avon-prdcts-idUSL1N0YJ21G20150528>.

<sup>7</sup> *Id.*

Marcia E. Asquith  
July 2, 2015  
Page 5

PIABA opposes this proposal, as FINRA should be reviewing any narrative descriptions included in retail communications for misleading information. Often, firms may blame decreases in NAVs on “market events” or other occurrences, although that is not necessarily accurate in some circumstances. One example is FINRA’s investigation of the Morgan Keegan proprietary bond funds in 2010. According to FINRA’s press release announcing the investigation, FINRA alleged that:

Morgan Keegan became aware, beginning in early 2007, of the adverse market effects on the bond funds, the firm failed to timely warn its brokers or revise its advertising materials to reflect the disproportionately adverse effect the market was having on the performance of the securities that comprised the bond funds – which Morgan Keegan brokers continued to sell widely. At this time, the firm reassured, rather than warned, its sales force about the riskiness of the bond funds. As a result, some of the firm’s brokers were unaware of the then-turbulent market’s effects on the funds and failed to disclose the negative effects caused by market forces.

See <https://www.finra.org/newsroom/2010/finra-files-complaint-against-morgan-keegan-company-misleading-customers-regarding> (last visited June 18, 2015). This example shows that any misleading narratives regarding the market condition could subject investors to further harm, and FINRA should be closely monitoring these narratives made in retail communications.

### *Bond Fund Volatility Ratings*

Under FINRA’s current rules, firms may use retail communications that include ratings provided by independent third parties that address the sensitivity of the net asset value of a bond fund to changes in market conditions. These communications must be accompanied or preceded by the bond fund’s prospectus and contain specific disclosures. Additionally, firms must file these communications with FINRA at least 10 days prior to use. The proposed rule seeks to modify the rule, requiring the filing of such communications *within* 10 days of first use, rather than 10 days *prior* to use. The proposed rule also eliminates the requirement that the rating must be accompanied or preceded by the prospectus.

In the interests of the investing public, FINRA should not enact these proposed rule modifications. There have been numerous bond fund scandals and regulatory investigations brought by FINRA and other regulators in the last five years, demonstrating that bond funds should be more highly regulated:

- a) Morgan Keegan paid \$200 million to settle with FINRA and several state regulators in June 2011 regarding claims on its proprietary bond funds;
- b) Charles Schwab paid \$18 million to settle with FINRA in January 2011 regarding claims on the YieldPlus Fund;
- c) Oppenheimer paid \$35 million to settle with the SEC in June 2012 regarding claims on the Champion Income Fund and Core Bond Fund;
- d) In October 2013, the SEC announced that it was investigating mutual funds holding Puerto Rican bonds, and in 2014, FINRA issued guidance and new procedures to deal with the substantial influx of arbitration claims involving Puerto Rican bond funds;

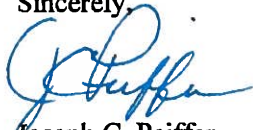
Marcia E. Asquith  
July 2, 2015  
Page 6

- e) In June 2012, the Attorney General of New York and the Massachusetts Attorney General began investigations into Citigroup's MAT, ASTA, and Falcon funds, which were municipal arbitrage bond funds

As demonstrated from these numerous investigations, it is important for FINRA to increase its regulation over bond funds and any communications directed to public investors regarding bond funds or their volatility. The proposed rule seeks to lessen the regulation over these products, to the detriment of the investing public.

In sum, PIABA opposes the implementation of these rule proposals, which are a step backwards in protecting investors. I want to thank you for the opportunity to comment.

Sincerely,



Joseph C. Peiffer  
PIABA, President



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July 1, 2015

BY EMAIL To: ([pubcom@finra.org](mailto:pubcom@finra.org))

Marcia E. Asquith  
Office of Corporate Secretary  
FINRA  
1735 K Street, NW  
Washington, DC 20006-1506

RE: FINRA Regulatory Notice 15-16, Request for Comments on Proposed Amendments to Rules Governing Communications With the Public

Dear Ms. Asquith:

TD Ameritrade, Inc.<sup>1</sup> (“TD Ameritrade” or “the Firm”) appreciates the opportunity to comment on proposed amendments to filing requirements in FINRA Rule 2210 and FINRA Rule 2214 and the content and disclosure requirements in FINRA Rule 2213. TD Ameritrade fully supports FINRA’s efforts to better align the investor protection benefits and the economic impacts of its rules, and includes further recommendations and comments below to further FINRA’s efforts in this area.

#### **Backup Material for Investment Company Performance Rankings and Comparison**

FINRA proposes to eliminate the requirement to file ranking and comparison backup material and instead require firms to maintain backup materials as part of their records. The Firm supports FINRA’s proposal as it will reduce the costs of compliance in this area without impacting investors. In the discussion of the proposal the Firm agrees with FINRA’s observation that some requirements which may have made sense prior to the Internet, can evolve over time in light of technological advances and ready access to multiple sources of information.

#### **Generic Investment Company Communications**

TD Ameritrade wholeheartedly supports the proposal related to generic investment company communications, whereby FINRA proposes to exclude from the filing requirements generic investment company retail communications that do not promote a particular fund or fund family. A significant portion of the Firm’s retail communications concerning registered investment companies fall under this description. TD Ameritrade agrees with FINRA’s assessment that this type of material typically is intended to educate the public about investment companies in general or the types of products that a member firm offers, and thus does not present the same risks of including potentially misleading information as promotional communications about specific funds or fund families.

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<sup>1</sup> TD Ameritrade is a wholly owned broker-dealer subsidiary of TD Ameritrade Holding Corporation (“TD Ameritrade Holding”). TD Ameritrade Holding has a 40-year history of providing financial services to self-directed investors. TD Ameritrade, provides investing and trading services to over six million client accounts that total more than \$710 billion in assets, and custodial services for more than 4000 independent registered investment advisors. During May 2015, TD Ameritrade’s clients on average placed approximately 427,000 trades each day.

## Investment Analysis Tools

TD Ameritrade also supports the proposed amendment with respect to investment analysis tools, whereby FINRA proposes to eliminate the filing requirement for investment analysis tool report templates and retail communications concerning such tools. In this case, however, TD Ameritrade recommends that FINRA consider an additional change to Rule 2214 to eliminate the disclosure requirements prescribed by paragraph (c) of the Rule for retail communications concerning the tool. At recent conferences, FINRA staff has discussed member concerns about “excessive disclosure content,” and questioned whether all such content was “required,” or added by members themselves voluntarily. Extensive disclosures are “required” by Rule 2214 and the Firm questions their value in something like a print ad, or a TV commercial.

While TD Ameritrade acknowledges that disclosures required by Rule 2214(c) are appropriate for a report template, TD Ameritrade does not believe they have any value, or provide any investor protection, when included on retail communications (*i.e.*, marketing materials) concerning the tool. The Firm is aware of the limited exceptions for retail communications addressed in Supplementary Material .06 of the Rule, however, that guidance is subject to interpretation of terms such as “incidental reference” and “refers to . . . more detail...” The Firm believes a clear line requiring the disclosures for report templates but eliminating them for retail communications would be beneficial without impacting investor protection.<sup>2</sup>

Lastly, TD Ameritrade believes that over time Rule 2214 has been applied more broadly than originally intended, to include some retirement planning calculators, which while they do “produce simulations and statistical analysis of the likelihood of various outcomes,” do not pose risk to investors. These calculators frequently use only broad asset class allocation data as the “investments, investment strategies or styles” addressed by Rule 2214. The Firm recommends continued evaluation of Rule 2214, and the possible exemption from the definition of investment analysis tool for planning calculators where the investment strategy or style is limited to broad asset class allocation.

## Filing Exclusion for Templates

TD Ameritrade supports the proposal related to expanding the template filing exclusion to include updated non-predictive narrative descriptions of market events during the period covered by the communication and factual descriptions of portfolio changes, as a sensible update that will save member firms’ from unnecessary filing costs.

## Alternative Approaches

FINRA requests specific comment on whether there are alternative approaches FINRA should consider to accomplish the goals described in this proposal, including opportunities to better align investor protection with the associated risks of activities and the costs of compliance. To that end, TD Ameritrade strongly recommends a review of FINRA Rule 2220 Options Communications, one of the rules governing communication with the public that was specifically excluded from the retrospective rule review conducted last year. TD Ameritrade has a large, and rapidly growing options business that generates a need to actively communicate with the public about the product and our trading platforms. In fact, options trading currently accounts for approximately 31% of the Firm’s trades per day. In

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<sup>2</sup> TD Ameritrade submits that if FINRA made it clear that retail communications did not require the disclosures, there would be no investor harm because such investors would receive the disclosures at the time they accessed the tools on the Internet.



Regulatory Notice 15-16, FINRA identifies the benefit of providing educational materials to permit investors to better understand the relative risks, costs, strategies and historical performance of mutual funds. TD Ameritrade submits that the same benefits exist concerning educational material related to options.

**Additional Changes to Consider**

TD Ameritrade also agrees with FINRA's comments in Endnote 4 concerning the potential for additional changes to Rule 2210 in response to comments addressing other issues, such as the amount of disclosure required in communications with the public, the standards applicable to the presentation of performance, and the standards governing online, mobile and social media communications. Just as the Internet as a communication channel was different than those that preceded it, the Firm views the mobile and social media channels, as quite different from the Internet. The Firm believes the mobile and social media channels are ripe for continued evolution of standards as well as means and method of compliance.

TD Ameritrade appreciates the opportunity to comment on this proposal. Please contact me at 503-610-1279 if you have any questions regarding the Firm's comments.

Sincerely,

W.J. Sampson  
Compliance Communications Review  
TD Ameritrade, Inc.

Advocacy  
Collaboration  
Education

Advocating Direct Investments  
Through Education



July 1, 2015

Via email to [pubcom@finra.org](mailto:pubcom@finra.org)

Marcia E. Asquith  
Office of the Corporate Secretary  
FINRA  
1735 K Street, NW  
Washington, DC 20006-1506

Dear Ms. Asquith,

The Investment Program Association ("IPA")<sup>1</sup> respectfully submits this letter in response to the request for comments by the Financial Industry Regulatory Authority ("FINRA") on RN 15-16, Proposed Amendments to Rules Governing Communications with the Public.

### **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. 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 with the economic impacts.

Pursuant to the recommendations in the report and as explained in RN 15-16, 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.

### **IPA Position**

The IPA applauds FINRA in its continued efforts to keep current with the ever-changing environment in which its rules exist.

The IPA expresses its support of the proposed, "Filing Exclusion for Templates," that would expand the template filing exclusion to allow firms to update non-predictive narrative descriptions of market events which have occurred in the period covered by the communication and to further update the factual descriptions of portfolio changes without having to refile the template.

The IPA also supports the proposal to exclude from the filing requirements generic retail communications related to investment companies. It is standard practice to create non-product specific materials for the purpose of educating the investing public about product types, such as

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<sup>1</sup> Formed in 1985, the IPA provides the direct investment industry with effective national leadership, and today is the leading advocate for the inclusion of direct investments in a diversified investment portfolio. IPA members include direct investment product sponsors, FINRA member broker/dealer firms, and direct investment service providers.

comparisons of growth versus income investment companies, comparisons between traded versus non-traded products, Business Development Companies (BDCs) versus REITs, or closed-end funds versus open end and exchange traded funds. Therefore, we encourage FINRA to also extend the generic material filing exclusion to cover not just investment companies, but all investment products, including direct investments, as defined below. Progressing in this manner would facilitate the education of investors and would allow for a more accurate portrayal of the array of investments and unique characteristics of those investments that individuals should consider when evaluating financial products.

Lastly, we ask that FINRA provide clarity to its guidance with regard to the applicability of the exclusion to single product distributors. There is currently some ambiguity in the industry as to whether or not a dealer manager of a single offering could publish generic materials without some level of inference that the materials' intent is to condition the market for sales of that product.

### **Analysis**

Direct investment categories include: non-traded REITs, non-traded BDCs, oil and gas programs and equipment leasing programs. In 2014, more than 30,000 financial advisors used non-listed REITs or BDCs in their practices, and more than 1.2 million investors had non-listed REITs or BDCs in their investment portfolios.

FINRA has asserted that retail investors do not understand many of the alternative investment options available to them. Participating broker/dealers regularly make requests of dealer managers to produce educational materials that facilitate discussions between financial advisors and investors regarding product features and risks. However, in creating those materials the dealer manager may find out the intended "generic materials" are classified as sales material and, therefore, must follow sales material requirements. In addition, it is sometimes stated by regulators that material cannot be generic if there is only one offering of that type available through the dealer manager. This can be challenging for dealer managers as they may have limited offerings of any one specific investment type. Regardless of who creates the material, the financial advisor is the end user of the piece with the investing public, and they use the piece for generic education of an asset class that is one of the numerous options available on that advisor's broker/dealer platform.

The IPA believes the guidelines of the Securities Act of 1933, under Rule 135a, provides a good structure for defining material as retail sales communications or generic communications. We believe generic educational materials should not be deemed an offer of any security if the material contains a general discussion of product attributes and does not include the name of a specific product or any information relating solely to a specific product offering.

Direct Investments are complex products that offer investors the potential for significant benefits, and they carry with them significant risks. The IPA believes that investors need non-product specific educational materials that clearly explain the benefits and risks to understand the investment being presented by their financial advisor.

We believe that expanding the proposed filing exclusion from its focus on generic investment company retail communications to all generic investor education retail communications would:

- Reflect that investors have more choices than just investment companies to meet their financial goals;
- Support the need for more education regarding complex products, including direct investments;
- Allow dealer managers to more quickly produce and deliver educational materials for use with the investing public; and,
- Contribute to the reduction of the number of pieces submitted to FINRA that do not carry the same risks as promotional communications about a specific investment.

**Conclusion**

We submit our observations, comments and recommendations in support of FINRA's continued efforts to modernize the Communication with the Public Rules. Thank you for this opportunity.

Respectfully submitted,



Kevin Shields  
Chairman of the Board of Directors

T. ROWE PRICE INVESTMENT SERVICES, INC.

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21117-4903

Toll Free 800-638-7890  
Fax 410-345-6575

June 29, 2015

Ms. Marcia E. Asquith  
Office of the Corporate Secretary  
FINRA  
1735 K Street, NW  
Washington, D.C. 20006-1506

Re: *FINRA Requests Comment on Proposed Amendments to Rules Governing Communications With the Public*, FINRA Regulatory Notice 15-16 (May 2015)

Dear Ms. Asquith:

T. Rowe Price Investment Services, Inc. ("T. Rowe Price") appreciates the opportunity to comment on FINRA's proposed amendments to Rules 2210, 2213, and 2214 ("Communications Rules"). T. Rowe Price is a registered broker-dealer under the Securities Exchange Act of 1934, a FINRA member firm, and acts as principal underwriter to the T. Rowe Price family of over 150 funds ("Price Funds"). As of March 31, 2015, the T. Rowe Price Funds had total assets of approximately \$497.2 billion. All Price Funds (with the exception of certain institutional and variable insurance funds) may be purchased by individual investors through intermediaries and on a direct basis with no front-end or deferred sales loads or 12b-1 fees. Certain Price Funds are distributed through intermediaries via separate share classes with 12b-1 fees. Accordingly, communications with the public through retail and institutional communications are the primary means by which T. Rowe Price promotes and solicits interest in the Price Funds. In this connection, we file approximately 3,000 retail communications with FINRA relating to the Price Funds each year, including print advertisements, sales materials, and websites.

We commend FINRA's efforts to improve the effectiveness and efficiency of the Communications Rules and we believe that the proposed amendments will further these goals without sacrificing investor protection. We encourage FINRA to also review and re-examine its administrative practices with respect to publishing comments and interpretations of its Communication Rules so that member firms have a better understanding of how the Rules are being applied in practice. While we have no specific comments on these amendments, we fully support the comments of the Investment Company Institute in their letter dated July 2, 2015. In response to FINRA's queries on the possible impact of the amendments on members' materials, T. Rowe Price does not plan to alter the delivery method or content of our communications if these amendments become effective, although we may continue to file materials that would be exempt from filing under this proposal in order to satisfy intermediary client requests for FINRA response letters.

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If you have any questions or need additional information, please contact me at (410) 345-4621.

Sincerely,



Danielle Nicholson Smith  
Vice President and Legal Counsel



P.O. Box 2600  
Valley Forge, PA 19482-2600

(610) 669-1000  
www.vanguard.com

June 29, 2015

**VIA EMAIL TO PUBCOM@FINRA.ORG**

Marcia E. Asquith  
Senior Vice President and Corporate Secretary  
Office of the Corporate Secretary  
FINRA  
1735 K Street, NW  
Washington, DC 20006-1500

Re: Request for Comment on Proposed Amendments to Rules Governing Communications with the Public; Regulatory Notice 15-16

Dear Ms. Asquith:

Vanguard<sup>1</sup> appreciates the opportunity to comment on FINRA's proposed amendments to FINRA rules governing communications with the public.<sup>2</sup> We commend FINRA for its ongoing efforts to improve the effectiveness of its communications rules<sup>3</sup> and support FINRA's proposal to modify certain filing requirements based on input FINRA received last year from member firms in response to FINRA's retrospective rule review of the communications rules (the "Retrospective Rule Review").<sup>4</sup>

Vanguard believes that FINRA is appropriately advancing investor protection by seeking to limit the number of materials that will be filed for FINRA's review. We believe that the proposed changes would allow FINRA to better focus its resources on reviewing communications that should be the subject of FINRA review. We also welcome FINRA's recently published guidance relating to the Communications with the Public rule.<sup>5</sup>

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<sup>1</sup> Offering more than 150 U.S. registered mutual funds and headquartered in Valley Forge, Pennsylvania, The Vanguard Group, Inc. manages approximately \$3 trillion in U.S. mutual fund assets on behalf of fund investors. Vanguard Marketing Corporation, a Vanguard subsidiary, is an SEC registered broker-dealer and member of FINRA. Vanguard Marketing Corporation offers brokerage services through its Vanguard Brokerage Services operating division, and provides marketing and distribution services for the Vanguard funds and certain 529 plans and annuity programs.

<sup>2</sup> See Regulatory Notice 15-16.

<sup>3</sup> See FINRA Rules 2210(Dec. 1, 2014), 2213(Feb. 4, 2013), and 2214 (July 11, 2014).

<sup>4</sup> See Regulatory Notice 14-14.

<sup>5</sup> See Regulatory Notice 15-17, FINRA Rule 2210 Questions and Answers posted May 22, 2015 ("FINRA Rule 2210 Q&A").

Ms. Marcia Asquith, Senior Vice President  
June 29, 2015  
Page 2

In particular, Vanguard supports FINRA's proposal to no longer require firms to file the manager's discussion of fund performance ("MDFP") portion of a registered investment company ("RIC") shareholder report that has been filed with the Securities and Exchange Commission ("SEC"). We agree that it is appropriate to exclude the MDFP from FINRA filing requirements given that RICs are required to file their annual and semi-annual reports with the SEC.

We have long supported excluding from the filing requirements generic investment company retail communications. We believe that the proposed new exclusion – materials that do not promote a particular fund or fund family – would further FINRA's important regulatory objective of devoting its resources to reviewing materials that raise investor protection concerns. As we noted in our letter responding to FINRA's request for comment on the Retrospective Rule Review<sup>6</sup>, we believe that RIC sponsors have strained FINRA's resources by filing non-promotional materials that do not require FINRA review. We believe that the proposed exclusion for generic investment company retail communications would provide the necessary clarity that non-promotional communications should not be filed with FINRA.

Finally, we encourage FINRA to continue to explore ways to allow firms to make use of web, social media, and mobile technologies to deliver required disclosures. FINRA's recent guidance to firms on filing requirements for communications delivered via responsive web design technology is an important step forward in advancing FINRA's approach to regulating communications in an increasingly electronic environment.<sup>7</sup> We look forward to FINRA's future initiatives in this area.<sup>8</sup>

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<sup>6</sup> See Letter from Heidi Stam, General Counsel, Vanguard, to Ms. Marcia E. Asquith, Senior Vice President and Corporate Secretary, FINRA, dated May 23, 2014.

<sup>7</sup> See FINRA Rule 2210 Q&A, "Filing Exclusion for Non-Material Changes to Previously Filed Communications," Questions 1-3.

<sup>8</sup> FINRA has noted it is still considering whether to propose additional changes to Rule 2210 relating to the standards governing online, mobile, and social media communications. See Regulatory Notice 15-16, Endnote 4.



Ms. Marcia Asquith, Senior Vice President  
June 29, 2015  
Page 3

\* \* \* \* \*

Vanguard appreciates the opportunity to comment on FINRA's proposed changes to the communications rules. If you would like to discuss these comments further, please do not hesitate to contact Lance Barrett at (610) 669-2616.

Very truly yours,

/s/ Heidi Stam

Heidi Stam  
Managing Director and General Counsel



July 2, 2015

By Electronic Mail ([pubcom@finra.org](mailto:pubcom@finra.org))

Marcia E. Asquith  
Office of the Corporate Secretary  
FINRA  
1735 K Street, N.W.  
Washington, D.C. 20006-1506

**Re: Regulatory Notice 15-16: FINRA Requests Comment on Proposed Amendments to Rules Governing Communications with the Public**

Dear Ms. Asquith:

The Securities Industry and Financial Markets Association (“SIFMA”)<sup>1</sup> appreciates the opportunity to provide comment on a proposed rule by the Financial Industry Regulatory Authority (“FINRA”) to amend various aspects of FINRA’s rules governing communications with the public.<sup>2</sup>

#### ***I. INTRODUCTION & BACKGROUND***

On May 18, 2015, FINRA, in Regulatory Notice 15-16 (“RN 15-16”), proposed amendments to FINRA rules governing communications with the public. On May 22, 2015, FINRA issued guidance in the form of frequently-asked-questions on the same set of rules (the “Communications FAQs”).<sup>3</sup> RN 15-

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<sup>1</sup> SIFMA is the voice of the U.S. securities industry, representing the broker-dealers, banks and asset managers whose 889,000 employees provide access to the capital markets, raising over \$2.4 trillion for businesses and municipalities in the U.S., serving clients with over \$16 trillion in assets and managing more than \$62 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.

<sup>2</sup> See generally FINRA Regulatory Notice 15-16 (May 18, 2015) (available at: [http://www.finra.org/sites/default/files/notice\\_doc\\_file\\_ref/Regulatory\\_Noteice\\_15-16.pdf](http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory_Noteice_15-16.pdf)) [last visited July 1, 2015].

<sup>3</sup> See generally FINRA Regulatory Notice 15-17 (May 22, 2105) (available at: <http://www.finra.org/industry/finra-rule-2210-questions-and-answers>) [last visited July 1, 2015].

Ms. Marcia E. Asquith  
July 2, 2015  
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16 and the Communications FAQs are the result of a retrospective rule review that FINRA began in April 2014.<sup>4</sup>

In RN 15-16, FINRA generally is proposing to:

- Amend FINRA Rule 2210 so that firms that are in their first year of FINRA membership will only have to file the contents of their website and any material changes to the site within ten (10) business days of first use.<sup>5</sup>
- Exclude shareholder reports filed with the SEC from the registered investment company filing requirements.
- Eliminate the requirement to file registered investment company ranking and comparison backup material.
- Exclude from the registered investment company filing requirements generic investment company retail communications that do not promote a particular fund or fund family.
- Exclude from the registered investment company filing requirements updated non-predictive narrative descriptions of market events during the period covered by the communication and factual descriptions of portfolio changes.
- Eliminate the requirement that firms file their investment analysis tool templates.
- Amend FINRA Rule 2213 so that retail communications relating to bond mutual funds that include ratings provided by independent third parties and other communications will no

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<sup>4</sup> See generally FINRA Regulatory Notice 14-14 (April 2014) (available at: <https://www.finra.org/sites/default/files/NoticeDocument/p479810.pdf>) [last visited June 30, 2015] and FINRA Retrospective Rule Review Report: Communications with the Public (Dec. 2014) (available at: <http://www.finra.org/sites/default/files/p602011.pdf>) [last visited June 30, 2015].

<sup>5</sup> FINRA rules currently require such firms to file all of their retail communications with the public. See FINRA Rule 2210.

Ms. Marcia E. Asquith  
July 2, 2015  
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longer need to be accompanied or preceded by the fund's prospectus or contain specific disclosures.

- Permit firms to file retail communications that relate to bond mutual fund volatility ratings within ten (10) business days of first use, rather than prior to first use.

## ***II. EXECUTIVE SUMMARY***

In this section of the comment letter, SIFMA summarizes some of its general comments on RN 15-16. A detailed discussion of each of these issues is included in the various sections of this comment letter.

- ***Retrospective Rule Review***: SIFMA commends FINRA for undertaking FINRA's retrospective rule review. SIFMA encourages FINRA to continue to review its rulebook and interpretations and to solicit member firm feedback on the function, operation, and purpose of FINRA's rules and interpretations.
- ***Proposals Included in RN 15-16***: SIFMA supports the amendments proposed in RN 15-16. SIFMA believes the proposed amendments will make FINRA's communications with the public rules less burdensome to the industry and more beneficial to investors by, among other things, eliminating unnecessary and duplicative filing requirements and leveraging information that is already available.
- ***Additional Suggested Changes***: While SIFMA supports the amendments proposed in RN 15-16, SIFMA believes an additional amendment to these rules and interpretations would further the underlying purpose of the rules while also making compliance with the rules less costly. As explained in greater detail in Section V of this comment letter, SIFMA suggests one additional change to FINRA Rule 2210(d)(1)(C) regarding the use of legends and footnotes relating to mobile devices.

Ms. Marcia E. Asquith  
July 2, 2015  
Page 4 of 6

### ***III. FINRA'S RETROSPECTIVE RULE REVIEW***

In April 2014, FINRA began a retrospective review of its communications with the public rules.<sup>6</sup> During the review process, FINRA met with and solicited feedback from a broad range of interested parties, including member firms. In December 2014, FINRA published a report on the assessment phase of the communications with the public rule review (the "Communications Rules Review Report").<sup>7</sup> FINRA's report noted, among other things, "that the rules and FINRA's administration of them may benefit from some updating and recalibration to better align the investor protection benefits and the economic impacts."<sup>8</sup> SIFMA understands that the proposals included in RN 15-16 and the Communications FAQs are a direct result from the suggestions included in the Communications Rules Review Report.

SIFMA would like to commend FINRA for undertaking FINRA's retrospective rule review. SIFMA encourages FINRA to continue to review its rulebook and interpretations and to solicit member firm feedback on the function, operation, and purpose of FINRA's rules and interpretations. As investors, technology, and the industry change, rules and interpretations should be re-evaluated to ensure they are still relevant and meet their underlying investor protection mandates in a cost effective and efficient manner. Outdated and inefficient rules and interpretations do not benefit anyone, particularly not investors who ultimately may bear the burden of the increased costs and inefficiencies in these rules.

### ***IV. PROPOSALS INCLUDED IN RN 15-16***

As noted above, the various proposals in RN 15-16 would reduce certain filing requirements under FINRA's communications with the public rules "where

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<sup>6</sup> See generally Regulatory Notice 14-14 (April 8, 2014) (available at: <http://www.finra.org/sites/default/files/NoticeDocument/p479810.pdf>) [last visited on July 1, 2015].

<sup>7</sup> See generally FINRA Retrospective Rule Review Report: Communications with the Public (Dec. 2014) (available at: <http://www.finra.org/sites/default/files/p602011.pdf>) [last visited on July 1, 2015].

<sup>8</sup> See *id.* at 12.

Ms. Marcia E. Asquith  
July 2, 2015  
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the investor protection benefits may not align with the associated economic costs.”<sup>9</sup>

SIFMA agrees that the proposed exclusions and streamlining of filing requirements would reduce the costs associated with such filings without diminishing investor protection. SIFMA strongly supports these and other efforts by FINRA to address opportunities to better align the protections to investors with the associated risks of the activities and the costs of compliance.

V. *ADDITIONAL SUGGESTED AMENDMENTS TO THE  
COMMUNICATIONS WITH THE PUBLIC RULES & INTERPRETATIONS*

A. FINRA Rule 2210(d)(1)(C) – Content Standards/Legends &  
Footnotes

FINRA Rule 2210(d)(1) applies various general content standards to member firm communications with the public. Rule 2210(d)(1)(C), in particular, provides that “[i]nformation may be placed in a legend or footnote only in the event that such placement would not inhibit an investor's understanding of the communication.”

SIFMA suggests that FINRA explicitly state that firms may use layered disclosure approaches for risk disclosures displayed on mobile and other similar small-form factor devices. FINRA should explicitly acknowledge the use of new techniques in the design and display of disclosures because of space limitations on mobile and other wearable technology devices. SIFMA believes this is best suited for the section of the rule (or applicable guidance) relating to the reference to footnotes and legends in 2210(d)(1)(C). This approach also aligns with FINRA’s statement in footnote 4 of RN 15-16 that “FINRA is considering whether to propose additional changes to Rule 2210 in response to . . . comments [related to the standards governing online, mobile and social media communications]”.<sup>10</sup>

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<sup>9</sup> See RN 15-16 at 5.

<sup>10</sup> *Id.* at 8 n.4.

Ms. Marcia E. Asquith  
July 2, 2015  
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**VI. CONCLUSION**

SIFMA thanks FINRA for the opportunity to comment on FINRA's proposed amendments to the rules governing communications with the public. Subject to the comments included in this letter, SIFMA supports the proposed amendments included in Regulatory Notice 15-16. SIFMA commends FINRA for undertaking its retrospective rule review and, in particular, using the feedback received pursuant to that review to draft and propose the amendments included in Regulatory Notice 15-16.

If you have any questions or require further information, please contact Kevin Zambrowicz, Managing Director & Associate General Counsel, SIFMA at (202) 962-7386 ([kzambrowicz@sifma.org](mailto:kzambrowicz@sifma.org)), or Stephen Vogt, Assistant Vice President & Assistant General Counsel, SIFMA at (202) 962-7393 ([svogt@sifma.org](mailto:svogt@sifma.org)).

Very truly yours,



Kevin Zambrowicz  
Associate General Counsel &  
Managing Director



Stephen Vogt  
Assistant Vice President &  
Assistant General Counsel

Cc: Evan Charkes, Co-Chair, SIFMA Compliance & Regulatory Policy  
Committee  
Pamela Root, Co-Chair, SIFMA Compliance & Regulatory Policy  
Committee

**EXHIBIT 5**

Below is the text of the proposed rule change. Proposed new language is underlined; proposed deletions are in brackets.

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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) Requirement for Certain Members to File Retail Communications**

**[Prior to First Use]**

(A) For a period of one year beginning on the date reflected in the Central Registration Depository (CRD®) system as the date that FINRA membership became effective, the member must file with the Department [at least] within 10 business days [prior to] of first use any retail communication that is published or used in any electronic or other public media, including any generally accessible website, newspaper, magazine or other periodical, radio, television, telephone or audio recording, video display, signs or billboards, motion pictures, or telephone directories (other than routine listings). [To the extent any retail communication that is subject to this filing requirement is a free writing prospectus that has been filed with the SEC pursuant to Securities Act Rule 433(d)(1)(ii), the member may file such retail communication within 10 business days of first use rather than at least 10 business days prior to first use.]

(B) 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.

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