within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change. The proposed rule change would, among other things, create a one-year pilot program, the Crowd Participant Program, for issuers of certain ETPs listed on the Exchange.

Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[5] designates March 26, 2014, as the date by which the Commission should either approve or disapprove or institute proceedings to determine whether to disapprove the proposed rule change (File Number SR–NYSEArca–2013–141).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–02872 Filed 2–10–14; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–71486; File No. SR–FINRA–2014–004]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change and Amendment No. 1 Thereto Relating to Amendments to FINRA Rule 5110 (Corporate Financing Rule—Underwriting Terms and Arrangements)

February 5, 2014.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 24, 2014, Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. On February 4, 2014, FINRA filed Amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

FINRA is proposing to amend FINRA Rule 5110 (Corporate Financing Rule—Underwriting Terms and Arrangements) to expand the circumstances in which termination fees and rights of first refusal are permissible; exempt from the filing requirements certain collective investment vehicles that are not registered as investment companies; and make clarifying, non-substantive changes regarding documents filed through FINRA's electronic filing system.[4]

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

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*

FINRA Rule 5110 (Corporate Financing Rule—Underwriting Terms and Arrangements) (the ''Rule''), among other things, regulates underwriting compensation, requires the filing of specified information in connection with public offerings in which members will participate, and prohibits unfair arrangements in connection with public offerings of securities. FINRA proposes to amend the Rule's provisions regarding unfair arrangements to: (1) Expand the circumstances under which members and issuers may negotiate termination fees and rights of first refusal (''ROFR''), with specified conditions; (2) exempt from the filing requirements exchange-traded funds formed as grantor or statutory trusts; and (3) codify the electronic filing requirement.

Termination Fees and Rights of First Refusal

Rule 5110(f) (Unreasonable Terms and Arrangements) sets forth terms and arrangements that, when proposed in connection with a public offering of securities, are considered unfair and unreasonable. Rule 5110(f)(2)(D) addresses fees in connection with a public offering of securities that is not completed according to the terms of agreement between the issuer and underwriter (''terminated offering''). Specifically, paragraph (D) generally provides that it is unfair and unreasonable for a member to arrange for the payment of any compensation by an issuer in connection with a terminated offering (''termination fee'' or ''tail fee''). Paragraph (D) further clarifies that this prohibition does not include compensation negotiated and paid in connection with a separate transaction that occurs in lieu of the proposed offering, or reimbursement of out-of-pocket accountable expenses actually incurred by the member.[5]

Currently, paragraph (f)(2)(E) of Rule 5110 provides that, in the event that an issuer terminates an offering with an underwriter and subsequently consummates a similar transaction, a termination fee may be permissible under certain circumstances. Historically, FINRA has only considered permitting termination fee arrangements under this provision where the subsequent transaction is an exchange offer or similar offering where members provide substantial structuring or advisory services (beyond that traditionally provided in connection with a distribution of a public offering).[6] In such cases, FINRA believes that a

[5] 15 U.S.C. 78s(b)(2).

[6] 17 CFR 200.30–3(a)(31).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] In Amendment No. 1, FINRA: (1) modified *Exhibit 5* to correct a marking error; and (2) modified Form 19b–4 on page 4 and Exhibit 1 on page 17 to replace the language ''exchange-traded funds formed as grantor or statutory trusts'' with the language ''collective investment vehicles that are not registered as investment companies.'' This Notice reflects the changes made by Amendment No. 1.

[4] The effective date of the electronic filing requirements under Rule 5110 was July 12, 2002. *See Notice to Members 02–26.*

[5] Rule 5110(f)(2)(C) prohibits payment of commissions or reimbursement of expenses to an underwriter prior to the commencement of the sale of the securities being offered, except for a reasonable advance against out-of-pocket accountable expenses actually anticipated to be incurred by the underwriter. To the extent such expenses are not actually incurred, any advance received must be reimbursed to the issuer.

Paragraph (D) currently provides that the reimbursement of out-of-pocket accountable expenses actually incurred by the member will not be presumed to be unfair or unreasonable under normal circumstances. The proposed amendment modifies paragraph (D) to specify that out-of-pocket accountable expenses must be *bona fide.*

[6] *See Notice to Members 97–82* (November 1997). Further, the Rule provides that a tail fee may not have a duration of more than two years from the date the member's services are terminated; however, the Rule provides that a member may demonstrate on the basis of information satisfactory to FINRA that an arrangement of more than two years is not unfair or unreasonable under the circumstances.

termination fee may be appropriate given the extent of the services provided by the member to the issuer.

FINRA has reevaluated its rules around termination fees and believes it is appropriate to update the Rule to provide members with a greater degree of flexibility and expand the circumstances under which participating members and issuers may negotiate termination fee arrangements. Specifically, FINRA is proposing to amend Rule 5110(f)(2) (Prohibited Arrangements) to generally permit termination fees where: (1) the agreement between the participating member and the issuer specifies that the issuer has a right of ''termination for cause'' (*i.e.,* where a member fails materially to perform the underwriting services contemplated in the written agreement);[7] (2) the agreement specifies that an issuer's exercise of its right of ''termination for cause'' eliminates any obligations with respect to the payment of any termination fee;[8] (3) the amount of any specified termination fee is reasonable in relation to the services contemplated in the written agreement; and (4) the agreement specifies that the issuer is not responsible for paying the termination fee unless an offering or other type of transaction is consummated by the issuer (without involvement of the member) within two years of the date the engagement is terminated with the member by the issuer. FINRA believes the proposal provides members with a greater degree of flexibility in negotiating the terms of their agreements for terminated offerings, while also providing protection for issuers if a member fails materially to perform the underwriting services contemplated in the written agreement.

Current Rule 5110(f)(2)(F) and (G) address ''ROFRs'', which provide a member with the right to underwrite or participate in future public offerings, private placements or other financings of the issuer. Rule 5110(f)(2)(F) deems as unfair and unreasonable any ROFR provided to a member that: (1) Has a duration of more than three years from the date of effectiveness or commencement of sales of the public offering, or (2) provides more than one opportunity to waive or terminate the ROFR in consideration of any payment or fee.[9] Rule 5110(f)(2)(G) prohibits any payment or fee to waive or terminate a ROFR regarding future public offerings, private placements or other financings that exceed specified values or that is not paid in cash.

FINRA also has reevaluated its rules around ROFRs and proposes amendments to permit ROFRs in the case of both successful as well as terminated offerings. FINRA proposes that ROFRs would be permissible where: (1) The agreement between the participating member and issuer specifies that the issuer has a right of termination for cause (*i.e.,* where a member fails materially to perform the underwriting services contemplated in the written agreement); (2) an issuer's exercise of its right of ''termination for cause'' eliminates any obligations with respect to the provision of any ROFR; and (3) any fees arising from services provided under a ROFR are customary for those types of services. As is currently the case, the Rule would continue to provide that the duration of any ROFR may not be for more than three years from the date of commencement of sales of the public offering (in the case of a successful offering). In the case of a terminated offering, the duration may not be for more than three years from the date the engagement is terminated by the issuer. In both cases, the agreement may not provide for more than one opportunity to waive or terminate the ROFR in consideration of any payment or fee.[10]

Filing Requirements for Certain Exchange-Traded Funds

Rule 5110(b)(8) (Exempt Offerings) generally provides an exemption for investment companies from the filing requirements of the Rule.[11] Due to this exemption, exchange-traded funds (''ETFs'') that are structured as investment companies generally are exempt. However, this exemption does not include certain other ETFs that are not investment companies. FINRA believes it is appropriate to add an exemption for these ETFs even if they do not fall under the definition of an ''investment company'' for the same reason that investment company ETFs are exempted from the Rule. Specifically, the creation structure of ETFs, whereby the component securities are deposited in return for shares of the fund, is not a distribution model that Rule 5110 was designed to address. Thus, FINRA is proposing to exempt offerings of securities issued by a pooled investment vehicle, whether formed as a trust, partnership, corporation, limited liability company or other collective investment vehicle, that is not registered as an investment company under the Investment Company Act and has a class of equity securities listed for trading on a national securities exchange; provided that such equity securities may be created or redeemed on any business day at their net asset value per share.

Electronic Filing

Rule 5110(b) (Filing Requirements) generally provides that no member or person associated with a member shall participate in any manner in a public offering of securities subject to Rules 2310, 5110 or 5121 unless the specified documents and information relating to the offering have been filed with and reviewed by FINRA. FINRA proposes to amend the Rule to make clarifying, non-substantive changes regarding documents filed through FINRA's electronic filing system.[12]

Industry Consultation

FINRA engaged in an extensive consultative process regarding the proposed rule change, including through the issuance of a *Regulatory Notice* soliciting comment on the termination fee and ROFR provisions, the exemption for ETFs, and the codification of the electronic filings requirement. Commenters generally supported the proposal as set forth in the *Notice,* requesting certain clarifications and modifications. A summary of the comments received in response to the *Regulatory Notice* is discussed in Item 5 below.[13]

FINRA will announce the implementation date of the proposed rule change in a *Regulatory Notice* to be published no later than 60 days

[7] The specific meaning of ''termination for cause'' would be dictated by the agreement. For purposes of this proposal, a ''termination for cause'' would include a member's material failure to perform the underwriting services contemplated in the written agreement, but is not required to include events that are outside the participating member's control.

[8] Members would continue to be permitted to receive reimbursement of out-of-pocket, bona fide, accountable expenses actually incurred by the participating member in connection with a terminated offering.

[9] Historically, FINRA has interpreted the Rule to permit ROFRs only in the case of successful offerings.

[10] FINRA is proposing to redesignate Rule 5110(f)(2)(G) as Rule 5110(f)(2)(F), which prohibits any payment or fee to waive or terminate a ROFR regarding future public offerings, private placements or other financings that exceed specified values or that is not paid in cash.

[11] Rule 5110(b)(8)(C) exempts from the Rule's filing requirements securities of ''open-end'' investment companies as defined in Section 5(a)(1) of the Investment Company Act of 1940 (''Investment Company Act'') and securities of any ''closed-end'' investment company as defined in Section 5(a)(2) of the Investment Company Act that: (1) makes periodic repurchase offers pursuant to Rule 23c–3(b) under of the Investment Company Act; and (2) offers its shares on a continuous basis pursuant to Rule 415(a)(1)(xi) of SEC Regulation C.

[12] The effective date of the electronic filing requirements under Rule 5110 was July 12, 2002. *See Notice to Members 02–26.*

[13] The Commission notes that Item 5 is part of the rule filing itself; it not part of this Notice.

following Commission approval. The effective date of the proposed rule change will be no later than 120 days following 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 [14] 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.

The proposed rule change provides more flexibility to issuers and participating members in the negotiation of termination fee and ROFR terms and arrangements, while also promoting just and equitable principles of trade by providing important protections for issuers who terminate agreements with members for cause. Issuers can benefit from the advice underwriters provide prior to raising capital, and may be able to utilize more of an underwriter's resources if they can wait to pay until they have the additional capital they plan to receive in a public offering. This may be especially true for foreign issuers that may need substantial advice and restructuring before accessing the U.S. capital markets. Accordingly, issuers may want to enter into termination fee or ROFR agreements if they provide an incentive to underwriters to devote additional resources when the risk of not receiving remuneration for those services is mitigated.

In addition, the proposed rule change provides an exemption for certain other collective investment vehicles that are not registered as investment companies, as exists for open-end and certain closed-end investment companies. The proposed rule change also formalizes that members must use FINRA's electronic filing system to file required information and documents relating to offerings in which they participate.

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. As discussed above, the proposed rule change sets out consistent rules for all members entering into agreements with issuers for the provision of services in connection with a public offering of securities, and also enhances competition among members that provide underwriting services to issuers by broadening the types of compensation arrangements that firms can negotiate with issuers. In addition, the amendments require that any termination fee paid must be reasonable in relation to the underwriting services contemplated and any ROFR fees paid must be customary in relation to the services the member provides.

Further, the proposed rule change provides additional protections to issuers that choose to enter into a termination fee agreement or provide a right of first refusal by requiring that the agreement provide issuers with a right to terminate for cause. Thus, under the proposal, issuers would have no obligation to pay a termination fee or be bound to a member by a ROFR if that member has failed materially to provide the underwriting services contemplated in the agreement.

The proposed rule change also would promote competition by eliminating disparate filing requirements for exchange-traded collective investment vehicles not registered as investment companies as compared to those that are structured as investment companies. FINRA does not believe that the codification of the electronic filing requirement or the other non-substantive and clarifying amendments contained in the filing will impact competition. Therefore, 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.

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

On June 6, 2012, FINRA published *Regulatory Notice 12–27* (''Notice'' or ''Notice 12–27'') requesting comment on FINRA's proposal to amend Rule 5110. A copy of the *Notice* is attached as Exhibit 2a.[15] The comment period expired on July 23, 2012. FINRA received three comments in response to the *Notice*.[16] 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. A summary of the comments and FINRA's response is provided below.

In *Notice 12–27,* FINRA proposed amendments substantially similar to the instant proposal. FINRA proposed to expand the circumstances under which termination fees and ROFRs would be permissible while providing protections for issuers that terminate arrangements with members for cause. The *Notice* also proposed to eliminate the filing requirements for exchange-traded funds that are structured as grantor or statutory trusts.

Commenters generally supported the proposal as set forth in the *Notice* and requested certain clarifications and modifications. With respect to the ''termination for cause'' provision, two commenters expressed concern that the provision would give an issuer broad discretion regarding the circumstances in which it could avoid paying an agreed upon termination fee to a member in the event of a terminated offering.[17] One commenter suggested limiting the circumstances under which an issuer could exercise its right to terminate for cause to an action or event that is ''within the direct control of the member'' and results in a material failure on the part of the member to provide the underwriting services.[18] Commenters also suggested that the issuer's termination for cause should take into account current market, economic and political conditions.[19] Another commenter suggested that the issuer's termination for cause be limited to cases in which the issuer requests the member to perform customary and reasonable services in connection with the public offering and ''it is determined that the member has materially failed to provide such services.'' [20]

FINRA continues to believe that it is an important issuer protection that members' arrangements include an issuer's right to terminate an agreement for cause, but has modified the proposal to provide that a ''termination for

[14] 15 U.S.C. 78*o*–3(b)(6).

[15] The Commission notes that Exhibits 2a, 2b, and 2c, are part of the rule filing itself; they are not exhibits to this Notice.

[16] *See* Letter from Bradley J. Swenson, Chief Compliance Officer, ALPS Distributors, Inc., to Joseph E. Price, Senior Vice President, FINRA, dated July 23, 2012 (''ALPS letter''); letter from Sean Davy, Managing Director, Corporate Credit Markets Division, Securities Industry and Financial Markets Association, to Marcia E. Asquith, Corporate Secretary, FINRA, dated July 23, 2012 (''SIFMA letter''); and letter from Jeffrey W. Rubin, Chair, Federal Regulation of Securities Committee, Business Law Section of the American Bar Association, to Marcia E. Asquith, Corporate Secretary, FINRA, dated July 30, 2012 (''ABA letter'').

[17] *See* ABA and SIFMA letters.

[18] *See* ABA letter.

[19] *See* ABA and SIFMA letters.

[20] *See* SIFMA letter. SIFMA also suggested that the termination for cause provision be operative as a function of the rule itself and not be required to be included in the written agreement. FINRA disagrees and believes it is important that the termination clause be known to issuers and set forth in any written agreement regarding the provision of underwriting services by a participating member in connection with a public offering of securities.

cause'' shall include the participating member's material failure to provide the underwriting services contemplated in the agreement, since agreements may be drafted broadly to include services that are not related to the member's role as an underwriter. FINRA also has clarified in this filing that an issuer's termination of an agreement due to events that are outside the member's control need not constitute a ''termination for cause'' under the proposal.

One commenter suggested amending the ''termination for cause'' provision to allow related persons and affiliates of the issuer and member to be parties to the written agreement noting that, in certain cases, the provisions and associated obligations may be reflected in an agreement between these persons.[21] Rule 5110 defines the terms ''issuer'' and ''participating member'' broadly to include certain related persons and affiliates. FINRA has revised the proposal to reflect the term ''participating member'' when referencing the parties to a member's written agreement with an issuer.

Notice 12–27 proposed that the agreement between the issuer and member provide that any termination fee must be reasonable and any fee arising from services provided under a ROFR be customary. Commenters argued that requiring the inclusion of the reasonable and customary language in a written agreement between the issuer and member is unnecessary and suggested that FINRA require these standards in the rule, but not require that they be expressed in the written agreement.[22] FINRA agrees and has reflected those changes in the instant filing. One commenter also suggested that FINRA clarify whether an issuer's payment of termination fees would be considered underwriting compensation in connection with a subsequent public offering that has been consummated within two years of the termination of services.[23]

In *Notice 12–27,* FINRA proposed an exemption from the filing requirements for ETFs formed as a grantor trust or statutory trust in which the portfolio assets include commodities, currencies or other assets that are not securities. Commenters supported this proposed amendment and further suggested that FINRA modify the proposed rule language to define the term ''ETF'' and broadly exempt from the Rule all ETFs without regard to how they are structured and organized.[24] FINRA has amended the language of the proposal to exempt offerings of securities issued by a pooled investment vehicle, whether formed as a trust, partnership, corporation, limited liability company or other collective investment vehicle, that is not registered as an investment company under the Investment Company Act and has a class of equity securities listed for trading on a national securities exchange; provided that such equity securities may be created or redeemed on any business day at their net asset value per share. FINRA believes that the current exemption for investment companies would capture virtually all other ETFs.

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 up to 90 days (i) as the Commission may designate 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 email to *rule-comments@sec.gov*. Please include File Number SR–FINRA–2014–004 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–FINRA–2014–004. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549–1090, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal offices of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–FINRA–2014–004, and should be submitted on or before March 4, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–02934 Filed 2–10–14; 8:45 am]

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[21] *See* SIFMA letter.

[22] *See* ABA and SIFMA letters. SIFMA stated that these standards should be ''operative as a function of the rule itself and should not be required to be set forth in a written agreement . . . .''

[23] *See* SIFMA letter. Under the Rule, items of value, such as termination fees or fees paid for services rendered pursuant to a ROFR are counted as compensation if they are received within 180 days prior to filing an offering or during the offering period. *See* Rule 5110(c)(3)(A)(xiii).

[24] *See* ABA and ALPS letters.

[25] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

Data Collection Available for Public Comments

ACTION: 60-day notice and request for comments.

SUMMARY: The Small Business Administration (SBA) intends to request approval, from the Office of Management and Budget (OMB) for the collection of information described below. The Paperwork Reduction Act (PRA) of 1995, 44 U.S.C Chapter 35 requires federal agencies to publish a notice in the **Federal Register** concerning each proposed collection of information before submission to OMB, and to allow 60 days for public