

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, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. 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-Phlx-2016-64 and should be submitted on or before July 6, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁰

Robert W. Errett,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-78026; 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)

June 9, 2016.

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 May 25, 2016, Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by FINRA. The Commission is publishing this notice to

solicit comments on the proposed rule change from interested persons.

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

FINRA is proposing 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 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

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.³ 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 disseminated retail communications, such as generally accessible Web sites, 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 according to FINRA. For example, if a new member wishes to update its public Web site with new information, the member must first file the proposed update with FINRA and wait at least 10 business days before it can post this update on its Web site. FINRA believes that 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.⁴

⁴ 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.

¹⁰ 17 CFR 200.30-3(a)(12).

¹¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Retrospective Rule Report, Communications with the Public, December 2014.

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.⁵ 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,⁶ 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.⁷ 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, 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.⁸ When FINRA adopted this requirement, prior to the Internet, FINRA staff did not have ready access to the sources of rankings or comparisons. Today, this information typically is easily available online. 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.⁹

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, 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 2005,¹⁰ 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

⁵ 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.").

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

⁷ 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.

⁸ See FINRA Rule 2210(c)(3)(A).

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

¹⁰ See *Notice to Members* 04-86 (November 2004).

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.¹¹

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.¹² However, members are required to re-file previously filed retail communications that are subject to filing under FINRA Rule 2210(c) to the extent that the member has updated any narrative information contained in the prior filing. Often these re-filed retail communications are templates for fact sheets concerning particular funds or products and provide quarterly information concerning a product's performance, portfolio holdings and investment objectives.

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

Accordingly, FINRA proposes to expand the template filing exclusion also to allow members to include updated non-predictive narrative descriptions of market events during the period covered by the communication and factual descriptions of portfolio changes without having to refile the template, as well as updated information that is sourced from a

registered investment company's regulatory documents filed with the SEC.¹³

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.¹⁴

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 2000,¹⁵ members have rarely, if ever, filed communications that contain bond fund volatility ratings. In general, in the few cases in which members filed such communications with FINRA, the staff has found that they have met applicable standards.

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

Consistent with the filing requirements for other retail communications about specific registered investment companies, the proposal would no longer require a retail communication that includes a bond fund volatility rating to be accompanied or preceded by a prospectus for the fund, and would permit members to file these

communications within 10 business days of first use rather than prior to use.¹⁶

FINRA believes that the requirement that any retail communication including a bond fund volatility rating be accompanied or preceded by a fund prospectus increases the burdens associated with these communications without adding commensurate investor protection. Except in rare circumstances due to operational hardship, all mutual fund prospectuses are available online, and thus an investor can easily access the prospectus, if needed.

Similarly, FINRA believes that requiring members to file these retail communications at least 10 business days prior to use and to withhold them from publication or circulation until any changes specified by the Department have been made does not provide appreciably greater investor protection. According to FINRA, this pre-use filing requirement inhibits a member's ability to circulate retail communications containing volatility ratings in a timely manner. Moreover, members still would be required to file these communications within 10 business days of first use, so that if they contain misleading content, the Department staff can take appropriate measures to correct any problems, such as recommending changes to the communication, or directing the member to cease using the communication with the public. FINRA has found a post-use filing requirement to be an effective investor protection approach for most retail communications with similar risk profiles.¹⁷

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

¹⁶ 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.

¹⁷ 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.

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

¹² See FINRA Rule 2210(c)(7)(B).

¹³ See proposed amendments to FINRA Rule 2210(c)(7)(B).

¹⁴ FINRA Rules 2210(c)(2)(C) and 2213(b) and (c).

¹⁵ See Notice to Members 00-23 (April 2000).

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, or Web site address for, a Web site that includes the criteria and methodology. Communications would have to provide the name of the entity that issued the rating, the most current rating and date for the rating, and whether consideration was paid for the rating, as well as a description of the types of risks the rating measures.

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

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,¹⁸ 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 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,

¹⁸ 15 U.S.C. 78o-3(b)(6).

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.¹⁹ 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.²⁰ 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

¹⁹ 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.

²⁰ 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.

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.²¹ 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.²² 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.²³

²¹ 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.

²² 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.

²³ 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

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 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

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.

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 in FINRA's view.

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 Web sites since new members primarily reach out to their existing and potential customers by developing Web sites. As discussed in more detail below, PIABA raised concerns about potential investor harm if FINRA only reviews new members' Web sites 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 Web sites.

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.²⁴ 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,²⁵ performance advertising,²⁶ the amount of disclosure required in print advertising,²⁷ the content standards under FINRA Rule 2210(d),²⁸ and options communications.²⁹

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,³⁰ and that FINRA update its electronic filing system to allow members to file materials in other than PDF format.³¹ 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

²⁴ See Exhibit 2b for a list of abbreviations assigned to commenters.

²⁵ See CAI, Fidelity, SIFMA, TD Ameritrade, and Vanguard.

²⁶ See TD Ameritrade.

²⁷ See Fidelity and TD Ameritrade.

²⁸ See FSI.

²⁹ See TD Ameritrade.

³⁰ See Fidelity and Wells Fargo.

³¹ See CAI.

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 states that it 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 Web sites. The *Notice* proposal would have narrowed the new member filing requirement to cover only public Web sites.

PIABA urged FINRA not to narrow the current new member filing requirements. PIABA stated that if FINRA reviews only new members’ Web sites 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 are 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 Web site) 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.³² 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.”³³

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

³² See ICI and Vanguard.

³³ See Investment Company Act Rule 30b2–1(a).

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 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 that promote or recommend a specific registered investment company or family of registered investment companies.³⁴

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).³⁵ 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.

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.³⁶ 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.

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 in FINRA's view, 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.³⁷ 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

³⁷ 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.

³⁵ 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.

³⁶ See FINRA Rule 2210(c)(3)(A).

³⁴ See CAI, TD Ameritrade, and Vanguard.

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.³⁸ 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 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.³⁹

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 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 email to rule-comments@sec.gov. Please include File Number SR-FINRA-2016-018 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange

³⁸ See CAI, ICI, and TD Ameritrade.

³⁹ 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.

Commission, 100 F Street NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-FINRA-2016-018. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will 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, 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 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 July 6, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴⁰

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016-14084 Filed 6-14-16; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-78029; File No. SR-NYSEMKT-2016-45]

Self-Regulatory Organizations; NYSE MKT LLC; Suspension of and Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Modify the NYSE Amex Options Fee Schedule With Respect to Fees, Rebates, and Credits for Transactions in the Customer Best Execution Auction

June 9, 2016.

I. Introduction

On April 11, 2016, NYSE MKT LLC (the "Exchange" or "NYSE MKT") filed with the Securities and Exchange Commission (the "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),¹ and Rule 19b-4 thereunder,² a proposed rule change (File No. SR-NYSEMKT-2016-45) to modify the NYSE Amex Options Fee Schedule with respect to fees, rebates, and credits relating to the Exchange's Customer Best Execution Auction ("CUBE Auction"),³ and to increase credits available under the Exchange's Amex Customer Engagement Program ("ACE Program").⁴ The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.⁵ Notice of filing of the proposed rule change was published in the **Federal Register** on April 26, 2016.⁶ Under Section 19(b)(3)(C) of the Act,⁷ the Commission is (1) hereby temporarily suspending

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The CUBE Auction is a mechanism in which an Exchange ATP Holder submits an agency order on behalf of a customer for price improvement, paired with a contra-side order guaranteeing execution of the agency order at or better than the National Best Bid or Offer ("NBBO") depending on the circumstances. The contra-side order could be for the account of the ATP Holder that initiated the CUBE Auction ("Initiating Participant"), or an order solicited from another participant. The agency order is exposed for a random period of time between 500 and 750 milliseconds in which other ATP Holders submit competing interest at the same price as the initial price or better ("RFR Responses"). The Initiating Participant is guaranteed at least 40% of any remainder of the order (after public customers and better-priced RFR Responses) at the final price for the CUBE order. See NYSE MKT Rule 971.1NY.

⁴ Under the ACE Program, credits are available to ATP Holders that bring customer orders to the Exchange based on the percentage (by tier) of national industry customer volume those customer orders comprise. See NYSE Amex Options Fee Schedule Section I.E.

⁵ 15 U.S.C. 78s(b)(3)(A).

⁶ See Securities Exchange Act Release No. 77658 (April 20, 2016), 81 FR 24674 ("Notice").

⁷ 15 U.S.C. 78s(b)(3)(C).

File No. SR-NYSEMKT-2016-45, and (2) instituting proceedings to determine whether to approve or disapprove File No. SR-NYSEMKT-2016-45.

II. Summary of the Proposed Rule Change

The Exchange's proposal amended certain fees, rebates, and credits relating to executions through its CUBE Auction. First, the proposal increased the fees assessed by the Exchange for RFR Responses (*i.e.*, orders and quotes submitted during a CUBE Auction that are executed against the agency order).⁸ Specifically, the Exchange increased RFR Response fees for Non-Customers (including Market Makers) from \$0.12 to \$0.70 for classes subject to the Penny Pilot⁹ ("Penny classes") and from \$0.12 to \$1.05 for classes not subject to the Penny Pilot ("Non-Penny classes").

Further, the proposal increased a rebate available to Initiating Participants in CUBE Auctions (*i.e.*, ATP Holders that initiate such auctions)¹⁰ under the Exchange's ACE Program. Specifically, the proposal increased the rebate paid to Initiating Participants that meet certain tiers of the ACE Program from \$0.05 to \$0.18 (the "ACE Initiating Participant Rebate") for each of the first 5,000 Customer contracts of an agency order executed in a CUBE Auction.¹¹

Finally, the proposal increased the credit paid by the Exchange to Initiating Participants (the "break-up credit") for each contract in the contra-side order that is paired with the agency order that does not trade with the agency order because it is replaced in the auction. Prior to the proposal, the credit granted was \$0.05 per contract in all classes. The proposal raised it to \$0.35 for Penny classes and \$0.70 for Non-Penny classes.¹²

In its filing, the Exchange stated that the changes to the CUBE Auction transaction fees are reasonable, equitable and not unfairly discriminatory "because they apply equally to all ATP Holders that choose to participate in the CUBE, and access to the Exchange is offered on terms that

⁸ See *supra* note 3 and NYSE Amex Options Fee Schedule, Section I.G.

⁹ See Commentary .02 to NYSE MKT Rule 960NY. See also Securities Exchange Act Release No. 75281 (June 24, 2015), 80 FR 37338 (June 30, 2015) (SR-NYSEMKT-2015-43) (extending the Penny Pilot through June 30, 2016).

¹⁰ See *supra* note 3.

¹¹ See NYSE Amex Options Fee Schedule, Section I.G.

¹² See *id.* Separate from its proposed changes to CUBE Auction fees and credits, the Exchange's proposal also increased certain credits available through its ACE Program with respect to non-CUBE transactions. See Notice, *supra* note 6, at 24674-75. See also NYSE Amex Options Fee Schedule, Section I.E.

⁴⁰ 17 CFR 200.30-3(a)(12).