



FINRA Proposes Initial Round of Amendments to Communications Rules

Introduction

In May 2016, FINRA filed with the SEC proposed revisions to its communications rules that include a few substantive revisions to existing rules, ease some burdensome filing requirements, and leave the door open for future changes. The rules to be revised include:

- FINRA Rule 2210 (Communications with the Public);
- 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).

FINRA's proposals and related discussion can be found at the following link:

http://www.finra.org/sites/default/files/rule_filing_file/SR-FINRA-2016-018.pdf

These proposals have been in the works for some time. FINRA commenced a review of its communications rules in April 2014, and FINRA initially proposed these revisions at a meeting of its Board of Governors in April 2015.

We note that these proposed amendments do not represent FINRA's final word about the communications rules. Rather, they are intended only as an initial set of changes, and are arguably somewhat narrow in scope and potential impact. Some are only technical clarifications, which do not involve any intended substantive change. However, FINRA expects that more revisions may come in the future to reflect its review and changes in the financial markets. For example, commentators have requested that FINRA update the rules concerning a variety of matters, including social media, mobile devices and electronic communications, performance advertising, the amount of disclosure in print advertising and options communications, among others. FINRA indicated that it is continuing to consider additional rule changes, and will address these topics as part of future proposals, as needed.

New Member Communications – A Shift to Post-Use Filing

FINRA Rule 2210(c)(1)(A) currently requires new FINRA members to file with FINRA retail communications that are used in any electronic or other public media at least 10 business days prior to use. Under the proposed

amendments, the new firm filing requirement would only apply to broadly disseminated retail communications, such as generally accessible websites, print media communications, and television and radio commercials.

The rule revision is designed to prevent a delay in these firms' ability to communicate with customers and prospective customers in a timely manner. FINRA believes it can continue to protect investors from potential harm without imposing this time delay on new members by reviewing most types of new members' communications on a post-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.

Offering Documents Concerning Unregistered Securities – A Clarification

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.” The filing exclusion has been interpreted by FINRA to exclude issuer-prepared offering documents concerning securities offerings that are exempt from registration, such as offerings of unregistered bank notes, Rule 144A offerings, and Regulation D offerings. 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.” FINRA believes that this amendment does not represent a substantive change to the current filing exclusion for unregistered securities' offering documents. (The rule would remain unchanged as to documents such as preliminary term sheets, which do not require filing under Rule 433, and which are exempt from the FINRA filing requirements.)

Investment Analysis Tools – Elimination of Certain Filing Requirements

“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. Under FINRA Rules 2210(c)(3)(C) and 2214(a), FINRA 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.

FINRA members have largely complied with these requirements applicable to templates for written reports produced by investment analysis tools and retail communications concerning these 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 FINRA content standards and the requirement that members provide access to the tools and their output upon request of FINRA's staff. Accordingly, FINRA proposes to eliminate the filing requirements for investment analysis tool report templates and retail communications about these tools. Instead, FINRA proposes to require its members to provide FINRA staff with access to investment analysis tools upon request.

Filing Exclusion for Templates – Extension to Narrative Information

FINRA members are currently not required to file retail communications that are based on templates that were previously filed with FINRA, but that are changed only to update recent statistical or other non-narrative information. However, members are required to re-file previously filed retail communications if 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. In the world of structured products, they may be used, for example, to show the recent historical performance of a proprietary index.

FINRA noted that, through its review of updated fund fact sheets and other similar templates, including its review of “thousands of template updates,” it found that certain narrative information has not presented significant risk to investors, and that these narrative updates are typically consistent with applicable standards. In particular, narrative updates that are not predictive in nature and only describe market events that occurred during the relevant period, or that only describe changes in a fund's portfolio, have typically not presented significant investor risks. The information also may be derived from the relevant SEC filings for these funds. In these cases, FINRA believes that the costs associated with filing these types of narrative updates exceed the investor benefits arising from a FINRA staff review of these updates.

Accordingly, FINRA proposes to expand the template filing exclusion to also allow members to include updated non-predictive narrative descriptions of market events during the relevant period, 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.

Investment Company Proposals

Investment Company Shareholder Reports. FINRA currently requires members to file the management's discussion of fund performance (“MDFP”) portion of a registered investment company shareholder report if the report is distributed or made available to prospective investors. FINRA requires members to file the MDFP because they may distribute or make shareholder reports available to prospective investors to provide more information about the offered funds, for example, in connection with the market process. Accordingly, FINRA has considered the MDFP to be subject to the filing requirement for retail communications.

FINRA proposes to exclude from the FINRA filing requirements the MDFP by adding an exclusion for annual or semi-annual reports that have been filed with the SEC in compliance with applicable requirements. FINRA believes that it would assist members' understanding of Rule 2210 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. FINRA believes it would be consistent to add shareholder reports that have been filed with the SEC.

Backup Material for Investment Company Performance Rankings and Comparisons. A FINRA 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. When FINRA adopted this requirement, prior to the widespread use of the Internet, FINRA staff did not have ready access to the sources of rankings or comparisons. However, this information today is usually easily available online. FINRA therefore proposes to eliminate the requirement to file ranking and comparison backup material and instead to require members to maintain backup materials as part of their records.

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 a family of registered investment companies. As a result, FINRA members would no longer be required to file generic investment company retail communications, such as a retail communication that describes different mutual fund types and features, but does not discuss the benefits of a specific fund or fund family.

Bond Mutual Fund Volatility Ratings. FINRA Rule 2213 permits FINRA 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.

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 these ratings. Since Rule 2213 first became effective, members have rarely filed communications that contain bond fund volatility ratings. FINRA also noted that in general, in the few cases in which members filed them with FINRA, they have met applicable standards.

FINRA believes it is appropriate to revise the rule to reduce some of these burdens, while continuing to include requirements that 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. 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, all mutual fund prospectuses are available online, and 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 FINRA have been made does not provide significant greater investor protection. This pre-use filing requirement inhibits a member’s ability to circulate retail communications containing volatility ratings in a timely manner. Members would still be required to file these communications within 10 business days of first use, so that if they contain misleading content, FINRA’s 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.

The proposal would also streamline the content and disclosure requirements. The amendments would eliminate the requirements:

- that all disclosures be contained in a separate disclosure statement;
- to disclose all current bond mutual fund volatility ratings that have been issued with respect to the fund;

- to explain the reason or any change in the current rating from the most recent prior rating;
- to describe the criteria and methodologies used to determine the rating;
- to include a statement that not all bond funds have volatility ratings; and
- to include a statement that the portfolio may have changed since the date of the rating.

Potential Effective Date

If the SEC approves the proposed rule changes, FINRA will announce the implementation date of the proposed rule changes in a regulatory notice to be published within 60 days. The effective date will be no later than 180 days following publication of the regulatory notice.

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