

Communications With the Public

SEC Approves Amendments to FINRA Rule 2210 to Exclude Research Reports on Exchange-Listed Securities From Filing Requirements and Clarify the Standards Applicable to Free Writing Prospectuses

Effective Date: July 11, 2014

Executive Summary

The SEC has approved amendments to FINRA Rule 2210 (Communications with the Public) that: (i) exclude from Rule 2210's filing requirements research reports concerning only securities listed on a national securities exchange, other than research reports which must be filed pursuant to Section 24(b) of the Investment Company Act of 1940 and (ii) clarify that free writing prospectuses that are exempt from filing with the SEC are not subject to Rule 2210's filing or content standards.¹ The amendments are effective immediately.

The text of the rule amendments is set forth in Attachment A.

Questions concerning this *Notice* should be directed to:

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Notice Type

- ▶ Rule Amendment

Suggested Routing

- ▶ Advertising
- ▶ Compliance
- ▶ Legal
- ▶ Registered Representatives
- ▶ Research
- ▶ Senior Management

Key Topics

- ▶ Advertising
- ▶ Communications With the Public
- ▶ Free Writing Prospectuses
- ▶ Investment Analysis Tools
- ▶ Research Reports

Referenced Rules & Notices

- ▶ FINRA Rule 2210
- ▶ FINRA Rule 2214
- ▶ FINRA Rule 2310
- ▶ Investment Company Act Rule 24b-3
- ▶ NASD Rule 2711
- ▶ Regulatory Notice 10-52
- ▶ Securities Act Rule 433
- ▶ Securities Act Rule 482

Background & Discussion

Filing Exclusion for Research Reports

FINRA Rule 2210 requires firms to file certain communications with FINRA's Advertising Regulation Department. Among other things, within 10 business days of first use or publication, firms must file retail communications concerning:

- ▶ registered investment companies (including mutual funds, exchange-traded funds, variable insurance products, closed-end funds and unit investment trusts);
- ▶ public direct participation programs (as defined in FINRA Rule 2310); and
- ▶ any security that is registered under the Securities Act of 1933 and that is derived from or based on a single security, a basket of securities, an index, a commodity, a debt issuance or a foreign currency.²

In addition, FINRA Rule 2210 requires new firms to file most broadly disseminated retail communications with FINRA at least 10 business days prior to first use for a one-year period beginning on the date reflected in the Central Registration Depository (CRD[®]) system as the date that FINRA membership became effective.³

Accordingly, the Rule 2210 filing requirements apply to research reports⁴ to the extent that they constitute retail communication about a product category that requires filing pursuant to Rule 2210 (including the provisions of the rule referenced above), or to the extent that they are covered by the new member filing requirements. The filing requirements cover research reports concerning certain exchange-listed securities, such as exchange-listed master limited partnerships (MLPs) and registered closed-end funds, as well as research reports produced by a firm that is subject to the new member filing requirements.

On June 26, 2014, the SEC approved amendments to FINRA Rule 2210 that exclude research reports concerning only exchange-listed securities from the filing requirements, other than research reports that must be filed pursuant to Section 24(b) of the 1940 Act. Section 24(b) requires any registered open-end investment company, any registered unit investment trust, or any registered face-amount certificate company, and any underwriter⁵ for such companies, to file all advertisements, pamphlets, circulars, form letters and other sales literature addressed to or intended for distribution to prospective investors with the SEC within 10 days of distribution of such material.⁶

Accordingly, firms no longer are required to file with FINRA any research reports concerning only securities listed on a national securities exchange, such as reports concerning an exchange-listed closed-end fund or master limited partnership, other than research reports that must be filed pursuant to Section 24(b) of the 1940 Act. In addition, firms that

are subject to the new member filing requirement will no longer be required to file any research reports concerning only securities listed on a national securities exchange, other than research reports that must be filed pursuant to Section 24(b).

Clarification Regarding Free Writing Prospectuses Exempt From SEC Filing

The filing requirements and content standards of FINRA Rule 2210 do not apply to prospectuses and similar documents that have been filed with the SEC, other than investment company advertisements prepared pursuant to Securities Act Rule 482, and free writing prospectuses that are used or referred to by a broker-dealer and distributed by or on behalf of the broker-dealer in a manner reasonably designed to lead to its broad unrestricted dissemination.

FINRA Rule 2210(c)(7)(F) excludes from the rule's filing requirements "[p]rospectuses, 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, except that an investment company prospectus published pursuant to Securities Act Rule 482 and a free writing prospectus that has been filed with the SEC pursuant to Securities Act Rule 433(d)(1)(ii) will not be considered a prospectus for purposes of this exclusion."

Similarly, FINRA Rule 2210(d)(8) excludes from the rule's content standards "[p]rospectuses, preliminary prospectuses, fund profiles and similar documents that have been filed with the SEC," but provides that the content standards do apply to "an investment company prospectus published pursuant to Securities Act Rule 482 and a free writing prospectus that has been filed with the SEC pursuant to Securities Act Rule 433(d)(1)(ii)."

Firms have raised questions as to whether these exclusions cover a free writing prospectus that is exempt from filing with the SEC pursuant to Securities Act Rule 433. FINRA intended these exclusions to cover prospectuses filed with the SEC as well as free writing prospectuses that are exempt from filing, other than so-called "omitting prospectuses" of registered investment companies governed by Securities Act Rule 482, and free writing prospectuses required to be filed with the SEC pursuant to Securities Act Rule 433(d)(1)(ii).⁷ To clarify this intent, FINRA has amended FINRA Rule 2210(c)(7)(F) and FINRA Rule 2210(d)(8) specifically to exclude from the filing and content standards free writing prospectuses that are exempt from filing with the SEC and to clarify that the filing and content requirements apply to free writing prospectuses required to be filed with the SEC pursuant to Securities Act Rule 433(d)(1)(ii).

Endnotes

1. See Securities Exchange Act Release No. 72480 (June 26, 2014), 79 FR 37796 (July 2, 2014) (File No. SR-FINRA-2014-012). The amendments also correct a cross-reference in FINRA Rule 2214 (Requirements for the Use of Investment Analysis Tools).
2. See FINRA Rule 2210(c)(3)(A), (B) and (E).
3. See FINRA Rule 2210(c)(1)(A). This filing requirement covers any retail communication that is published or used in any electronic or other public media, including any generally accessible website, newspaper, magazine or other periodical, radio, television, telephone or audio recording, video display, signs or billboards, motion pictures or telephone directories (other than routine listings). To the extent any retail communication that is subject to this filing requirement is a free writing prospectus that has been filed with the SEC pursuant to Securities Act Rule 433(d)(1)(ii), the firm may file such retail communication within 10 business days of first use rather than at least 10 business days prior to first use.
4. NASD Rule 2711(a)(9) defines “research report” as “any written (including electronic) communication that includes an analysis of equity securities of individual companies or industries, and that provides information reasonably sufficient upon which to base an investment decision.” The definition specifically excludes certain types of communications, such as discussions of broad-based indices or commentaries on economic, political or market conditions.
5. The 1940 Act defines “underwriter” to include “any person who has purchased from an issuer with a view to, or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking.” The term excludes “a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributor’s or seller’s commission.” See 1940 Act Section 2(a)(40).
6. Pursuant to Rule 24b-3 under the 1940 Act, any sales material shall be deemed filed with the SEC for purposes of Section 24(b) upon filing with FINRA.
7. See [Regulatory Notice 10-52](#) (Free Writing Prospectuses) (October 2010) (FINRA communication rules “apply to free writing prospectuses distributed by a broker-dealer in a manner reasonably designed to lead to broad unrestricted dissemination”). FINRA Rule 2210’s filing and content standards are intended to apply to free writing prospectuses that are subject to filing with the SEC pursuant to Securities Act Rule 433(d)(1)(ii), but not to other types of free writing prospectuses.

ATTACHMENT A

New language is underlined; deletions are in brackets.

2000. DUTIES AND CONFLICTS

2200. COMMUNICATIONS AND DISCLOSURES

2210. Communications with the Public

(a) through (b) No change.

(c) Filing Requirements and Review Procedures

(1) through (6) No change.

(7) Exclusions from Filing Requirements

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

(A) through (E) No change.

(F) 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, and free writing prospectuses that are exempt from filing with the SEC, except that an investment company prospectus published pursuant to Securities Act Rule 482 and a free writing prospectus that [has been]is required to be filed with the SEC pursuant to Securities Act Rule 433(d)(1)(ii) will not be considered a prospectus for purposes of this exclusion.

(G) through (N) No change.

(O) Research reports as defined in NASD Rule 2711 that concern only securities that are listed on a national securities exchange, other than research reports required to be filed with the Commission pursuant to Section 24(b) of the Investment Company Act of 1940.

(8) through (9) No change.

(d) Content Standards

(1) through (7) No change.

(8) Prospectuses Filed with the SEC

Prospectuses, preliminary prospectuses, fund profiles and similar documents that have been filed with the SEC and free writing prospectuses that are exempt from filing with the SEC are not subject to the standards of this paragraph (d); provided, however, that the standards of this paragraph (d) shall apply to an investment company prospectus published pursuant to Securities Act Rule 482 and a free writing prospectus that [has been]is required to be filed with the SEC pursuant to Securities Act Rule 433(d)(1)(ii).

(e) through (g) No change.

2214. Requirements for the Use of Investment Analysis Tools

(a) General Considerations

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

(b) through (d) and **Supplementary Material** No change.