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Vice President and Counsel

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June 18, 2014

Kevin O'Neill  
Deputy Secretary  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

**Re: File No. SR-FINRA-2014-012 – Response to Comments**

Dear Mr. O'Neill:

This letter responds to comments submitted to the Securities and Exchange Commission (“SEC” or “Commission”) in regard to the above-referenced rule filing.<sup>1</sup> The proposed rule change would: (i) amend FINRA Rule 2210 (Communications with the Public) to exclude from the 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 (“1940 Act”); (ii) amend FINRA Rule 2210 to clarify that free writing prospectuses that are exempt from filing with the SEC are not subject to the rule’s filing or content standards; and (iii) correct a rule cross-reference in FINRA Rule 2214 (Requirements for the Use of Investment Analysis Tools).

The Commission received four comment letters in response to the Proposed Release.<sup>2</sup> FINRA’s response to these comments is discussed below.

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<sup>1</sup> See Securities Exchange Act Release No. 71792 (March 25, 2014), 79 FR 18094 (March 31, 2014) (Notice of Filing of File No. SR-FINRA-2014-012).

<sup>2</sup> Letters from Jason Doss, President, Public Investors Arbitration Bar Association, dated April 15, 2014 (“PIABA”); Carrie Devorah, dated April 17, 2014 (“Devorah”); Dorothy Donohue, Acting General Counsel, Investment Company Institute, dated April 21, 2014 (“ICI”); and Stephanie Nicolas, Wilmer Cutler Pickering Hale and Dorr LLP, on behalf of Barclays Capital Inc., Citigroup Global Markets Inc., Credit Suisse Securities (USA) LLC, Deutsche Bank Securities Inc., Goldman, Sachs & Co., J.P. Morgan Securities LLC, Merrill Lynch, Pierce Fenner & Smith Incorporated, Morgan Stanley & Co. LLC, and RCS Capital Markets, LLC (“WilmerHale”).

### **Overall Support for Proposal**

The ICI and WilmerHale both express support for the proposed filing exclusion for research reports on exchange-listed securities. The ICI agrees with FINRA's assessment that the proposed filing exclusion is appropriate based on the fact that research reports are already subject to regulation under NASD Rule 2711 (Research Analysts and Research Reports), that securities listed on a national securities exchange are less likely to be subject to price manipulation, that research reports may only be produced by persons who have passed the appropriate qualification examinations, and that the FINRA staff has not seen significant problems with research reports on exchange-listed securities that have been filed with FINRA. The ICI also states that the filing exclusion may facilitate more timely and efficient dissemination of information about closed-end funds to the market.

WilmerHale similarly supports the proposal based on its belief that equity research reports on exchange-listed securities do not implicate investor protection concerns. However, WilmerHale recommends that the proposed exclusion be expanded to cover all other equity research materials concerning exchange-listed securities that do not meet the definition of "research report" under NASD Rule 2711(a)(9). WilmerHale believes that this expanded exclusion would be consistent with the approach FINRA has taken for purposes of other parts of FINRA Rule 2210, such as the provisions that allow a supervisory analyst to approve research communications.<sup>3</sup>

WilmerHale also argues that this expansion is appropriate because exchange-listed securities are associated with increased liquidity and price transparency, and thus research communications concerning such securities do not raise the same investor protection concerns as communications concerning other more illiquid securities. In addition, WilmerHale states that research communications that are not research reports are still prepared in a controlled environment that is designed to reduce the potential for conflicts of interest, and research analysts that produce such communications are subject to comprehensive independence requirements of NASD Rule 2711.

WilmerHale urges FINRA to consider amending FINRA Rule 2210 to provide a comparable filing exclusion for debt research reports if and when a FINRA rule regarding debt research is approved. WilmerHale believes that the requirements and protections of such a rule would justify an exclusion from the filing requirements for research reports on debt securities.

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<sup>3</sup> See FINRA Rule 2210(b)(1)(B).

### **Opposition to Rule Proposal**

PIABA opposes the proposed filing exclusion for research reports on exchange-listed securities because its members believe that the amendment is misguided and runs counter to FINRA's stated objective of investor protection. PIABA states that the securities industry is not far removed from the research analyst scandals which were based in part on misinformation and lack of transparency. PIABA also argues that the costs of filing such reports is a small price to pay for the additional protection it gives to investors, and that the filing requirement is essential for restoring investor confidence.

Devorah submitted a lengthy letter that comments on a number of provisions of FINRA Rule 2210. The letter contains a wide variety of observations and concerns regarding FINRA rules, including that FINRA's regulation of member firm communications should promote transparency. However, the letter does not comment on the proposed filing exclusion for research reports concerning exchange-listed securities.

### **Response to Comments**

Based on the comments received, FINRA does not believe it is appropriate either to withdraw the proposal or to amend the proposal as suggested. FINRA does not believe it is appropriate to expand the filing exclusion to cover research communications that do not meet the definition of research report. Unlike research reports, other research communications are not subject to the comprehensive disclosure, content and analyst independence provisions of NASD Rule 2711 and SEC Regulation Analyst Certification, nor is there any requirement that a registered research analyst prepare such communications. Accordingly, FINRA does not agree that the same investor protections apply to research communications that are not research reports.

FINRA also believes it is premature to commit to an exclusion from the filing requirements for research reports concerning debt securities in anticipation of FINRA adopting a debt research rule. FINRA believes it would be more appropriate to consider such a proposal if and when a proposed debt research rule is filed with the SEC and approved.

FINRA disagrees that the benefits to investors of requiring firms to file research reports concerning exchange-listed securities exceed the costs associated with such filings. While FINRA agrees that the research analyst scandals that occurred a decade ago raised a number of investor protection concerns, FINRA responded to such concerns by adopting NASD Rule 2711, and Congress also imposed requirements on firms that produce research reports as part of the Sarbanes-Oxley Act.<sup>4</sup> FINRA's

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<sup>4</sup> See 15 U.S.C. § 15D.

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experience since Rule 2711 took effect is that it has significantly reduced the problems that occurred prior to the adoption of the rule,<sup>5</sup> and that also requiring research reports concerning exchange-listed securities to be filed with FINRA does not appreciably increase investor protection relative to the costs associated with filing.

Moreover, by requiring firms to file research reports with FINRA, it is diverting FINRA staff resources that must be applied to review of these communications. FINRA believes such resources would be better spent on higher risk communications, and that by re-allocating such resources, FINRA will be indirectly increasing the regulatory benefits to investors.

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FINRA believes that the foregoing fully responds to the issues raised by the commenters. If you have any questions, please contact Philip Shaikun, Vice President and Associate General Counsel, at (202) 728-8451, or me at (240) 386-4534.

Very truly yours,



Joseph P. Savage  
Vice President & Counsel  
Regulatory Policy

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<sup>5</sup> See Joint Report by NASD and the NYSE On the Operation and Effectiveness of the Research Analyst Conflict of Interest Rules (December 2005), available at [www.finra.org](http://www.finra.org); U.S. Government Accountability Office, Securities Research: Additional Actions Could Improve Regulatory Oversight of Analyst Conflicts of Interest (January 2012), available at [www.gao.gov](http://www.gao.gov).