

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-86700; File No. SR-FINRA-2019-017)

August 16, 2019

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving a Proposed Rule Change to Amend FINRA Rules 2210 (Communications with the Public) and 2241 (Research Analysts and Research Reports)

I. Introduction

On June 20, 2019, Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“SEC or Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend FINRA Rules 2210 (Communications with the Public) and 2241 (Research Analysts and Research Reports) to conform to the requirements of the Fair Access to Investment Research Act of 2017 (“FAIR Act”).<sup>3</sup> The proposed rule change would eliminate the “quiet period” restrictions in FINRA Rule 2241 on publishing a research report or making a public appearance concerning a covered investment fund and would create a filing exclusion under FINRA Rule 2210 for covered investment fund research reports.

The proposed rule change was published for comment in the Federal Register on July 8, 2019.<sup>4</sup> The public comment period closed on July 29, 2019. The Commission received one

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Fair Access to Investment Research Act of 2017, Pub. L. No. 115-66, 131 Stat. 1196 (2017).

<sup>4</sup> See Exchange Act Release No. 86257 (Jul. 1, 2018), 84 FR 32492 (Jul. 8, 2019) (File No. SR-FINRA-2019-017 (“Notice”).

comment letter in response to the Notice, supporting the proposed rule change.<sup>5</sup> This order approves the proposed rule change.

## II. Description of the Proposed Rule Change<sup>6</sup>

The FAIR Act requires the SEC to propose and adopt rule amendments that would extend the current safe harbor under Securities Act of 1933 (“Securities Act”) Rule 139<sup>7</sup> to a “covered investment fund research report” upon terms and conditions that the SEC determines are necessary or appropriate in the public interest, for the protection of investors, and for the promotion of capital formation.<sup>8</sup> The FAIR Act directs that in implementing the safe harbor for covered investment fund research reports, the SEC is required to: (1) meet specified requirements concerning the safe harbor’s conditions, (2) prohibit any self-regulatory organization (“SRO”) from maintaining or enforcing specified rules regarding such reports, and (3) provide that a covered investment fund research report is not subject to the sales material filing requirements in section 24(b) of the Investment Company Act of 1940 (“Investment Company Act”).<sup>9</sup>

On November 30, 2018, the SEC adopted its final rules and rule amendments to implement the FAIR Act.<sup>10</sup> New Rule 139b expanded the Rule 139 safe harbor to include covered investment fund research reports, subject to specified conditions. Specifically, Rule 139b established a safe harbor for an unaffiliated broker or dealer participating in a securities offering of a

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<sup>5</sup> See Letter from the Dorothy Donohue, Deputy General Counsel, Investment Company Institute (“ICI”), dated July 29, 2019 (“ICI Letter”), available at <https://www.sec.gov>.

<sup>6</sup> The subsequent description of the proposed rule change is substantially excerpted from FINRA’s description in the Notice. See Notice, 84 FR at 32492-32497.

<sup>7</sup> 17 CFR 230.139.

<sup>8</sup> See Section 2(a) of the FAIR Act.

<sup>9</sup> See Section 2(b) of the FAIR Act.

<sup>10</sup> See Securities Act Release No. 10580 (Nov. 30, 2018), 83 FR 64180 (Dec. 13, 2018) (the “Release”).

covered investment fund to publish or distribute a covered investment fund research report. If the conditions in Rule 139b are satisfied, the publication or distribution of a covered investment fund research report would be deemed not to be an offer for sale or offer to sell the covered investment fund's securities for purposes of sections 2(a)(10) and 5(c) of the Securities Act. Rule 139b also adopted the FAIR Act's definitions of "covered investment fund," "covered investment fund research report," and "research report," subject to minor non-substantive revisions.<sup>11</sup>

The SEC also adopted new Rule 24b-4 under the Investment Company Act, which specifies that a covered investment fund research report as defined in Rule 139b that concerns a fund registered under the Investment Company Act shall not be subject to section 24(b) of the Investment Company Act or any rules or regulations thereunder, unless the report is not subject to SRO rules relating to research reports, including rules governing communications with the public.<sup>12</sup> Section 24(b) of the Investment Company Act generally requires certain registered investment companies and their underwriters to file sales material concerning those funds with the SEC within 10 days of use.<sup>13</sup>

#### Changes to FINRA Rules Required by the FAIR Act

As discussed in the Notice, FINRA has interpreted the FAIR Act as requiring it to make two changes to FINRA Rules. Therefore, FINRA has proposed: (1) to amend Rule 2241 to eliminate the quiet period restrictions on publishing a research report or making a public appearance concerning a covered investment fund that is the subject of such a report; and (2) to

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<sup>11</sup> See 17 CFR 230.139b(c).

<sup>12</sup> See 17 CFR 270.24b-4.

<sup>13</sup> See 15 U.S.C. 80a-24(b). This filing requirement applies to sales material concerning any registered open-end management investment company, any registered unit investment trust ("UIT"), or any registered face-amount certificate company ("FACC").

amend Rule 2210 to create a filing exclusion for covered investment fund research reports that qualify for the Securities Act Rule 139b safe harbor.

#### FINRA Equity Research Rules

FINRA Rule 2241 governs the publication of research reports concerning equity securities and the analysts that produce such research. Rule 2241 requires members to establish, maintain and enforce written policies and procedures reasonably designed to identify and effectively manage conflicts of interest related to the preparation, content and distribution of research reports and public appearances by research analysts.<sup>14</sup> Among other things, these policies and procedures also must define periods during which the member must not publish or otherwise distribute research reports, and research analysts must not make public appearances, related to the issuer (“quiet periods”). As discussed in the Notice, these quiet periods restrict a member that has participated as an underwriter or dealer in an initial public offering (“IPO”), as well as managers and co-managers of secondary offerings, from publishing research or having its research analysts make public appearances.<sup>15</sup>

While Rule 2241 excludes from its definition of “research report” communications related to mutual funds, the Rule does apply to communications that meet the definition of “research report” under Rule 2241 concerning other covered investment funds, including closed-end funds (“CEFs”), exchange-traded funds (“ETFs”), BDCs, UITs, and commodity or currency

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<sup>14</sup> See FINRA Rule 2241(b)(1).

<sup>15</sup> See Notice, 84 FR at 32493. See also, FINRA Rule 2241(b)(2)(I). This provision contains specified exceptions to the quiet periods for research reports and public appearances following an offering of securities of an Emerging Growth Company, for reports or appearances that discuss significant news or events concerning a subject company, and for reports and appearances regarding subject companies with “actively traded securities” as defined in SEC Regulation M.

funds.<sup>16</sup> Therefore, research reports (as defined under Rule 2241) on covered investment funds (other than mutual funds) are subject to Rule 2241's quiet periods if such research reports are published by an underwriter or dealer in the IPO or manager or co-manager of a secondary offering.

As discussed above, Section 2(b) of the FAIR Act requires the SEC to prohibit any SRO from maintaining or enforcing any rule that would prohibit the ability of a member to:

- Publish or distribute a covered investment fund research report solely because the member is also participating in a registered offering or other distribution of the fund; or
- Participate in a registered offering or other distribution of securities of a covered investment fund solely because the member has published or distributed a covered investment fund research report about the fund or its securities.<sup>17</sup>

Therefore, FINRA's proposal to amend Rule 2241 excepts from the Rule's quiet period requirements the publication or distribution of research reports and research analysts' public appearances if the member has participated in the offering of the subject company's securities.<sup>18</sup> Under this new proposed exception, the quiet period requirements shall not apply to a research report or a public appearance following any offering of the securities of a covered investment

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<sup>16</sup> See FINRA Rule 2241(a)(11).

<sup>17</sup> See Section 2(b)(3) of the FAIR Act.

<sup>18</sup> As discussed above, because the definition of "research report" under Rule 2241 is narrower than the definition of "research report" under the FAIR Act, not all covered investment fund research reports are subject to Rule 2241. Nevertheless, to the extent that a covered investment fund research report is also a research report subject to Rule 2241, the publication and distribution of such reports will not be subject to the rule's quiet periods.

fund that is the subject of a covered investment fund research report.<sup>19</sup> Although the FAIR Act does not address quiet periods for public appearances by research analysts, FINRA also proposes to eliminate such quiet periods for public appearances concerning a covered investment fund. Under Rule 2241, quiet periods for both research reports and public appearances are the same, and FINRA believes elimination of both quiet periods would advance the policy objectives of the FAIR Act.<sup>20</sup>

#### Elimination of Filing Requirement

As discussed above, section 24(b) of the Investment Company Act requires registered open-end management investment companies, registered UITs, registered FACCs, and their underwriters to file sales material for the funds with the SEC within 10 days of first use. Investment Company Act Rule 24b-3 provides that any sales material shall be deemed filed with the SEC for purposes of section 24(b) upon filing with a registered national securities association that has adopted rules providing standards for the investment company advertising practices of its members and has established and implemented procedures to review that advertising.<sup>21</sup>

Accordingly, virtually all principal underwriters of mutual funds, ETFs, UITs and FACCs satisfy the section 24(b) requirement by filing their sales material with FINRA. Rule 2210 requires members to file within 10 business days of first use or publication retail

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<sup>19</sup> FINRA also proposes to define the terms “covered investment fund” and “covered investment fund research report” as having the same meanings as in Securities Act Rule 139b. See Proposed FINRA Rules 2241(a)(15) and (16).

<sup>20</sup> FINRA rules do not prohibit a member from participating in a registered offering or other distribution of securities of a covered investment fund solely because the member has published research about the fund. Accordingly, there is no need to amend any FINRA rule to meet this requirement of section 2(b)(3) of the FAIR Act or Securities Act Rule 139b(b).

<sup>21</sup> FINRA is currently the only national securities association registered under the Exchange Act that has adopted such rules and procedures.

communications that promote or recommend a specific registered investment company or family of registered investment companies (including mutual funds, ETFs, variable insurance products, CEFs and UITs), as well as retail communications that concern any other registered security 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.<sup>22</sup>

As discussed in the Notice, pursuant to section 2(b)(4) of the FAIR Act, the SEC has adopted Investment Company Act Rule 24b-4, which provides that a covered investment fund research report, as defined in Securities Act Rule 139b(c)(3), of a covered investment fund registered as an investment company under the Investment Company Act, shall not be subject to section 24(b) of the Act or any rules or regulations thereunder. However, a covered investment fund research report is still subject to the section 24(b) filing requirement if the report is not subject to the content standards of any SRO rules related to research reports, including those contained in the SRO's rules governing communications with the public regarding investment companies or substantially similar standards.<sup>23</sup>

As discussed above, section 2(c)(2) of the FAIR Act provides that nothing in the Investment Company Act shall be construed as in any way limiting the authority of any SRO to examine or supervise a member's practices in connection with the member's publication or

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<sup>22</sup> See FINRA Rules 2210(c)(3)(A) and (D). For a one-year period beginning on the date reflected in FINRA's Central Registration Depository (CRD) system as the date that FINRA membership became effective, a member also must file with FINRA at least 10 business days prior to first use any broadly disseminated retail communication, regardless of whether it concerns a registered investment company. See FINRA Rule 2210(c)(1)(A). In addition, a member must file at least 10 business days prior to first use any retail communication concerning registered investment companies that includes performance rankings or comparisons that are not generally published, or that were created by the investment company, its underwriter, or an affiliate. See FINRA Rule 2210(c)(2)(A).

<sup>23</sup> See 17 CFR 270.24b-4.

distribution of a covered investment fund research report for compliance with applicable provisions of the Federal securities laws or SRO rules related to research reports, including those contained in rules governing communications with the public, or to “require the filing of communications with the public the purpose of which is not to provide research and analysis of covered investment funds.”<sup>24</sup> Accordingly, FINRA interpreted the FAIR Act as requiring FINRA to create a filing exclusion in Rule 2210 for covered investment fund research reports, but permits FINRA to require the filing of a covered investment fund research report if the purpose of the report is not to provide research and analysis of covered investment funds.<sup>25</sup>

Further, FINRA stated it intended to create a rule that furthers the purposes of the FAIR Act, protects investors, and is relatively straightforward for broker-dealers to implement. FINRA believes that these objectives could best be achieved if the filing exclusion applies to any “covered investment fund research report” as defined by Rule 139b that qualifies for the Rule 139b safe harbor.<sup>26</sup> Moreover, FINRA believes that the SEC, through rulemaking, had determined which research reports should be subject to the Rule 139b safe harbor, and there is no policy reason to create a filing exclusion for covered investment fund research reports that differed from this standard.

As stated above, the FAIR Act authorizes FINRA to require members to file any covered investment fund research report the purpose of which is not to provide research and analysis of

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<sup>24</sup> See section 2(c)(2) of the FAIR Act.

<sup>25</sup> See Notice, 83 FR at 32494.

<sup>26</sup> In the Notice, FINRA summarized comments that the Commission had discussed in the Release that recommended that FINRA modify its rules. FINRA also explained that it did not modify the definition of “research report” under FINRA Rule 2241 to match the definition of “research report” under the FAIR Act and Rule 139b because FINRA believes that it would be inconsistent with the requirements of Section 15D of the Exchange Act to do so. See Notice, 83 FR at 32494-32495.



covered investment funds. As described more fully in the Notice, FINRA considered how and whether to treat such reports.<sup>27</sup> FINRA believes that the intent of the FAIR Act and Rule 139b is to increase the volume and publication of research reports on covered investment funds subject to appropriate conditions, and thus believes that its proposed filing exclusion should be consistent with this approach. Moreover, FINRA believes that Rule 139b's requirements reflect the Commission's careful consideration of balancing the need for more fund research with investor protection.<sup>28</sup> For these reasons, FINRA has proposed to exclude from filing all covered investment fund research reports that qualify for the Rule 139b safe harbor.<sup>29</sup>

Therefore, FINRA has proposed to create a new filing exclusion under Rule 2210 for "any covered investment fund research report that is deemed for purposes of sections 2(a)(10) and 5(c) of the Securities Act not to constitute an offer for sale or offer to sell a security under Securities Act Rule 139b."<sup>30</sup> FINRA also proposed to define "covered investment fund research report" as having the same meaning given that term in paragraph (c)(3) of Securities Act 139b.<sup>31</sup>

#### Affiliated Research Reports

The FAIR Act and Securities Act Rule 139b define "covered investment fund research report" to exclude a research report to the extent that the report is published or distributed by the covered investment fund, any affiliate of the covered investment fund, or any broker or dealer

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<sup>27</sup> See, Notice, 83 FR 32495.

<sup>28</sup> See generally Release, supra note 10, at 64183-64193.

<sup>29</sup> Of course, FINRA may still review such reports through examinations, targeted sweeps, or spot checks, and such reports will remain subject to the content standards of FINRA rules governing communications with the public. See Section 2(c)(2) of the FAIR Act; see also Release, supra note 10, at 64194 and fn. 185.

<sup>30</sup> See Notice, proposed FINRA Rule 2210(c)(7)(P).

<sup>31</sup> See Notice, proposed FINRA Rule 2210(a)(7).

that is an investment adviser (or an affiliated person of an investment adviser) for the covered investment fund.<sup>32</sup> Thus, research reports published or distributed by a covered investment fund, its affiliate, or any broker-dealer that is an investment adviser (or an affiliate of the investment adviser) for the covered investment fund will still have to be filed under Investment Company Act section 24(b) and FINRA Rule 2210.<sup>33</sup>

In some cases, an investment adviser or another affiliate of a registered investment company will enter into an agreement with an unaffiliated broker-dealer to act as the principal underwriter for the fund (“third-party distributor”). As described in the Notice, third-party distributors provide a variety of services pursuant to their distribution agreements with investment companies. Typically, these funds’ investment advisers or the funds themselves prepare the retail communications, and then submit the communications to the third-party distributor for compliance review and filing with FINRA and may be posted on the investment adviser’s or the fund’s or an affiliate’s websites or through other media. As the SEC noted in the Release, one factor to consider in evaluating whether a research report has been published or distributed by a person covered by the affiliate exclusion from the definition of covered investment fund research report is the extent of such person’s involvement in the preparation of

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<sup>32</sup> See Section 2(f)(3) of the FAIR Act and Securities Act Rule 139b(c)(3).

<sup>33</sup> If a research report concerns both a covered investment fund that is an affiliate of the member that is publishing or distributing the research report, as well as a third-party fund that is not affiliated with the member publishing or distributing the report, the research report would not qualify as a covered investment fund research report. See Release, supra note 7, at 64191 (stating that “[w]e believe extending the rule 139b safe harbor to affiliated funds in industry research reports (whether industry representation or comprehensive list reports) would not be consistent with the intent and plain language of section 2(f)(3) of the FAIR Act”).

the research report.<sup>34</sup> The Commission refers to such affiliate involvement or endorsement as “the entanglement or adoption theory, respectively.”<sup>35</sup>

Thus, FINRA stated that it will not consider research reports on covered investment funds to be excluded from filing under the proposed changes to Rule 2210 if personnel of the covered investment fund, any affiliate of the fund, or any broker-dealer that is the investment adviser or an affiliated person of the investment adviser were entangled with the preparation of the report, or had adopted its contents after it had been prepared.<sup>36</sup>

### III. Comment Summary

As noted above, the Commission received one comment letter on the proposed rule change, supporting the proposal.<sup>37</sup> The commenter strongly supports FINRA’s proposed amendments, stating that the proposal aligns FINRA’s quiet period requirements and filing exclusion applicable to covered investment funds with the SEC’s rules adopted to implement the FAIR Act and does so in a manner that is streamlined and straightforward.<sup>38</sup> The commenter believes FINRA’s clarification of the applicability of quiet periods of Rule 2241 removes a potential ambiguity and impediment to broker-dealers’ use of the safe harbor.<sup>39</sup> The commenter agrees with FINRA’s determination that the proposed filing exclusion in FINRA Rule 2210 for

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<sup>34</sup> See Release, supra note 10, at 64182.

<sup>35</sup> See supra note 34.

<sup>36</sup> See Release, supra note 10, at 64181-64183 (discussion of affiliate exclusion). For example, if a third-party distributor publishes or distributes research concerning a fund that was written by personnel of the fund’s investment adviser, the report still would be subject to filing under Rule 2210.

<sup>37</sup> See supra note 5.

<sup>38</sup> See ICI Letter.

<sup>39</sup> Id.

covered investment fund research reports not differ from the standard adopted by the SEC in Rule 139b.<sup>40</sup> The commenter strongly supports this streamlined approach proposed by FINRA as benefitting investors, funds and broker-dealers by ensuring broker-dealers producing such reports need only conduct one legal analysis to comply with both the SEC and FINRA rules.<sup>41</sup> According to the commenter, the streamlined amendments would help facilitate broker-dealers' use of the safe harbor which the commenter believes would generate useful fund information for investors.<sup>42</sup>

#### IV. Discussion and Commission Findings

After careful review of the proposed rule change and the comment letter, the Commission finds that the proposal is consistent with the requirements of the Exchange Act and the rules and regulations thereunder that are applicable to a national securities association.<sup>43</sup> Specifically, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Exchange Act,<sup>44</sup> which requires, among other things, that FINRA rules 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.

#### **Protection of Investors and the Public Interest**

The Commission considers FINRA's proposed changes to the FINRA Rule 2241 quiet periods applicable to publication of covered investment fund research reports to be consistent

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<sup>40</sup> Id.

<sup>41</sup> Id.

<sup>42</sup> Id.

<sup>43</sup> In approving this rule change, the Commission has considered the rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>44</sup> 15 U.S.C. 78o-3(b)(6).

with the language and purposes of the FAIR Act. In addition, the Commission believes that FINRA's additional proposed change to eliminate quiet periods applicable to public appearances involving an offering of covered investment fund securities provides consistency and clarity with respects to members that produce research reports for covered investment funds.

The Commission believes that the proposed rule change would clarify the applicability of FINRA Rule 2241 quiet periods to covered investment funds that are subject of a research report, as well as further the purposes of the FAIR Act which directed the SEC to extend the current safe harbor available under Securities Act Rule 139 to a covered investment fund research report. The Commission believes the extension of the safe harbor in Rule 139b should improve investors' access to potentially useful and timely information about such covered investment funds which furthers the public interest. The consistency of standards in Rule 139b and FINRA Rule 2241 provides clarity to broker-dealers, funds and their affiliates which in turn reduces the cost of compliance.

The Commission also believes that the proposed filing exclusion under FINRA Rule 2210 for covered investment fund research reports that qualify for the Rule 139b safe harbor is consistent with the FAIR Act's intent to increase the volume and publication of research reports on covered investment funds subject to appropriate conditions. The Commission believes that this proposed rule change will improve efficiency and reduce regulatory burden without diminishing investor protection. Specifically, the consistency of standards in Rule 139b and FINRA Rule 2210 provides clarity to broker-dealers, funds and their affiliates as to which research reports constitute "covered investment fund research reports," which in turn reduces the cost of compliance. In addition, FINRA retains other methods to review covered investment fund research reports, such as through examinations, targeted sweeps, or spot checks. Thus, the

Commission considers proposed FINRA Rule 2210 and its consistency with the Rule 139b safe harbor as a clear and appropriate approach to furthering the purposes of the FAIR Act and is consistent with protecting investors and the public interest.

Taking into consideration FINRA's views and the commenter's support, the Commission believes that the proposal is consistent with the Exchange Act. In particular, the Commission believes that the proposed rule change is appropriate and designed to protect investors and the public interest, consistent with Section 15(A)(b)(6) of the Exchange Act. For these reasons, the Commission finds that the proposed rule change is consistent with the Exchange Act and the rules and regulations thereunder.

## V. Conclusion

IT IS THEREFORE ORDERED pursuant to Section 19(b)(2) of the Exchange Act<sup>45</sup> that the proposal (SR-FINRA-2018-019), be and hereby is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>46</sup>

Jill M. Peterson

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<sup>45</sup> 15 U.S.C. 78s(b)(2).

<sup>46</sup> 17 CFR 200.30-3(a)(12).

Assistant Secretary