

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-2014-026 and should be submitted on or before July 23, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>65</sup>

**Kevin M. O'Neill,**  
Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 72480; File No. SR-FINRA-2014-012]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving Filing of a Proposed Rule Change To Amend FINRA Rules 2210 (Communications with the Public) and 2214 (Requirements for the Use of Investment Analysis Tools)

June 26, 2014.

#### I. Introduction

The Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("SEC" or "Commission") on March 25, 2014, pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to (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")<sup>3</sup>; (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 mistaken rule cross-reference in FINRA Rule 2214 (Requirements for the Use of Investment Analysis Tools). The proposed rule change was published for comment in the **Federal Register** on March 31, 2014.<sup>4</sup> The Commission received four comments in response to the proposed rule change.<sup>5</sup> This order approves the proposed rule change.

#### II. Description of the Proposed Rule Change

##### (a) Filing Exclusion for Research Reports on Exchange-Listed Securities

As further described in the Notice, FINRA proposed to amend the current requirements for members to file certain retail communications with the Advertising Regulation Department (the "Department"). Under this amendment, members would no longer be required to file research reports that concern only securities listed on a national securities exchange. Between the dedicated protections applied to research reports by other FINRA and SEC rules, and the increased liquidity and price transparency associated with exchange-listed securities, FINRA stated its belief that the additional investor protection benefit of Department review of those retail communications is minimal in relation to the cost of compliance and administration of the filing requirement. This exclusion will not apply to research reports that must be filed under Section 24(b) of the 1940 Act.

##### (b) Clarification Regarding Free Writing Prospectuses Exempt from SEC Filing

FINRA proposed to amend FINRA Rule 2210(c)(7)(F) and FINRA Rule 2210(d)(8) to exclude from the filing and content standards free writing prospectuses that are exempt from filing

with the SEC. FINRA also proposed 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).<sup>6</sup>

##### (c) Correction of Rule Cross-Reference in FINRA Rule 2214

Paragraph (a) of FINRA Rule 2214 (Requirements for the Use of Investment Analysis Tools) mistakenly cross-references FINRA Rule 2210(c)(3)(D) (the filing requirement for retail communications concerning collateralized mortgage obligations).<sup>7</sup> Rule 2214(a) should cross-reference Rule 2210(c)(3)(C) (the filing requirement for any template for written reports produced by, or retail communications concerning, an investment analysis tool). FINRA proposed to correct this rule cross-reference.

FINRA stated that it would announce the effective 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 the date of publication of the *Regulatory Notice* announcing Commission approval.

#### III. Comment Letters

The SEC received four comment letters.<sup>8</sup> Two commenters expressed support for the proposal<sup>9</sup> and two opposed it.<sup>10</sup> The Commission also received FINRA's response to comments, which is discussed below.<sup>11</sup>

##### (a) Overall Support for Proposal

One commenter agreed 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 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.<sup>12</sup> The commenter also stated that the filing

<sup>6</sup> 17 CFR 230.433(d)(1)(ii).

<sup>7</sup> See Securities Exchange Act Release No. 66681 (March 29, 2012), 77 FR 20452 (April 4, 2012) (SR-FINRA-2011-035).

<sup>8</sup> See *supra* note 5.

<sup>9</sup> See ICI and WilmerHale Letters.

<sup>10</sup> See PIABA and Devorah Letters.

<sup>11</sup> Letter from Joseph P. Savage, FINRA, dated June 18, 2014 ("FINRA Letter").

<sup>12</sup> See ICI Letter.

<sup>65</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> 15 U.S.C. 80a-24(b).

<sup>4</sup> See Securities Exchange Act Release No. 34-71792 (March 31, 2014), 79 FR 18094 (SR-FINRA-2014-012) ("Notice").

<sup>5</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").

exclusion may facilitate more timely and efficient dissemination of information about closed-end funds to the market.<sup>13</sup>

Another commenter similarly supported the proposal based on its belief that equity research reports on exchange-listed securities do not implicate investor protection concerns.<sup>14</sup> However, the commenter recommended 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).<sup>15</sup> The commenter believed 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>16</sup>

The commenter also argued 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.<sup>17</sup> In addition, the commenter stated that research communications—which 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.<sup>18</sup>

The commenter urged 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.<sup>19</sup> The commenter believed that the requirements and protections of such a rule would justify an exclusion from the filing requirements for research reports on debt securities.<sup>20</sup>

#### (b) Opposition to Rule Proposal

One commenter opposed 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.<sup>21</sup> The commenter stated that the securities industry is not far removed from the research analyst scandals which were based in part on misinformation and lack of transparency.<sup>22</sup> The commenter also argued 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.<sup>23</sup>

Another commenter submitted a letter that comments on a number of provisions of FINRA Rule 2210.<sup>24</sup> 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.<sup>25</sup> However, the letter does not comment on the proposed filing exclusion for research reports concerning exchange-listed securities.<sup>26</sup>

#### (c) Response to Comments

FINRA responded to these comments by stating that it does not believe it is appropriate either to withdraw the proposal or to amend the proposal as suggested.<sup>27</sup> FINRA also noted that it does not believe it is appropriate to expand the filing exclusion to cover research communications that do not meet the definition of research report.<sup>28</sup> FINRA stated that 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.<sup>29</sup> Accordingly, FINRA asserted that it does not agree that the same investor protections apply to research communications that are not research reports.<sup>30</sup>

FINRA also stated that 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.<sup>31</sup> FINRA noted that 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.<sup>32</sup>

In its letter, FINRA disagreed that the benefits to investors of requiring firms to file research reports concerning exchange-listed securities exceed the costs associated with such filing.<sup>33</sup> FINRA also noted that while it 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>34</sup> FINRA responded that its experience since Rule 2711 took effect is that it has significantly reduced the problems that occurred prior to the adoption of the rule, 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.<sup>35</sup>

Moreover, FINRA noted that by requiring firms to file research reports with FINRA, it is diverting FINRA staff resources that must be applied to review of these communications.<sup>36</sup> FINRA stated that it 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.<sup>37</sup>

#### IV. Discussion and Findings

After careful review of the proposed rule change, the comments, and FINRA’s response to the comments, the Commission finds that the proposed rule change is consistent with the requirements of the Act, and the rules and regulations thereunder that are applicable to a national securities association.<sup>38</sup> In particular, the

<sup>13</sup> *Id.*

<sup>14</sup> *See* WilmerHale Letter.

<sup>15</sup> *Id.* (citing 15 U.S.C. 15D).

<sup>16</sup> *See* FINRA Letter (citing Joint Report by NASD and the NYSE On the Operations 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)).

<sup>17</sup> *Id.*

<sup>18</sup> *See* FINRA Letter (citing Joint Report by NASD and the NYSE On the Operations 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)).

<sup>19</sup> In approving this proposal, the Commission has considered the proposed rule’s impact on

<sup>13</sup> *Id.*

<sup>14</sup> *See* WilmerHale Letter.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* (citing FINRA Rule 2210(b)(1)(B)).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *See* PIABA Letter.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *See* Devorah Letter.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *See* FINRA Letter.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

Commission finds that the proposal to exclude research reports concerning only exchange-listed securities from the filing requirements for certain retail communications is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>39</sup> 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. The proposed exclusion should reduce the burdens imposed on member firms that would otherwise have to file research reports on exchange-listed securities with FINRA, while continuing to protect investors through the protections provided by FINRA Rule 2210 and NASD Rules 1022, 1050 and 2711.

The Commission also finds that the proposed clarification (consistent with FINRA's current interpretation of Rule 2210) regarding the application of Rule 2210's filing and content standards to free writing prospectuses that are exempt from filing with the SEC is consistent with the provisions of Section 15A(b)(6) of the Act.<sup>40</sup> The Commission further finds that the proposed correction of the rule cross-reference in FINRA Rule 2214 is consistent with the provisions of Section 15A(b)(6) of the Act.<sup>41</sup> The correction of the cross-reference is consistent with the Rule's intent and purpose and will reduce any potential confusion due to the current incorrect cross-reference.

In general, the Commission believes that FINRA has responded to the comments adequately, and has explained how the proposed rule change is consistent with the requirements of the Act, and the rules and regulations thereunder that are applicable to a national securities association.

## V. Conclusions

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>42</sup> that the proposed rule change (SR-FINRA-2014-012) be, and hereby is, approved.

efficiency, competition, and capital formation. See 15 U.S.C. 17c(f).

<sup>39</sup> 15 U.S.C. 78o-3(b)(6).

<sup>40</sup> 15 U.S.C. 78o-3(b)(6).

<sup>41</sup> 15 U.S.C. 78o-3(b)(6).

<sup>42</sup> 15 U.S.C. 78s(b)(2).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>43</sup>

**Kevin M. O'Neill,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-72477; File No. SR-BOX-2014-16]

### Self-Regulatory Organizations; BOX Options Exchange LLC; Notice of Filing of Proposed Rule Change To Adopt New Trade Allocation Algorithms for Matching Trades at the Conclusion of the PIP and COPIP

June 26, 2014.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on June 16, 2014, BOX Options Exchange LLC ("Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule from interested persons.

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

The Exchange proposes to amend BOX Rules 7150 (Price Improvement Period ("PIP")) and 7245 (Complex Order Price Improvement Period ("COPIP")) to adopt new trade allocation algorithms for matching trades at the conclusion of the PIP and COPIP. The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room and also on the Exchange's Internet Web site at <http://boxexchange.com>.

#### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization 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. The self-regulatory organization 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

The Exchange proposes to amend BOX Rules 7150 (Price Improvement Period ("PIP")) and 7245 (Complex Order Price Improvement Period ("COPIP")) to adopt new trade allocation algorithms for matching trades at the conclusion of the PIP and COPIP. This is a competitive filing based on the rules of NASDAQ OMX PHLX LLC ("Phlx").<sup>3</sup>

##### PIP

The Exchange currently offers Participants the possibility of price improvement via its innovative electronic auction process known as the PIP. The PIP has saved investors more than \$467 million versus the prevailing NBBO since 2004, a monthly average of more than \$3.8 million. BOX believes that the proposed rule change will result in additional PIP transactions, and give customers a greater opportunity to benefit from price improvement.

Options Participants executing agency orders for single options series instruments may designate Customer Orders for price improvement and submission to the PIP. Customer Orders designated for the PIP ("PIP Orders") may be submitted to BOX with a matching contra order ("Primary Improvement Order") equal to the full size of the PIP Order. The Primary Improvement Order is on the opposite side of the market from the PIP Order and at a price equal to or better than that of the National Best Bid Offer ("NBBO") at the time of the commencement of the PIP (the "PIP Start Price"). BOX begins a PIP by broadcasting a message to market participants via the Exchange's High Speed Vendor Feed ("HSVF"). During the PIP, order flow providers ("OFFPs") and Market Makers (other than the Initiating Participant) may submit competing orders ("Improvement Orders") for their own account and OFFPs may also provide access to the PIP for the account of a Public Customer<sup>4</sup> or for any account except Market Maker. Options Participants may continually

<sup>3</sup> See Phlx Rule 1080(n).

<sup>4</sup> The term "Public Customer" means a person that is not a broker or dealer in securities. See BOX Rule 100(a)(51).

<sup>43</sup> 17 CFR 200.30-3(a)(12).

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

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