

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–86257; File No. SR–FINRA–2019–017]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change To Amend FINRA Rules 2210 (Communications With the Public) and 2241 (Research Analysts and Research Reports)

July 1, 2019.

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 20, 2019, Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

FINRA is proposing 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 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 text of the proposed rule change is available on FINRA’s website at <http://www.finra.org>, at the principal office of FINRA and at the Commission’s Public Reference Room.

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

In its filing with the Commission, FINRA 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. FINRA 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 FAIR Act

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>4</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>5</sup> 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>6</sup> On November 30, 2018, the SEC adopted its final rules and rule amendments to implement the mandates of the FAIR Act.<sup>7</sup> These requirements are discussed in more detail below.

#### Definition of “Covered Investment Fund Research Report”

Under the FAIR Act, a “research report” generally has the meaning given that term under section 2(a)(3) of the Securities Act.<sup>8</sup> Under section 2(a)(3), “research report” means “a written, electronic or oral communication that includes information, opinions, or recommendations with respect to securities of an issuer or an analysis of a security or an issuer, whether or not it provides information reasonably sufficient upon which to base an investment decision.”<sup>9</sup> In contrast, under FINRA Rule 2241 (Research Analysts and Research Reports), the term “research report” is defined as

“any written (including electronic) communication that includes an analysis of equity securities of individual companies or industries (other than an open-end investment registered investment company that is not listed or traded on an exchange) and that provides information reasonably sufficient upon which to base an investment decision.”<sup>10</sup>

Under the FAIR Act, the term “covered investment fund research report” includes a research report published or distributed by a broker-dealer about a “covered investment fund,”<sup>11</sup> or any of the covered investment fund’s securities. However, a covered investment fund research report excludes research published or distributed by the covered investment fund itself, any affiliate of a covered investment fund, or any broker-dealer that is an investment adviser (or an affiliated person of an investment adviser) to the covered investment fund.<sup>12</sup>

#### Rule 139

Securities Act Rule 139 provides that a broker’s or dealer’s publication or distribution of a research report about an issuer or any of its securities shall be 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 that is the subject of a registered offering, provided that the issuer and its securities meet specified conditions in the Rule. Rule 139 is sometimes described as a “safe harbor” for such research reports, since they are

<sup>10</sup> The definition includes a number of exclusions, such as for communications that are limited to discussions of broad-based indices, communications that are distributed to fewer than 15 persons, and statutory prospectuses that are filed as part of an issuer’s registration statement. See FINRA Rule 2241(a)(11).

<sup>11</sup> Section 2(f)(2) of the FAIR Act defines “covered investment fund” as:

(A) An investment company registered under, or that has filed an election to be treated as a business development company under, the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) and that has filed a registration statement under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) for the public offering of a class of its securities, which registration statement has been declared effective by the Commission; and

(B) a trust or other person—

(i) issuing securities in an offering registered under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) and which class of securities is listed for trading on a national securities exchange;

(ii) the assets of which consist primarily of commodities, currencies, or derivative instruments that reference commodities or currencies, or interests in the foregoing; and

(iii) that provides in its registration statement under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) that a class of its securities are purchased or redeemed, subject to conditions or limitations, for a ratable share of its assets.

<sup>12</sup> See section 2(f)(3) of the FAIR Act.

<sup>4</sup> 17 CFR 230.139.

<sup>5</sup> See section 2(a) of the FAIR Act.

<sup>6</sup> See section 2(b) of the FAIR Act.

<sup>7</sup> See Securities Act Release No. 10580 (November 30, 2018), 83 FR 64180 (December 13, 2018) (the “Release”).

<sup>8</sup> However, the term does not include an oral communication. See section 2(f)(6) of the FAIR Act.

<sup>9</sup> See section 2(a)(3) of the Securities Act, 15 U.S.C. 77b(a)(3).

<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, Public Law 115–66, 131 Stat. 1196 (2017).

not subject to many of the Securities Act's requirements for written offers of securities. Prior to the SEC's adoption of rules required by the FAIR Act, Rule 139's safe harbor was not available for a broker-dealer's publication or distribution of research reports pertaining to specific registered investment companies or business development companies ("BDCs").

In implementing the safe harbor, the FAIR Act directs the SEC to meet certain requirements concerning covered investment fund research reports. For example, the SEC is limited in terms of imposing conditions to the safe harbor related to a broker-dealer's initiation of research, or related to a covered investment fund's registration history or minimum net assets.

In addition, the SEC must provide that covered investment fund research reports will not be subject to the filing requirements of section 24(b) of the Investment Company Act, or rules or regulations thereunder, except to the extent that such reports are not subject to content standards of any SRO rules related to research reports, including those governing communications with the public.<sup>13</sup> However, the FAIR Act also specifies that nothing in the 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 covered investment fund research reports for compliance with federal law and SRO rules, or to require the filing of communications the purpose of which is not to provide research and analysis of covered investment funds.<sup>14</sup>

The FAIR Act also requires the SEC to provide that SROs may not prohibit the ability of a broker-dealer to publish or distribute a covered investment fund research report solely because the broker-dealer is participating in a registered offering or other distribution of the fund, and that an SRO may not prohibit the ability of a broker-dealer to participate in the registered offering or distribution of a covered investment fund solely because the broker-dealer has published or distributed research about the fund.<sup>15</sup>

#### SEC Final Rules Under the FAIR Act

On November 30, 2018, the SEC adopted its final rules and rule amendments to implement the mandates of the FAIR Act.<sup>16</sup> First, the SEC adopted new Rule 139b under the Securities Act, which expanded the

Rule 139 safe harbor to include covered investment fund research reports, subject to specified conditions. Rule 139b adopts the FAIR Act's definitions of "covered investment fund," "covered investment fund research report," and "research report," subject to minor non-substantive revisions.<sup>17</sup>

Among other things, in order to qualify for the Rule 139b safe harbor with respect to an issuer-specific research report, the covered investment fund that is the subject of the report must have been subject to relevant reporting requirements under the Investment Company Act and the Exchange Act for at least 12 calendar months prior to the reliance on the safe harbor, and these reports must have been filed in a timely manner.<sup>18</sup> In addition, the covered investment fund must satisfy a minimum public market threshold at the date of reliance on Rule 139b (the "float" requirement), which is currently \$75 million.<sup>19</sup> In addition, the safe harbor requires that a broker-dealer's publication or distribution of research reports be "in the regular course of its business."<sup>20</sup> Rule 139b also contains other conditions for industry reports, and with regard to the presentation of performance information of a registered open-end management investment company or a trust account.<sup>21</sup>

In addition, Rule 139b provides that an SRO may not maintain or enforce 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 participating in a registered offering or distribution of securities of a covered investment fund, or to participate in a registered offering or other distribution of such securities solely because the member has published or distributed a covered investment fund research report about the fund or its securities.<sup>22</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 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>23</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>24</sup>

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

FINRA interprets the FAIR Act as requiring it to make two changes to FINRA Rules. First, FINRA is proposing 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. Second, FINRA is proposing to 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. Under Rule 2241, members must 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>25</sup> Among other things, these policies and procedures 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").

These quiet periods restrict a member that has participated as an underwriter or dealer in an initial public offering ("IPO") from publishing research or having its research analysts make public appearances for a minimum of 10 days following the date of an IPO. They also restrict a member that has acted as a manager or co-manager of a secondary offering from publishing research or having its research analysts make personal appearances for a minimum of three days following the date of the offering.<sup>26</sup>

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

<sup>24</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").

<sup>25</sup> See FINRA Rule 2241(b)(1).

<sup>26</sup> See FINRA Rule 2241(b)(2)(f). This provision contains specified exceptions to the quiet periods

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<sup>13</sup> See section 2(b)(4) of the FAIR Act.

<sup>14</sup> See section 2(c)(2) of the FAIR Act.

<sup>15</sup> See section 2(b)(3) of the FAIR Act.

<sup>16</sup> See Release, *supra* note 7.

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

<sup>18</sup> See 17 CFR 230.139b(a)(1)(i)(A).

<sup>19</sup> See 17 CFR 230.139b(a)(1)(i)(B). The required float value does not include shares held by affiliates of the fund, and is based on General Instruction I.B.1 to Form S-3.

<sup>20</sup> See 17 CFR 230.139b(a)(1)(ii).

<sup>21</sup> See 17 CFR 230.139b(a)(2) and (a)(3).

<sup>22</sup> See 17 CFR 230.139b(b).

While Rule 2241 excludes from its definition of “research report” communications related to mutual funds, the Rule applies 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 funds, to the extent such research reports are published by an underwriter or dealer in the IPO or manager or co-manager of a secondary offering.<sup>27</sup> Accordingly, such research reports (as defined under Rule 2241) on covered investment funds (other than mutual funds) are subject to Rule 2241’s quiet periods.

As discussed above, 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>28</sup>

Accordingly, FINRA is proposing to amend Rule 2241 to add a new exception from the Rule’s quiet period requirements for 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>29</sup> Under this new 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 fund that is the subject of a covered

investment fund research report.<sup>30</sup> Although the FAIR Act does not address quiet periods for public appearances by research analysts, FINRA also proposes to eliminate 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 those quiet periods would advance the policy objectives of the FAIR Act.<sup>31</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>32</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 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>33</sup>

As discussed above, 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. 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 communications rules regarding investment companies or substantially similar standards.<sup>34</sup>

As discussed above, section 2(c)(2) of the FAIR Act provides that nothing in the 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 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>35</sup> Accordingly, FINRA interprets 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.

In the Release, the SEC made clear that, even if the exclusion of covered investment fund research reports from the provisions of section 24(b) affects the applicability of FINRA Rule 2210’s filing requirements or exclusions, “it would not affect FINRA’s authority to require the filing of a communication that is included in the FAIR Act

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.

<sup>27</sup> See FINRA Rule 2241(a)(11).

<sup>28</sup> See section 2(b)(3) of the FAIR Act. The SEC implemented this requirement in Securities Act Rule 139b(b).

<sup>29</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.

<sup>30</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) in Exhibit 5.

<sup>31</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>32</sup> FINRA is currently the only national securities association registered under the Exchange Act that has adopted such rules and procedures.

<sup>33</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>34</sup> See 17 CFR 270.24b–4.

<sup>35</sup> See section 2(c)(2) of the FAIR Act.

definition of ‘covered investment fund research report’ but whose purpose is not to provide research and analysis.”<sup>36</sup>

The SEC also discussed in the Release industry comments recommending that FINRA modify its rules in light of the FAIR Act. One commenter recommended that FINRA harmonize its research rules with SEC Rule 139b and that broker-dealers relying on Rule 139b be exempted from FINRA’s filing requirements with respect to covered investment fund research reports. Another commenter suggested that the FAIR Act be interpreted as limiting FINRA’s authority to require the filing of covered investment fund research reports only if a report provides “information” that a user would not be able to use for research and analysis, since such information would be for promotional rather than research purposes. In addition, one commenter argued that because the definition of “research report” under the FAIR Act is broader than FINRA’s definition of “research report” in Rule 2241, this difference may cause confusion and conflicting interpretive views on what communications are deemed research for purposes of the safe harbor and filing exclusion.<sup>37</sup>

FINRA believes that it would be inconsistent with the requirements of Section 15D of the Exchange Act to modify the definition of “research report” under FINRA Rule 2241 to match the definition of “research report” under the FAIR Act and Rule 139b. Section 15D of the Exchange Act, which was enacted as part of the Sarbanes-Oxley Act, required FINRA to adopt rules reasonably designed to address research analyst conflict of interests, and specifically defined “research report” using language similar to that used in FINRA Rule 2241.<sup>38</sup> FINRA further notes that SEC Regulation Analyst Certification (“Reg AC”) also uses a substantially similar definition of “research report.” FINRA Rule 2241 and Reg AC have different regulatory objectives than the research report provisions of the FAIR Act, and Congress could have—but chose not to—harmonize the statutory definitions of “research report” in the FAIR Act.

FINRA intends to create a rule that furthers the purposes of the FAIR Act, protects investors, and is relatively straightforward for broker-dealers to implement. These objectives can 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. The SEC has determined which research reports should be subject to the safe harbor, and FINRA sees no policy reason to create a filing exclusion for covered investment fund research reports that differs from this standard.

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 covered investment funds. FINRA could simply amend Rule 2210 by adding a filing exclusion for covered investment fund research reports, but qualifying the filing exclusion as not applying to reports the purpose of which is not to provide research and analysis of covered investment funds. While this approach would adhere to the text of the FAIR Act, FINRA believes such an approach would be difficult to apply in practice and would be inconsistent with the purpose and spirit of the FAIR Act and Rule 139b.

For example, if FINRA took this approach, members would have to first determine whether a covered investment fund research report qualifies for the Rule 139b safe harbor, and then determine if it is for the purpose of providing research and analysis of covered investment funds. This approach could create regulatory uncertainty for members, and also require more compliance resources to process reports. 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 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>39</sup> For these reasons, FINRA proposes to exclude from filing all covered investment fund research reports that qualify for the Rule 139b safe harbor. 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.<sup>40</sup>

Accordingly, FINRA proposes 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>41</sup> FINRA also proposes to define “covered investment fund research report” as having the same meaning given that term in paragraph (c)(3) of Securities Act Rule 139b.<sup>42</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 that is an investment adviser (or an affiliated person of an investment adviser) for the covered investment fund.<sup>43</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>44</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”). 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 concerning the funds, and then submit the communications to the third-party distributor for compliance review and filing with FINRA. These communications typically are published on the website for the fund or its investment adviser, or

<sup>41</sup> See proposed FINRA Rule 2210(c)(7)(P) in Exhibit 5.

<sup>42</sup> See proposed FINRA Rule 2210(a)(7) in Exhibit 5.

<sup>43</sup> See section 2(f)(3) of the FAIR Act and Securities Act Rule 139b(c)(3).

<sup>44</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 (“[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”).

<sup>36</sup> See Release, *supra* note 7, at 64196.

<sup>37</sup> See *supra* note 36.

<sup>38</sup> See Section 15D(d)(2) of the Exchange Act, 15 U.S.C. 78o-6(d)(2).

<sup>39</sup> See generally Release, *supra* note 7, at 64183–64193.

<sup>40</sup> See section 2(c)(2) of the FAIR Act; see also Release, *supra* note 7, at 64194 and fn. 185.

the investment adviser or another fund affiliate requests that it be published or distributed 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 the research report.<sup>45</sup> These determinations would be based on the extent to which a person covered by the affiliate exclusion, or any person acting on its behalf, has been involved in preparing the information or explicitly or implicitly endorsed or approved the information. The Commission refers to such affiliate involvement or endorsement as "the entanglement or adoption theory, respectively."<sup>46</sup>

Thus, FINRA 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>47</sup> 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.

If the Commission approves the proposed rule change, FINRA will announce the approval 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 Commission approval of the proposed rule change.

## 2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>48</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. FINRA believes that the FAIR Act mandates the proposed changes to the FINRA Rule 2241 quiet

periods around publication of covered investment fund research reports. FINRA believes the additional proposed change to eliminate quiet periods around public appearances involving an offering of covered investment fund securities furthers the policies underlying the statutory mandate by improving information flow to investors regarding such funds. FINRA believes that the proposed filing exclusion under FINRA Rule 2210 for covered investment fund research reports that qualify for the SEC 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. FINRA also believes that the proposed rule change will improve efficiency and reduce regulatory burden without diminishing investor protection. As discussed above, FINRA retains other methods to review covered investment fund research reports.

### *B. Self-Regulatory Organization's Statement on Burden on Competition*

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. FINRA has undertaken an economic impact assessment, as set forth below, to analyze the regulatory need for the proposed rulemaking, its potential economic impacts, including anticipated costs and benefits, and the alternatives FINRA considered in assessing how to best meet its regulatory objectives.

### *Economic Impact Assessment*

FINRA interprets the FAIR Act as requiring it to make two changes to its rules regarding quiet periods for covered investment funds and communications filings of covered investment fund research reports. The Economic Impact Assessment considers only the impacts of the specific aspects of the proposed rule changes over which FINRA has used its discretion. The economic implications for the other aspects of the proposed rule change that are mandated by the FAIR Act can be deemed assessed as part of the Act.

In this proposal, FINRA used its discretion in two areas. First, FINRA has chosen to include research analysts' public appearances as part of the proposed exception to Rule 2241's quiet period requirements. Second, FINRA has chosen to create a new filing exclusion under 2210 for all covered investment fund research reports that qualify for the Rule 139b safe harbor

rather than just the reports that are for research and analysis purposes.

### *Regulatory Need*

Consistent with requirements in the FAIR Act, FINRA is proposing to amend Rule 2241 to eliminate the Rule's quiet periods for the publication of research reports concerning covered investment funds where the member is also participating in a registered offering or other distribution of the fund. Although not specifically addressed by the FAIR Act, quiet periods for public appearances by research analysts that are responsible for covered investment fund research reports will also be eliminated. FINRA believes that including public appearances in the proposed amendments is consistent with how FINRA has traditionally viewed them vis-à-vis research reports and is in accordance with the spirit of the FAIR Act.

FINRA is also proposing to amend Rule 2210 to create a new filing exclusion for any covered investment fund research report that qualifies for the Rule 139b safe harbor. The FAIR Act authorizes FINRA to continue to require members to file any covered investment fund research reports whose purpose is for something other than research and analysis of covered investment funds. FINRA has chosen to exclude from Rule 2210 filing requirements all covered investment fund research reports that qualify for the safe harbor under Rule 139b regardless of their purpose.

### *Economic Baseline and Impact*

#### *Quiet Period*

Currently under Rule 2241, members must establish policies and procedures that prohibit research analysts that produce "research reports" as defined under that rule from making public appearances during specified quiet periods following the offering of an equity security. As Rule 2241 does not apply to research reports concerning mutual funds, this proposed change will only affect public appearances by analysts responsible for reports concerning other types of equity securities, including covered investment funds such as BDCs, commodity or currency funds.

The proposed rule change will create a new exception from the Rule's quiet period requirements for the publication or distribution of research reports and research analysts' public appearances. Elimination of the quiet period for research analysts' public appearances will allow analysts to provide the same information contemporaneously through both research reports and public

<sup>45</sup> See Release, *supra* note 7, at 64182.

<sup>46</sup> See *supra* note 45.

<sup>47</sup> See Release, *supra* note 7, at 64181–64183 (discussion of affiliate exclusion).

<sup>48</sup> 15 U.S.C. 78o–3(b)(6).

appearances. However, the elimination of the quiet period could increase the risk that research analysts make misleading statements in public appearances at an earlier date. This risk is mitigated by the other aspects of Rule 2241, including identifying and managing conflicts of interest, with which members are still required to comply.

#### Communications Filings

Currently Rule 2210 requires members to file within 10 business days of first use or publication certain retail communications including covered investment fund research reports that would qualify under the Rule 139b safe harbor. FINRA is proposing to create a new filing exclusion under Rule 2210 for all covered investment fund research reports that qualify for the safe harbor under Rule 139b regardless of their purpose.

Between 2016 and 2018, approximately 381 covered investment fund research reports were filed by members unaffiliated with the covered investment fund. Over 90 percent of these reports were filed by three member firms. FINRA does not know how many of the filings were for purposes other than research and analysis. Members that currently file these types of reports will benefit through savings on the administrative costs associated with tracking filing deadlines for the communications and with the time and effort to put together the filings as well as fees associated with filing the reports. Alternatively, the exclusion of these reports from filing requirements could increase risks to investors. Lower costs could increase the number of non-research related reports on unaffiliated covered investment funds published by members. Further, members may risk including more biased or misleading statements in the reports given the lack of immediate FINRA oversight.

This risk to investors is mitigated by two factors. First, only reports published or distributed by a member unaffiliated with the covered investment fund qualify for the exclusion. Members unaffiliated with the covered investment fund have a lower incentive to provide misleading information than those affiliated with the fund. Second, FINRA continues to have the ability to review these communications as part of the examination process or through a sweep or spot checks.

#### Alternatives Considered

FINRA considered excluding from the Rule's filing requirements only those

covered investment fund research reports whose purpose is to provide research and analysis of the covered investment funds. If FINRA carved out of the proposed exclusion non-research related reports, members would be required to first evaluate whether the report was covered under the safe harbor and then determine whether its purpose was for research and analysis or something else. This additional evaluation criterion could lead to higher compliance costs and greater regulatory uncertainty, especially for those members that publish or distribute a high number of covered investment fund research reports. While this requirement could reduce risks to investors, FINRA believes that the reduced risk is not commensurate with the increased costs to members in complying with the rule and would be inconsistent with the purpose and spirit of the FAIR Act and Rule 139b.

#### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

Comments were neither solicited nor received.

#### **III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) By order approve or disapprove such proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

#### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### *Electronic Comments*

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-FINRA-2019-017 on the subject line.

#### *Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-FINRA-2019-017. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written 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 website 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 a.m. and 3 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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-FINRA-2019-017 and should be submitted on or before July 29, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>49</sup>

**Eduardo A. Aleman,**  
*Deputy Secretary.*

[FR Doc. 2019-14402 Filed 7-5-19; 8:45 am]

**BILLING CODE 8011-01-P**

<sup>49</sup> 17 CFR 200.30-3(a)(12).