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July 2, 2015

Via Email Only

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506
pubcom@finra.org

Re: *Regulatory Notice 15-16, Proposed Rule Changes for FINRA Rules 2210, 2214, and 2213 Regarding Communications with the Public*

Dear Ms. Asquith:

I write on behalf of the Public Investors Arbitration Bar Association ("PIABA"), an international bar association comprised of attorneys who represent investors in securities arbitrations. Since its formation in 1990, PIABA has promoted the interests of the public investor in all securities and commodities arbitration forums, while also advocating for public education regarding investment fraud and industry misconduct. Our members and their clients have a strong interest in rules promulgated by the Financial Industry Regulatory Authority ("FINRA") to govern the conduct of securities firms and their representatives. In particular, our members and their clients have a strong interest in FINRA rules relating to the information provided to investors.

In Notice 15-16, FINRA seeks comment regarding changes to Rules 2210, 2214, and 2213 regarding communications with the public. As detailed below, PIABA opposes these rule proposals, as they relax FINRA's regulatory oversight and could harm investors.

New Firm Communications

For a one year period (from the effective date of a new FINRA member firm's membership), FINRA rules currently require that all new firm file with FINRA "any retail communication that is published or used in any electronic or other public media . . ." at least 10 business days prior to the first use of communication. FINRA is proposing to drop this requirement, because it predates the internet and FINRA believes that member firms primarily reach customers and potential customers through the firms' websites. FINRA also believes that the long-standing requirement of filing retail communications 10 business days before using them "unnecessarily delays firms' abilities to communicate with the public" and there is no benefit to investors that cannot be accomplished by FINRA's post-use review of communications.

FINRA claims that the changes it is proposing are the result of a "retrospective review" of its rules regarding communications with the public that it launched in April 2014, the results of which were published by FINRA in a report in December 2014. The report found that the rules "could benefit from some updating to better align the investor protection benefits and the economic impacts."

Rather than "aligning the investor protections benefits" with "the economic impacts" (or anything else for that matter), under the proposed rule changes FINRA eliminates the pro-active investor protection the current rule affords customers. If the proposed rule goes into effect, new FINRA member firms would not have to obtain any FINRA pre-approval for common retail communications such as those in newspapers, magazines, or other periodicals and/or those on the radio, television, telephone or audio recording, video display, signs or billboards or motion pictures. Instead, FINRA will only pre-approve the use of one form of retail communication – a firm's website.

Of course, as FINRA well knows, not every customer or potential customer uses the internet as the primary source of information about financial advisors, brokerage firms or investments. Indeed, the "National Senior Investor Initiative" report that was released in April 2015, by the SEC and FINRA illustrates the different forms of communications that reach and are relied on by one segment of investors – seniors. The report contains the observations from examinations conducted by the SEC Office of Compliance Inspections and Examinations and FINRA as part of their "collaborative effort" to determine and report on issues pertinent to "senior investors" (age 65 and older).

In the "Marketing and Communications" section of the report, the SEC and FINRA observed that firms promoted senior-related investment themes "through various channels such as **brochures, print and electronic advertisement, newspaper columns, radio and television commercials, and seminars**."[1] Yet, under the proposed rule changes, FINRA will not review and approve any such communications prior to them going to senior investors. Moreover, with regard to certain communications (radio shows and seminars), the SEC and FINRA examinations revealed potential rule violations such as misleading advertisements and failure to properly supervise the content of the shows, as well as potential failure to comply with a firm's written supervisory procedures for seminar materials.[2]

"Post-use" review of all retail communications (other than websites) by FINRA will not provide adequate investor protection for customers who lose their life savings after investing with a broker from an unknown start-up firm with flashy television or radio ads or a fancy seminar presentation. Further, it is not clear that FINRA can effectively regulate advertising on a post-use basis. For example, according to the large defense firm, Sutherland Asbill & Brennan LLP ("Sutherland"), FINRA disciplinary actions in 2013 reflected a

[1] *See* http://www.sec.gov/ocie/reportspubs/sec-finra-national-senior-investor-initiative-report.pdf, p. 13(last visited on June 24, 2015) (emphasis added).
[2] *Id*. at 13-15.

troubling enforcement trend – an "incredible slowdown in the amount of fines imposed in advertising cases."[3]

This stood out to Sutherland because advertising had been on its "Top Enforcement Issues" list in 2010-2012 (based on the amounts of fines assessed), and yet in 2013, there was a seventy-three percent (73%) decrease in the total fines assessed in advertising cases (even though there were 53 cases in 2013 and only 50 in 2012).[4] Although advertising returned to Sutherland's "Top Enforcement Issues" list for FINRA disciplinary actions in 2014, there were only 31 advertising disciplinary cases.[5] It simply does not seem to be in the investing public's interest to rely on FINRA to effectively regulate retail communications only after-the-fact.

In light of the importance of the existing retail communication rules, and the real potential for greater harm to investors without those rules, FINRA should not eliminate the need for pre-use oversight of all but one form of retail communication. FINRA has not provided sufficient evidence that brokerage firms will save enough money if they are not required to file for pre-use approval of retail communications to outweigh the resulting harm to investors who could have been protected by the current rule. Further, if it is too much of a financial burden on a new firm to comply with existing industry rules related to pre-use approval of communications with the public, then perhaps that firm should not be in the brokerage industry at this time.

Investment Company Shareholder Reports

FINRA currently requires firms to file the manager's discussion of fund performance ("MDFP") portion of a registered investment company's shareholder report if it to be made available or distributed to potential investors. FINRA has required the filing of MDFPs and treated them like any other retail communication even though shareholder reports are also required to be filed with the SEC. FINRA is proposing to specifically exclude MDFPs from the filing requirements of the retail communications rules if the shareholder's report containing the MDFP has been filed with the SEC. FINRA's rationale for this proposed rule change seems to be that the MDFP "presents less investor risk than other types of promotional communications" and excluding MDFPs would be consistent with the fact that FINRA has previously excluded other similar types of documents from the filing requirements.

In order for the proposed rule to offer any investor protection whatsoever, FINRA has to assume that the SEC adequately reviews regulatory filings when they are received and that the SEC will bring improper retail

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[3]*See* http://www.sutherland.com/NewsCommentary/Press-Releases/161244/Annual-Sutherland-Analysis-of-FINRA-Sanctions-Shows-27-Decrease-in-Fines-Number-of-Cases-Nearly-Identical. Sutherland generally only includes in its review those cases that resulted in fines of $200,000 or more.
[4] *Id*.
[5]*See* http://www.sutherland.com/NewsCommentary/Press-Releases/170501/Annual-Sutherland-Analysis-of-FINRA-Sanctions-Reveals-Blockbuster-Year-in-Fines-for-FINRA-but-Decrease-in-the-Number-of-Cases. Sutherland did note that the large increase in amounts fined in 2014 (to $17.2 million) was largely attributable to a $15 million research analyst and research report case which included allegations related to improper promotions at IPO road shows. *Id*.

communications to FINRA's attention. The problem with these assumptions is that the SEC does not fully review all regulatory filings made on the EDGAR system, which is where such filings would be made.

On May 28, 2015, Reuters reported that the SEC "does not fact check or make corrections to filings," which makes sense if the SEC receives approximately 4,000 filings per day.[6] The Reuters article was prompted by a letter that Senator Charles Grassley, from Iowa, sent to the SEC about his concern with a "systemic vulnerability" exposed with the EDGAR system when a fraudster was able to use the EDGAR site to file documents that reflected a phony takeover bid for Avon Products Inc.[7]

In light of FINRA's estimate that the proposed rule change would result in a decrease of 5,000 filings **per year** and the estimate that the SEC receives 4,000 filings **per day**, which it does not meaningfully review, in order for investors to be protected, FINRA just needs to do its job. The SEC is not an acceptable substitute under the circumstances.

Investment Company Performance Rankings and Comparisons

FINRA rules currently require firms to file retail communications for registered investment companies that contain fund performance rankings or comparisons. FINRA is proposing to drop this requirement, because this information is now available online. Under the proposed rule, FINRA would require the firm to maintain the rankings or comparisons in its own files.

Again, this proposed rule is simply a way for FINRA to shirk its responsibilities of protecting the investors. If FINRA continues to require firms to provide these rankings or comparisons, FINRA can analyze whether these rankings are accurately represented or misleading. Such rankings and comparisons are tools that investors often use when shopping around for different investment products (such as mutual funds or annuities), and FINRA should closely monitor these communications with the investing public. This proposed rule flies in the face of investor protection.

Moreover, if investment companies are already required to provide retail communications to FINRA, it should not be that much of an extra burden to provide those performance rankings or comparisons. As such, FINRA should not enact this proposed rule.

Filing Exclusion for Templates

Under the current rules, firms are not required to file retail communications that were previously filed with FINRA but changed only to update recent statistical or non-narrative information. FINRA proposes to expand this exemption and allow firms to include "non-predictive" narrative descriptions of market events covered by the communication without needing to re-file the template.

[6] *See* http://www.reuters.com/article/2015/05/28/senate-sec-avon-prdcts-idUSL1N0YJ21G20150528.
[7] *Id.*

PIABA opposes this proposal, as FINRA should be reviewing any narrative descriptions included in retail communications for misleading information. Often, firms may blame decreases in NAVs on "market events" or other occurrences, although that is not necessarily accurate in some circumstances. One example is FINRA's investigation of the Morgan Keegan proprietary bond funds in 2010. According to FINRA's press release announcing the investigation, FINRA alleged that:

Morgan Keegan became aware, beginning in early 2007, of the adverse market effects on the bond funds, the firm failed to timely warn its brokers or revise its advertising materials to reflect the disproportionately adverse effect the market was having on the performance of the securities that comprised the bond funds – which Morgan Keegan brokers continued to sell widely. At this time, the firm reassured, rather than warned, its sales force about the riskiness of the bond funds. As a result, some of the firm's brokers were unaware of the then-turbulent market's effects on the funds and failed to disclose the negative effects caused by market forces.

See https://www.finra.org/newsroom/2010/finra-files-complaint-against-morgan-keegan-company-misleading-customers-regarding (last visited June 18, 2015). This example shows that any misleading narratives regarding the market condition could subject investors to further harm, and FINRA should be closely monitoring these narratives made in retail communications.

Bond Fund Volatility Ratings

Under FINRA's current rules, firms may use retail communications that include ratings provided by independent third parties that address the sensitivity of the net asset value of a bond fund to changes in market conditions. These communications must be accompanied or preceded by the bond fund's prospectus and contain specific disclosures. Additionally, firms must file these communications with FINRA at least 10 days prior to use. The proposed rule seeks to modify the rule, requiring the filing of such communications *within* 10 days of first use, rather than 10 days *prior* to use. The proposed rule also eliminates the requirement that the rating must be accompanied or preceded by the prospectus.

In the interests of the investing public, FINRA should not enact these proposed rule modifications. There have been numerous bond fund scandals and regulatory investigations brought by FINRA and other regulators in the last five years, demonstrating that bond funds should be more highly regulated:

a) Morgan Keegan paid $200 million to settle with FINRA and several state regulators in June 2011 regarding claims on its proprietary bond funds;
b) Charles Schwab paid $18 million to settle with FINRA in January 2011 regarding claims on the YieldPlus Fund;
c) Oppenheimer paid $35 million to settle with the SEC in June 2012 regarding claims on the Champion Income Fund and Core Bond Fund;
d) In October 2013, the SEC announced that it was investigating mutual funds holding Puerto Rican bonds, and in 2014, FINRA issued guidance and new procedures to deal with the substantial influx of arbitration claims involving Puerto Rican bond funds;

e) In June 2012, the Attorney General of New York and the Massachusetts Attorney General began investigations into Citigroup's MAT, ASTA, and Falcon funds, which were municipal arbitrage bond funds

As demonstrated from these numerous investigations, it is important for FINRA to increase its regulation over bond funds and any communications directed to public investors regarding bond funds or their volatility. The proposed rule seeks to lessen the regulation over these products, to the detriment of the investing public.

In sum, PIABA opposes the implementation of these rule proposals, which are a step backwards in protecting investors. I want to thank you for the opportunity to comment.

Sincerely,

Joseph C, Peiffer
PIABA, President