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*. Please include File Number SR–NASDAQ–2021–046 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–NASDAQ–2021–046. 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 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. 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–NASDAQ–2021–046 and should be submitted on or before July 6, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–12475 Filed 6–14–21; 8:45 am]

BILLING CODE 8011–01–P

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–92133; File No. SR–FINRA–2020–038]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving Proposed Rule Change, as Modified by Amendment No. 1, to FINRA Rules 5122 (Private Placements of Securities Issued by Members) and 5123 (Private Placements of Securities) That Would Require Members To File Retail Communications Concerning Private Placement Offerings That Are Subject to Those Rules' Filing Requirements

June 9, 2021.

I. Introduction

On October 28, 2020, the Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend FINRA Rules 5122 (Private Placements of Securities Issued by Members) and 5123 (Private Placements of Securities) that would require members to file certain retail communications concerning private placements.

The proposed rule change was published for comment in the **Federal Register** on November 6, 2020.[3] On December 11, 2020, FINRA consented to an extension of the time period in which the Commission must approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change to February 4, 2021.[4] On January 12, 2021, FINRA responded to five comment letters received in response to the Notice and filed an amendment to the proposed rule change (''Amendment No. 1'').[5] On January 29, 2021, FINRA responded to a sixth comment letter received in response to the Notice.[6] On February 4, 2021, the Commission filed an Order Instituting Proceedings to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.[7] The Commission received no comments in response to the OIP. On April 12, 2021, FINRA responded to a seventh comment letter received in response to the Notice.[8] On May 4, 2021, FINRA consented to an extension of the time period in which the Commission must approve or disapprove the proposed rule change to May 26, 2021.[9] On May 25, 2021, FINRA consented to an extension of the time period in which the Commission must approve or disapprove the proposed rule change to June 9, 2021.[10] This order approves the proposed rule change, as modified by Amendment No. 1.

II. Description of the Proposed Rule Change

For certain private placements of unregistered securities issued by a FINRA member or a control entity [11] (''member private placements''), FINRA Rule 5122 requires the member or control entity to provide prospective

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Exchange Act Release No. 90302 (Nov. 2, 2020), 85 FR 71120 (Nov. 6, 2020) (File No. SR–FINRA–2020–038) (''Notice'').

[4] *See* letter from Joseph Savage, Vice President, Office of General Counsel Regulatory Policy, FINRA, to Daniel Fisher, Branch Chief, Division of Trading and Markets, Commission, dated December 11, 2020. This letter is available at *https://www.finra.org/sites/default/files/2021-01/SR-FINRA-2020-038-Extension1.pdf*.

[5] *See* letter from Joseph P. Savage, Vice President and Counsel, Office of General Counsel, FINRA, to Vanessa Countryman, Secretary, Commission, dated January 12, 2021 (''FINRA January 12 Letter''). The FINRA January 12 Letter is available at the Commission's website at *https://www.sec.gov/comments/sr-finra-2020-038/srfinra2020038-8233135-227749.pdf*. Amendment No. 1 is available at *https://www.finra.org/sites/default/files/2021-01/SR-FINRA-2020-038-Amendment1.pdf*.

[6] *See* letter from Joseph P. Savage, Vice President and Counsel, Office of General Counsel, FINRA, to Vanessa Countryman, Secretary, Commission, dated January 29, 2021 (''FINRA January 29 Letter''). The FINRA January 29 Letter is available at the Commission's website at *https://www.sec.gov/comments/sr-finra-2020-038/srfinra2020038-8311262-228459.pdf*.

[7] *See* Exchange Act Release No. 91066 (Feb. 4, 2021), 86 FR 8970 (Feb. 10, 2021) (File No. SR–FINRA–2020–038) (''OIP'').

[8] *See* letter from Joseph P. Savage, Vice President and Counsel, Office of General Counsel, FINRA, to Vanessa Countryman, Secretary, Commission, dated April 12, 2021 (''FINRA April 12 Letter''). The FINRA April 12 Letter is available at the Commission's website at *https://www.sec.gov/comments/sr-finra-2020-038/srfinra2020038-8662482-235305.pdf*.

[9] *See* letter from Joseph Savage, Vice President, Office of General Counsel Regulatory Policy, FINRA, to Daniel Fisher, Branch Chief, Division of Trading and Markets, Commission, dated May 4, 2021. This letter is available at *https://www.finra.org/sites/default/files/2021-05/SR-FINRA-2020-038-Extension2.pdf*.

[10] *See* letter from Joseph Savage, Vice President, Office of General Counsel Regulatory Policy, FINRA, to Daniel Fisher, Branch Chief, Division of Trading and Markets, Commission, dated May 25, 2021. This letter is available at *https://www.finra.org/sites/default/files/2021-05/SR-FINRA-2020-038-Extension3.pdf*.

[11] A ''control entity'' means any entity that controls or is under common control with a member, or that is controlled by a member or its associated persons. *See* FINRA Rule 5122(a)(2)–(3); *see also* Notice at note 3.

investors [12] with a private placement memorandum (''PPM''), term sheet or other offering document that discloses the intended use of the offering proceeds, the offering expenses, and the amount of selling compensation that will be paid to the member and its associated persons. Among other things, the current rule also requires a member to file the PPM, term sheet or other offering document with FINRA's Corporate Financing Department at or prior to the first time the document is provided to any prospective investor, and to file any amendments to such documents within 10 days of being provided to any investor or prospective investor.[13] Similarly, for certain private placements of unregistered securities [14] issued by a non-member, FINRA Rule 5123 requires members or control persons to file with FINRA's Corporate Financing Department any PPM, term sheet or other offering document,[15] including any material amended versions thereof, used in connection with an offering within 15 calendar days of the date of first sale.

Separately, FINRA also requires broker-dealers to file with FINRA's Advertising Regulation Department certain written communications that they distribute or make available to retail customers to review those written communications for compliance with the content requirements of FINRA Rule 2210 (Communications with the Public).[16] For example, retail communications [17] are required to comply with the general, fair and balanced standards in FINRA Rule 2210.[18] Despite these existing obligations, FINRA has found a comparatively high rate of non-compliance with Rule 2210 of retail communications concerning private placements.[19] Currently, some broker-dealers submit retail communications as part of their Rules 5122 and 5123 filings either voluntarily or as new members.[20] In a 2018 spot check of these filings, FINRA found that 76% of retail communications filed during the spot check review period involved significant violations of Rule 2210.[21]

Further, FINRA stated that since January 1, 2014, it has initiated 49 disciplinary actions related to non-compliant retail communications concerning private placements. This number represents 21% of all actions involving private placements. According to FINRA, these communications often present false or misleading information regarding the underlying offering, which could result in significant losses to investors and could undermine public trust in the private placement markets.[22]

To address this area of regulatory concern, FINRA proposed amendments to Rules 5122 and 5123 that would require members or control persons to file retail communications that ''promote or recommend'' a private placement with FINRA's Corporate Financing Department, in addition to the currently required PPMs, term sheets, and other offering documents.[23] The rules' requirements that material amendments to offering documents must be filed also would apply to any material amendments to retail communications concerning private placements.[24] The proposed rule change would provide FINRA with a more timely opportunity to review retail communications concerning private placements for compliance with its rules. Other than those documents filed pursuant to Rule 2210, FINRA's review of such documents is currently limited to its cycle and spot exams of its members.[25]

The proposed rule change would not, however, broaden the application of the rules to capture those offerings that are currently exempt from filing.[26] The proposed rule change also would not impose new filing fees on broker-dealers.[27]

In addition, the proposed rule change would neither amend Rule 2210 nor, as FINRA states, alter FINRA's interpretation of the application of that rule's requirements.[28] Thus, if written communications qualify as retail communications pursuant to FINRA Rule 2210, those retail communications

[12] Because of the types of private placements exempt from the application of Rule 5122, FINRA believes that the rule applies predominately to private placements sold to retail investors. *See* Notice at 71121.

[13] *See* Notice at 71120.

[14] *See* Notice at note 8 (listing those types of member private placements exempt from the filing obligations of Rule 5122, including, among others, offerings sold solely to institutional accounts, qualified purchasers, qualified institutional buyers, investment companies, and banks).

[15] Rules 5122 and 5123 do not enumerate the types of information that might be considered ''other offering documents.'' However, FINRA has stated previously that an example of ''other offering document'' is ''[a]ny other type of document that sets forth the terms of the offering.'' *See* ''Frequently Asked Questions (FAQ) About Private Placements,'' Question #10, available on *www.finra.org.* The ''terms of an offering'' include facts such as the amount of proceeds that the issuer intends to raise, the type of security, descriptions or illustrations of the intended use of proceeds, and explanations of tax benefits or other information that would be relevant to an investor when deciding whether to make an investment. *See* Notice at 71121.

[16] *See* FINRA Rule 2210(c) (Filing Requirements and Review Procedures).

[17] FINRA Rule 2210(a)(5) defines a ''retail communication'' as any written (including electronic) communication that is distributed or made available to more than 25 retail investors within any 30 calendar-day period. *See* Regulatory Notice 20–21 (Jul. 2020) (stating that a member firm that assists in the preparation of a PPM or other offering document should expect that it will be considered a communication with the public by that member firm for purposes of Rule 2210); *see also* FINRA January 12 Letter. FINRA Rule 2210 generally does not require members to file private placement communications. More specifically, there are no filing requirements for communications distributed or made available only to institutional investors, as defined in Rule 2210(a)(4), or communications that are distributed or made available to 25 or fewer retail customers within a 30-day period. Moreover, there is no product-specific filing requirement for retail communications concerning private placements in FINRA Rule 2210(c)(1) through (4)), as those requirements apply only to retail communications concerning specified registered securities, such as mutual funds or variable products. Under FINRA Rule 2210(c)(1)(A), during the first year after a member's registration is declared effective, the member must file at least 10 business days prior to use any widely disseminated retail communication (*e.g.,* newspaper, television, or radio advertisements and publicly available websites). However, FINRA Rule 2210(c)(7) excludes specified retail communications from the filing requirements, including retail communications that were previously filed with FINRA's Advertising Regulation Department and used without material change ((c)(7)(A)); that do not make any financial or investment recommendation or otherwise promote a product or service of the member ((c)(7)(C)); or that are ''offering documents'' similar to prospectuses (such as PPMs) concerning securities that are exempt from registration ((c)(7)(F)).

[18] All member communications must be based on principles of fair dealing and good faith, must be fair and balanced, and must provide a sound basis for evaluating the facts in regard to any particular security or type of security, industry, or service. *See* FINRA Rule 2210(d)(1)(A).

[19] *See* Notice at 71122.

[20] *See* Notice at 71223 (stating that members submit retail communications as part of their Rule 5122 and 5123 private placement filings while some others submit them through FINRA's Advertising Regulation Department's filings review program under Rule 2210 either voluntarily or as new members) and at note 12 (citing FINRA Rule 2210(c)(1)(A) requiring new members to file all widely-distributed retail communications (such as publicly available websites) that promote products or services of the firm during the first year after the member's broker-dealer membership with FINRA's Advertising Regulation Department is declared effective).

[21] *See* Notice at 71122 (stating that the violations included retail communications that: contained prohibited projections or unreasonable forecasts; failed to provide a sound basis to evaluate the facts with respect to the offering; failed to adequately disclose the general risks associated with private placement investments; or contained readily apparent false or misleading statements or claims).

[22] *See id.*

[23] Amendment 1 to the proposed rule change clarified that members or control persons would be required to file any retail communication that ''promotes or recommends'' a private placement, rather than any retail communication that ''concerns'' a private placement, as originally proposed.

[24] *See* Notice at 71122.

[25] *See id.*

[26] *See e.g., supra* note 14.

[27] *See* Notice at 71122 and note 21.

[28] *See* FINRA January 12 Letter, FINRA January 29 Letter, and FINRA April 12 Letter.

would be subject to the proposed rule changes.

III. Discussion and Commission Findings

A. Discussion

After careful review of the proposed rule change, as modified by Amendment No. 1, the comment letters, and FINRA's responses to the comments, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Exchange Act and the rules and regulations thereunder that are applicable to a national securities association.[29] Specifically, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with Section 15A(b)(6) of the Exchange Act,[30] 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.

Four commenters supported the proposed rule change.[31] Two of these commenters stated that the proposed rule change would establish necessary investor protections in light of regulatory changes that have expanded the marketplace for private placements.[32] Specifically, one stated that its state securities administrator members have observed significant, recurring problems with private placements and that, ''[w]ith the SEC's recent regulatory changes to the private [placement] marketplace, . . . the need for increased regulatory scrutiny of private placement advertisements is even more acute.'' [33] One other supportive commenter stated that, because the number of persons who can invest in private placements has increased substantially over the last several decades, ''FINRA must keep an eye [on] private placement sales abuses.'' [34] One of the other supportive commenters stated that FINRA and Commission rules already require members to keep detailed records on marketing materials, which are routinely requested during cycle examinations, and that the proposed rule changes could facilitate this review process.[35] The fourth supportive commenter stated that the proposed rule changes are justified because they would help FINRA ''better ensure that retail communications used by broker-dealers in retail private placements are fair, balanced and not misleading.'' [36]

1. Requests for Guidance Under FINRA Rule 2210 (Communications With the Public)

a. Issuer-Prepared Material

A supportive commenter requested that the Commission use this opportunity to provide ''definitive guidance'' to members with respect to the applicability of Rule 2210 to materials prepared and disseminated by an issuer to the public, without the involvement of a member firm or its registered representatives.[37] In response, FINRA stated that it has already addressed the applicability of Rule 2210 to issuer-prepared communications.[38] In particular, FINRA has previously stated that ''[a member] that assists in the preparation of a private placement memorandum or other offering document should expect that it will be considered a communication with the public by that [member] for purposes of . . . Rule 2210, FINRA's advertising rule.'' [39] Similarly, FINRA has stated that sales literature concerning a private placement that a member distributes will be deemed to constitute a communication by that member with the public, whether or not the member assisted in its preparation.[40] Therefore, regardless of whether a member distributes a retail communication that is attached to a PPM or as a standalone document, it constitutes a member communication subject to Rule 2210.[41]

FINRA's proposed rule change does not amend the definition of ''retail communications'' or change the scope of communications captured within the definition of the term. Thus, the Commission believes that interpretations of the definition of ''retail communications'' are outside the scope of the proposed rule change. However, FINRA stated that it has issued guidance on retail communications concerning private placements, stating that, in general, if a member distributes sales literature concerning a private placement it will be deemed a communication by that member with the public subject to Rule 2210.[42] In addition, Rule 2210 prohibits members from publishing, circulating, or distributing ''any communication that the member knows or has reason to know contains any untrue statement of a material fact or is otherwise false or misleading'' regardless of its origin.[43]

b. Performance Projections

Three commenters sought guidance regarding the application of FINRA Rule 2210 to performance projections.[44] A supportive commenter requested that the Commission provide interpretive guidance under Exchange Act Rule 10b–5 [45] concerning the inclusion of

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[29] 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).

[30] 15 U.S.C. 78o–3(b)(6).

[31] *See* letter from David P. Meyer, President, Public Investors Advocate Bar Association, to Vanessa Countryman, Secretary, Commission, dated November 27, 2020 (''PIABA Letter''); letter from Lisa Hopkins President, General Counsel and Senior Deputy, North American Securities Administrators Association, Inc., to J. Matthew DeLesDernier, Assistant Secretary, Commission, dated November 24, 2020 (''NASAA Letter''); letter from James P. Dowd, North Capital Private Securities Corp. and Public Brokers, LLC, to Secretary, Commission, dated November 23, 2020 (''NCPSC Letter''); and letter from Tom Selman, Founder, Scopus Financial Group, to Vanessa Countryman, Secretary, Commission, dated November 22, 2020 (''Scopus Letter'').

[32] *See* NASAA Letter and PIABA Letter.

[33] NASAA Letter (citing Securities Act Release No. 10824 (Aug. 6, 2020) (File No. S7–25–19) (updating the definition of ''accredited investor'' to identify more effectively investors that have sufficient knowledge and expertise to participate in investment opportunities that do not have the rigorous disclosure and procedural requirements, and related investor protections, provided by registration under the Securities Act of 1933); and Securities Act Release No. 10884 (Nov. 2. 2020) (File No. S7–05–20) (improving certain aspects of the exempt offering framework to promote capital formation while preserving or enhancing important investor protections)).

[34] PIABA Letter (noting a rise in the percentage of American households qualified as ''accredited investors'' since the Commission first established the qualification standards in 1982).

[35] *See* NCPSC Letter (referencing FINRA Rule 2210(b)(4)).

[36] Scopus Letter. Communications with the public are subject to FINRA Rule 2210's content standards, including its requirements that communications be fair and balanced and not misleading. *See* FINRA January 12 Letter.

[37] *See* NCPSC Letter.

[38] FINRA January 12 Letter.

[39] *Id.* (citing Regulatory Notice 20–21 (Jul. 2020) (quoting Regulatory Notice 10–22 (Apr. 2010))).

[40] *See id.; see also* Regulatory Notice 12–29 (Jun. 2012) (stating that effective February 4, 2013, communications previously defined as ''sales literature'' under NASD Rule 2210 (Communications with the Public) fell within the definition of ''retail communication'' in FINRA Rule 2210).

[41] *See* FINRA January 12 Letter.

[42] *See supra* note 38–41 and accompanying text.

[43] FINRA Rule 2210(d)(1)(B); *see also* FINRA January 12 Letter.

[44] *See* NCPSC Letter; letter from Anthony Chereso, President and CEO, Institute for Portfolio Alternatives, to Vanessa Countryman, Division of Investment Management [sic], Commission, dated January 26, 2021 (''IPA Letter''); and letter from Mick Law P.C., L.L.O. to Vanessa Countryman, Division of Investment Management [sic], Commission, dated February 2, 2021 (''Mick Letter'').

[45] Under Exchange Act Rule 10b–5, it is unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, to employ any device, scheme, or artifice to defraud, to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances

performance return objectives in private placement sales materials.[46] Specifically, the commenter believes that because of Rule 2210's restrictions on predicting or projecting performance,[47] broker-dealers are placed at a competitive disadvantage relative to private placements that do not involve a broker-dealer (to which Rule 2010 would not apply), and that the Commission should ''level the playing field.'' [48]

In response, FINRA stated that, in general, Rule 2210(d)(1)(F) prohibits member communications from predicting or projecting performance or making any exaggerated or unwarranted claim, opinion or forecast.[49] More specifically, FINRA stated that retail communications concerning private placements may not project or predict returns to investors such as yields, income, dividends, capital appreciation percentages or any other future investment performance.[50] However, FINRA also clarified that despite its prohibition on certain types of performance predictions, its rules permit retail communications concerning private placements to include reasonable forecasts of issuer operating metrics (*e.g.,* forecasted sales, revenues or customer acquisition numbers) that may convey important information regarding the issuer's plans and financial position. FINRA stated that these presentations should provide a sound basis for evaluating the facts, such as clear explanations of the key assumptions underlying the forecasted issuer operating metrics and the key risks that may impede achievement of the forecasted metrics.[51]

One commenter recommended that FINRA ''clarify the application of its principles-based advertising rules to retail communications concerning private placement[s].'' [52] In particular, the commenter recommended that FINRA provide interpretive guidance on the term ''performance projection'' to help members comply with FINRA Rule 2210(d)(1)(F).[53] FINRA responded that the proposed rule change would not amend or provide guidance on Rule 2210. Accordingly, FINRA believes that the commenter's recommendation is outside the scope of the proposed rule change.[54]

Another commenter described its experience evaluating the features and risks of alternative investments marketed through private placements and has found, like FINRA, many instances in which a sponsor's offering promotional materials did not comply with FINRA Rule 2210.[55] Thus, the commenter asked FINRA to further clarify Regulatory Notice 20–21 to: (1) Explain what types of information constitute an issuer's ''operating metrics'' [56] and (2) clarify when members may present information about ''distribution rates'' within retail communications.[57]

In response, FINRA stated that the commenter's concerns regard the application of FINRA Rule 2210 rather than the filing requirements in the proposed rule changes to Rules 5122 and 5123 that are the subject of the rule filing.[58] FINRA reiterated its guidance under Regulatory Notice 20–21 but stated that it is willing to further discuss with its members issues regarding particular retail communications that are filed with FINRA, both before and after a communication is filed.[59]

Given that the proposed rule change does not change the interpretation of retail communications, the Commission believes that interpretations of the definition of ''retail communications'' are outside the scope of the proposed rule change. However, FINRA stated that it has existing guidance regarding the type of performance projections a member can include, and is prohibited from including, in its retail communications.

2. Other Suggested Rule Changes

One of the four commenters supporting the proposed rule change suggested three additional changes ''to protect retail investors in the private placement market.'' [60] First, the commenter recommended that FINRA combine Rules 5122 and 5123 into a single rule and that the combined new rule should require (as does Rule 5122) disclosure about the use of offering proceeds, offering expenses and selling compensation, suggesting that providing investors these key pieces of information about an offering is justified given the history of problems in the private placement market. Third, the commenter recommended that FINRA amend Rule 2210 so that it applies to PPMs, term sheets, and other offering documents in retail private placements, arguing that in the absence of a legal definition of ''private placement memorandum'' it is difficult to distinguish a PPM from other retail communications and it may be difficult to determine if a member assisted in its preparation. Accordingly, the commenter recommended that such offering documents be subject to the general content standards of Rule 2210(d)(1).[61]

In response, FINRA stated that the commenter's suggestions were beyond the scope of the proposed rule change and could not be adopted as part of this filing.[62] The Commission agrees with FINRA that the commenter's suggestions raise issues that go beyond the subject matter of this proposal and therefore are beyond the scope of the proposed rule change.

3. Non-Promotional Communications

One commenter expressed concern with the breadth of the communications that would be required to be filed.[63] The commenter believes that requiring a member to file all ''retail communications concerning a private placement'' could result in members being required to file communications that are administrative in nature, such as confirmations that a signature was received or reminders of actions that investors still need to take.[64] Instead, the commenter recommended that FINRA narrow the scope of the filing requirement to capture only ''those types of communications on which investors are likely to base an investment decision,'' such as pitch decks or slide shows.[65]

In response, FINRA noted that the examples of administrative communications that the commenter identified likely would be directed to a single or small group of investors, and thus would be correspondence (which is not subject to filing) rather than retail

under which they were made, not misleading, or to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

[46] *See* NCPSC Letter.

[47] *See* FINRA Rule 2210(d)(1)(F) (stating that, in general, communications may not predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast).

[48] *See id.*

[49] *See* FINRA January 12 Letter.

[50] *See id.* (citing Regulatory Notice 20–21 (Jul. 2020)).

[51] *See id.*

[52] IPA Letter.

[53] *See id.*

[54] *See* FINRA January 29 Letter.

[55] *See* Mick Letter.

[56] *See id.*

[57] *See id.*

[58] *See* FINRA April 12 Letter.

[59] *See id.*

[60] Scopus Letter.

[61] *See id.*

[62] *See* FINRA January 12 Letter.

[63] *See* letter from Atish Davda, Co-Founder and Chief Executive Office, Chris Giampapa, General Counsel, and Phil Haslett, Co-Founder and Chief Revenue Officer, EquityZen Inc., to Vanessa A. Countryman, Secretary, Commission, dated December 4, 2020.

[64] *See id.*

[65] *See id.*

communications.[66] Nevertheless, FINRA recognized that some of these administrative and non-promotional communications may fall within the definition of retail communication because they are distributed to more than 25 retail investors within a 30-day period.[67] Accordingly, FINRA amended the proposed rule change to narrow the filing requirement to any retail communication that ''promotes or recommends'' a member private placement (Rule 5122) or other private placement (Rule 5123), rather than a retail communication ''concerning'' such offerings.[68]

The Commission believes that the proposed rule change in Amendment No. 1 to apply the filing requirement only to a retail communication that ''promotes or recommends'' a member private placement is designed to protect investors and the public interest by appropriately narrowing the filing requirement to those communications that pose the greatest regulatory concern, and therefore improving the timeliness of FINRA's review of private placement communications that might influence investors' transaction decisions.

B. Commission Findings

Under Rules 5122 and 5123, broker-dealers are required to file with FINRA's Corporate Financing Department any PPM, term sheet, or other offering document used in connection with private placements, but these rules do not currently require retail communications governed by Rule 2210 to be filed. Similarly, Rule 2210 generally does not require broker-dealers to file with FINRA's Advertising Regulation Department the materials they use to communicate with retail investors concerning private placements. Accordingly, firms currently have no regulatory obligation to submit retail communications concerning private placements for review by FINRA. Currently, some broker-dealers submit retail communications as part of their Rules 5122 and 5123 filings either voluntarily or as new members.[69] Given the comparatively high rate of non-compliance with Rule 2210 in these private placement retail communications, and the increased risk of investor harm associated with those communications,[70] FINRA proposed to amend Rules 5122 and 5123 to make such submissions mandatory, in addition to the currently required PPMs, term sheets, and other offering documents.[71] The proposed rule change would not amend Rule 2210 or change FINRA's interpretations of the rule.

The Commission believes that the proposed rule change to require members to file retail communications concerning private placements would help prevent fraudulent and manipulative acts and practices by facilitating FINRA's review of information about private placements being disclosed to retail customers in those communications. Requiring members to file retail communications concerning private placements with FINRA's Corporate Financing Department would allow FINRA to review the documents more efficiently and timely than it could by relying on cycle reviews of its members. Through its reviews of the these retail communications, FINRA would be able to more efficiently identify retail communications about private placements that may not be fair and balanced as required by FINRA Rule 2210, thereby reducing the potential risk of customer harm from investing on the basis of misleading communications. Moreover, given the high rate of non-compliance with this fundamental communications standard, FINRA's increased ability to review retail communications concerning private placements pursuant to this proposed rule change would likely incentivize broker-dealers to distribute those types of retail communications that are fair and balanced in compliance with Rule 2210 and deter them from presenting information in a manner that may cause investor harm. The Commission believes that these changes are particularly important in light of the expanded retail investor participation in the market for private placements.[72] The proposed rule change would help encourage the use of fair and balanced communications to investors making investment decisions.

Although some commenters requested clarification of specific aspects of the application of FINRA Rule 2210, such as broker-dealers' use of performance projections in their retail communications, and in some cases sought guidance on specific factual scenarios, FINRA has previously provided guidance on these issues and has offered to continue to provide guidance as necessary. Moreover, the Commission believes that these comments are beyond the scope of this proposed rule change.[73] Notably, the proposed rule change does not modify Rule 2210, does not change its application, nor does it subject any additional communications to 2210's requirements.[74]

In sum, the Commission believes that the proposed rule change addresses a problem identified by FINRA regarding the comparatively high rate of non-compliance with Rule 2210 of retail communications concerning private placements. The Commission believes that FINRA's proposed rule change would improve the quality of information available to retail investors about private placement securities offered by FINRA members and strengthen FINRA's ability to monitor these communications for potential violations of its rules thereby improving prospective investors' confidence in these communications. FINRA has taken a number of steps to narrowly tailor this proposed rule change in some key respects: The proposed rule change would apply to types of retail communications that have been found to have a high rate of noncompliance with FINRA's fair and balanced standards; broker-dealers would not have to pay a filing fee for their submissions; and the proposed filing requirement has been narrowed to apply only to retail communications concerning private placements that ''promote or recommend'' a private placement security. Thus, for the reasons stated above, we believe that the proposed rule change, as modified by Amendment No. 1, is consistent with the provisions of Section 15A(b)(6) of the Exchange Act because it is 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.

[66] *See* FINRA January 12 Letter. ''Correspondence'' is defined as any written (including electronic) communication that is distributed or made available to 25 or fewer retail investors within any 30 calendar-day period. *See* Rule 2210(a)(2).

[67] *See supra* note 17.

[68] *See* FINRA January 12 Letter; *see also supra* note 5.

[69] *See supra* note 20.

[70] *See supra* note 19–22 and accompanying text.

[71] *See id.*

[72] *See supra* notes 32–34 and accompanying text.

[73] Another commenter requested that the Commission require issuers of new Regulation D offerings to disclose, at a minimum, the use of offering proceeds and the offering expenses associated with the offering, and that they be filed for review. *See* Scopus Letter. The Commission believes that interpretations of its own regulatory terms are beyond the scope of the proposed rule change.

[74] A commenter also requested that FINRA combine Rules 5122 and 5123 into a single rule requiring (as does Rule 5122) disclosure about the use of offering proceeds, offering expenses and selling compensation. The Commission finds that this suggestion is also beyond the scope of the proposed rule change.

IV. Conclusion

It is therefore ordered pursuant to Section 19(b)(2) of the Exchange Act [75] that the proposed rule change (SR–FINRA–2020–038), as modified by Amendment No. 1, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[76]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–12474 Filed 6–14–21; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–92138; File No. SR–EMERALD–2021–20]

Self-Regulatory Organizations; MIAX Emerald, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Adopt Fees for the Open-Close Report

June 9, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on May 28, 2021, MIAX Emerald, LLC (''MIAX Emerald'' or ''Exchange''), filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. 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

The Exchange is filing a proposal to amend the Exchange's Fee Schedule (''Fee Schedule'') to adopt fees for a new data product to be known as the Open-Close Report.

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings/emerald,* at MIAX's principal office, 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, the Exchange 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 Exchange 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 recently adopted a new data product known as the Open-Close Report, which will be available for purchase to Exchange Members [3] and non-Members.[4] The Exchange now proposes to adopt fees for the Open-Close Report. The Open-Close Report is described under Exchange Rule 531(b)(1).

By way of background, the Exchange will offer two versions of the Open-Close Report, an end of day summary and intra-day report. The end-of-day version is a volume summary of trading activity on the Exchange at the option level by origin (Priority Customer, Non-Priority Customer, Firm, Broker-Dealer, and Market Maker [5]), side of the market (buy or sell), contract volume, and transaction type (opening or closing). The customer and professional customer volume is further broken down into trade size buckets (less than 100 contracts, 100–199 contracts, greater than 199 contracts). The Open-Close Data is proprietary Exchange trade data and does not include trade data from any other exchange. It is also a historical data product and not a real-time data feed.

The intraday Open-Close Report will provide similar information to that of Open-Close Data but will be produced and updated every 10 minutes during the trading day. Data is captured in ''snapshots'' taken every 10 minutes throughout the trading day and is available to subscribers within five minutes of the conclusion of each 10-minute period. For example, subscribers to the intraday product will receive the first calculation of intraday data by no later than 9:45 a.m. ET, which represents data captured from 9:30 a.m. to 9:40 a.m. Subscribers will receive the next update by 9:55 a.m., representing the data previously provided together with data captured from 9:40 a.m. through 9:50 a.m., and so forth. Each update will represent the aggregate data captured from the current ''snapshot'' and all previous ''snapshots.'' The intraday Open-Close Data will provide a volume summary of trading activity on the Exchange at the option level by origin (Priority Customer, Non-Priority Customer, Firm, Broker-Dealer, and Market Maker), side of the market (buy or sell), and transaction type (opening or closing). All volume will be further broken down into trade size buckets (less than 100 contracts, 100–199 contracts, greater than 199 contracts).

The Exchange anticipates a wide variety of market participants to purchase the Open-Close Report, including, but not limited to, individual customers, buy-side investors, and investment banks. The Exchange believes the Open-Close Report product may also provide helpful trading information regarding investor sentiment that may allow market participants to make better trading decisions throughout the day and may be used to create and test trading models and analytical strategies and provides comprehensive insight into trading on the Exchange. For example, intraday open data may allow a market participant to identify new interest or possible risks throughout the trading day, while intraday closing data may allow a market participant to identify fading interests in a security. The product is a completely voluntary product, in that the Exchange is not required by any rule or regulation to make this data available and that potential subscribers may purchase it only if they voluntarily choose to do so. The Exchange notes that other exchanges offer a similar data product.[6]

[75] 15 U.S.C. 78s(b)(2).

[76] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The term ''Member'' means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[4] *See* Securities Exchange Act Release No. 91963 (May 21, 2021), 86 FR 28662 (May 27, 2021) (SR–EMERALD–2021–18) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Adopt a New Historical Market Data Product To Be Known as the Open-Close Report).

[5] *See* Exchange Rule 100.

[6] *See* Securities Exchange Act Release Nos. 89497 (August 6, 2020), 85 FR 48747 (August 12, 2020) (SR–CboeBZX–2020–059); 89498 (August 6, 2020), 85 FR 48735 (August 12, 2020) (SR–Cboe–EDGX–2020–36); 85817 (May 9, 2019), 84 FR 21863 (May 15, 2019) (SR–CBOE–2019–026); 89496 (August 6, 2020), 85 FR 48743 (August 12, 2020) (SR–C2–2020–010); 89596 [sic] (August 17, 2020), 85 FR 51833 (August 21, 2020) (SR–C2–2020–012); 62887 (September 10, 2010), 75 FR 57092 (September 17, 2010) (SR–Phlx–2010–121); 65587 (October 18,

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