

December 15, 2023

Sherry R. Haywood  
Assistant Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

Re: *Notice of Filing of a Proposed Rule Change To Amend FINRA Rule 2210 (Communications With the Public) To Permit Projections of Performance of Investment Strategies or Single Securities in Institutional Communications (File Number SR-FINRA-2023-016)*

Dear Ms. Haywood:

The Investment Company Institute<sup>1</sup> is writing to provide our views on FINRA’s proposed amendments to its rule that regulates communications with the public (Rule 2210, or the “rule”).<sup>2</sup> Subject to conditions intended to protect investors, the proposal would allow FINRA members to provide communications with performance projections or targeted returns to (i) institutional investors and (ii) on a more limited basis, qualified purchasers (QPs).

We believe that performance projections and targets, subject to proper investor protection guardrails, can help inform investors’—including retail investors’—decision-making process. Because the current rule largely proscribes the use of performance projections in communications, adoption of the proposal would modestly improve the status quo. To further extend the informational benefits of performance projections and targets, we urge FINRA to align more fully any final amendments with the performance standards that the SEC adopted in its 2020 marketing rule for investment advisers.

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<sup>1</sup> The [Investment Company Institute](http://www.ici.org) (ICI) is the leading association representing regulated investment funds. ICI’s mission is to strengthen the foundation of the asset management industry for the ultimate benefit of the long-term individual investor. ICI’s members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in other jurisdictions. Its members manage \$ 29.9 trillion invested in funds registered under the US Investment Company Act of 1940, serving more than 100 million investors. Members manage an additional \$8.5 trillion in regulated fund assets managed outside the United States. ICI also represents its members in their capacity as investment advisers to certain collective investment trusts (CITs) and retail separately managed accounts (SMAs). ICI has offices in Washington DC, Brussels, and London and carries out its international work through [ICI Global](http://www.ici.org).

<sup>2</sup> *Notice of Filing of a Proposed Rule Change To Amend FINRA Rule 2210 (Communications With the Public) To Permit Projections of Performance of Investment Strategies or Single Securities in Institutional Communications*; SEC Release No. 34-98977, 88 Fed. Reg. 82482 (Nov. 24, 2023) (the “proposal”), available at <https://www.govinfo.gov/content/pkg/FR-2023-11-24/pdf/2023-25881.pdf>.

## Section 1: Background and Description of the 2023 Proposal

In 2017, FINRA issued a Regulatory Notice requesting comment on proposed amendments to the rule.<sup>3</sup> FINRA’s proposal follows from its 2014 retrospective review of this rule and others, which was intended to assess their effectiveness and efficiency.

Notwithstanding the rule’s general prohibition on communications that predict or project performance,<sup>4</sup> the 2017 proposal conditionally would have permitted customized hypothetical investment planning illustrations that project performance of an asset allocation or other investment strategy (but not an individual security).<sup>5</sup> These proposed amendments were “intended to better harmonize regulatory standards,” presumably a reference to the SEC’s standards for investment advisers.

ICI’s comment letter generally supported FINRA’s 2017 proposal, which we believed could help inform investors’ investment decision-making process.<sup>6</sup> We viewed this proposal as good policy and a welcome first step in harmonizing FINRA and SEC marketing standards.

In 2020, the SEC adopted amendments under the Investment Advisers Act (“Advisers Act”) to update rules that govern investment adviser marketing.<sup>7</sup> The final SEC marketing rule and related guidance conditionally allow hypothetical performance in advertisements.<sup>8</sup> We

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<sup>3</sup> *FINRA Requests Comment on Proposed Amendments to Rules Governing Communications with the Public*, FINRA Regulatory Notice 17-06 (February 2017) (“Regulatory Notice 17-06”), available at: [www.finra.org/sites/default/files/notice\\_doc\\_file\\_ref/Regulatory-Notice-17-06.pdf](http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-17-06.pdf).

<sup>4</sup> Rule 2210(d)(1)(F) prohibits communications that “predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast,” subject to specific exceptions for: a hypothetical illustration of mathematical principles, provided that it does not predict or project the performance of an investment or investment strategy; an investment analysis tool, or a written report produced by an investment analysis tool, that meets the requirements of Rule 2214; and a price target contained in a research report on debt or equity securities, subject to certain conditions.

<sup>5</sup> Specifically, using this exception would be conditioned upon (i) there being a “reasonable basis for all assumptions, conclusions and recommendations;” and (ii) providing clear and prominent disclosure that the illustration is hypothetical; that there is no assurance that the performance or event will occur; and that includes all material assumptions and limitations. The proposed amendments also would have included related supervisory requirements.

<sup>6</sup> Available at [https://www.finra.org/sites/default/files/notice\\_comment\\_file\\_ref/17-06\\_ICI\\_comment.pdf](https://www.finra.org/sites/default/files/notice_comment_file_ref/17-06_ICI_comment.pdf). We recommended that the proposal be enhanced further by: (i) removing the “customization” requirement; and (ii) providing guidance regarding the precise scope of the proposed and existing exceptions to the rule’s general prohibition on projections, so that members could put them to wider and better use (e.g., in educational materials).

<sup>7</sup> Rule 206(4)-1 under the Advisers Act (“SEC marketing rule”). See also *Investment Adviser Marketing*, SEC Release No. IA-5653, 86 Fed. Reg. 13024 (Mar. 5, 2021) (“SEC Marketing Rule Release”), available at <https://www.govinfo.gov/content/pkg/FR-2021-03-05/pdf/2020-28868.pdf>.

<sup>8</sup> Under the SEC marketing rule, “hypothetical performance” includes model performance, backtested performance, and targeted or projected performance returns. The SEC marketing rule conditionally permits an adviser to advertise

understand that FINRA delayed its 2017 proposal in large part so that it could take into account the SEC's final marketing rule prior to finalizing its rule amendments. This was an eminently sensible approach since these rules address overlapping subject matter.

The 2023 proposal conditionally would permit “[a] communication that projects the performance or provides a targeted return with respect to a security or asset allocation or other investment strategy.” This new exception would be limited to: (i) institutional communications, or (ii) communications that are distributed or made available only to QPs and that promote or recommend specified non-public offerings. Thus, use of projections or targets in retail communications would continue to be almost entirely prohibited.<sup>9</sup>

To use projections or targets in these communications, the proposal would require:

- The member to implement written policies and procedures reasonably designed to ensure that the communication is relevant to the likely financial situation and investment objectives of the investor receiving the communication and to ensure compliance with all applicable requirements;
- The member to have a reasonable basis for the criteria used and assumptions made in calculating the projected performance or targeted return, and retain written records supporting the basis for these criteria and assumptions;
- The communication to prominently disclose that the projected performance or targeted return is hypothetical in nature and that there is no guarantee that the projected or targeted performance will be achieved; and
- The member to provide sufficient information to enable the investor to understand:
  - the criteria used and assumptions made in calculating the projected performance or targeted return, including whether the projected performance or targeted return is net of anticipated fees and expenses; and
  - the risks and limitations of using the projected performance or targeted return in making investment decisions, including reasons why the projected performance or targeted return might differ from actual performance.

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hypothetical performance, provided the adviser: (i) adopts and implements policies and procedures reasonably designed to ensure that the hypothetical performance is relevant to the likely financial situation and investment objectives of the intended audience of the advertisement; (ii) provides sufficient information to enable the intended audience to understand the criteria used and assumptions made in calculating such hypothetical performance; and (iii) provides (or, if the intended audience is an investor in a private fund, provides, or offers to provide promptly) sufficient information to enable the intended audience to understand the risks and limitations of using such hypothetical performance in making investment decisions.

<sup>9</sup> “In most cases, an individual investor who has \$5 million or more in investments, but who does not have at least \$50 million in assets, will be both a qualified purchaser under the Investment Company Act and a retail investor for purposes of Rule 2210. Accordingly, some QP private placement communications will be either correspondence or retail communications under the rule.” Proposal at n.20.

In connection with the proposed “reasonable basis” requirement, proposed Supplementary Material 2210.01 would require members to consider multiple enumerated factors, with none being determinative.<sup>10</sup>

## **Section 2: Comments on the Proposal**

### **2.1 Projections and Investor Protection Generally**

We believe that the current rule’s near-prohibition on projected performance is unduly restrictive and prevents FINRA members from communicating in ways that help investors better understand the risk and return characteristics of investments and portfolios. For instance, projections can highlight important investment concepts such as variability of investment returns, differences in rates of return among asset classes, ways in which asset classes with different performance correlations might be combined to reduce overall portfolio volatility, and the benefit of compound returns over long time horizons. More tangibly, projections can be very useful to investors who are seeking to achieve future financial objectives (e.g., financing retirement or college education) and need assistance in determining how best to do so. While projections and targets can never be precise for investments with return volatility, when done responsibly, they at least provide an investor with a range of likely outcomes and how such outcomes relate to their financial objectives. Projections are indispensable in helping provide investors with improved clarity around their investment-specific questions (e.g., “How much can I reasonably expect my investment portfolio to be worth when I retire?”).

At the same time, we recognize and agree that investor protection should be considered. If projections are not done responsibly and investors rely on them too heavily, investors risk making decisions that could prove harmful. It is therefore appropriate for FINRA and the SEC to carefully calibrate the conditions on broker-dealers’ or advisers’ use of performance projections and targets to preserve their benefits while reducing risk of investor harm.

While there is legitimate policy tension here, we believe the 2023 proposal gives too little weight to the benefits of performance projections and targets and undue weight to their potential risks. We therefore urge FINRA to allow wider use of projections and targets (subject to appropriate safeguards) in any final rule amendments.

### **2.2 Comparing the 2023 Proposal to FINRA’s 2017 Proposal**

In two respects, the 2023 proposal is better than the 2017 proposal. First, the 2017 proposal would have permitted only a “customized” illustration, which FINRA described as “one designed for a particular client or multiple clients who share an account.”<sup>11</sup> We saw this as

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<sup>10</sup> It lists 13 factors and also states that members may not base projected performance or a targeted return upon (i) hypothetical, back-tested performance, or (ii) the prior performance of a portfolio or model that was created solely for the purpose of establishing a track record.

<sup>11</sup> Regulatory Notice 17-06 at n.4.

unnecessarily limiting the efficacy of this exception, particularly given the proposed disclosure and supervisory review requirements.<sup>12</sup>

Second, the 2023 proposal is broader in that it would cover “a security or asset allocation or other investment strategy.” We believe that projections and targets can be useful in considering potential risks and returns of specific investments (e.g., mutual funds and ETFs).

We support these changes and also urge FINRA to broaden the permitted audience for these communications. We believe, as FINRA did in 2017, that the rule can be crafted to both protect and benefit retail investors, who should receive the helpful information that illustrations can provide.

The 2023 proposal correctly highlights two important existing protections that strengthen the case for allowing broader use of performance projections and targets:

- These new communications “must meet Rule 2210’s general standards, including the requirements that communications be fair and balanced, provide a sound basis for evaluating the facts in regard to any particular security or type of security, and not contain false, exaggerated, unwarranted, promissory or misleading content.”<sup>13</sup>
- If members “use a projection of performance or targeted return in connection with a recommendation of a securities transaction or investment strategy involving securities to a retail customer, the recommendation must meet the requirements of Reg BI.”<sup>14</sup>

The additional protections proposed would further enhance the considerable investor protections already in place.

### **2.3 Comparing the 2023 Proposal to the SEC’s Hypothetical Performance Standards**

We have long supported harmonization of the FINRA and SEC marketing standards. We therefore were heartened by FINRA delaying any action on its 2017 proposal until the SEC adopted its marketing rule, and we support this proposal’s incorporation of many of the SEC’s provisions.

We were disappointed to see that unlike the SEC marketing rule, the 2023 proposal limits the use of performance projections and targets to institutional and certain QP communications.

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<sup>12</sup> We saw no policy reason for limiting illustrations to those that are customized. While having the ability to customize illustrations is no doubt beneficial (e.g., the illustrations could show investor-specific investment sums, goals, and time horizons), more general illustrations also may be useful to investors.

<sup>13</sup> Proposal at 82485-82486.

<sup>14</sup> *Id.* at 82486.

As discussed above, hypothetical performance may help inform both institutional and retail investors who are evaluating various investment options to decide how best to achieve their financial objectives. The SEC Marketing Rule Release recognizes these benefits:

we understand that other information that may demonstrate the adviser’s investment process as well as hypothetical performance may be useful to prospective investors who have the resources and financial expertise. When subjected to this analysis, the information may allow an investor to evaluate an adviser’s investment process over a wide range of periods and market environments or form reasonable expectations about how the investment process might perform under different conditions.<sup>15</sup>

In 2020, the SEC concluded that “the final rule will not include different provisions for Retail and Non-Retail Persons and we believe that the rule is sufficiently flexible to facilitate the application of the hypothetical performance conditions based on facts and circumstances.”<sup>16</sup>

We recommend that FINRA likewise broaden the reach of any final rule amendments to include retail investors, which it could do simply by deleting proposed Rule 2210(d)(1)(F)(iv)(a).<sup>17</sup> To further protect retail investors, the final amendments could include guidance similar that found in the SEC Marketing Rule Release: “We intend for advertisements including hypothetical performance information to only be distributed to investors who have access to the resources to independently analyze this information and who have the financial expertise to understand the risks and limitations of these types of presentations.”<sup>18</sup>

With these changes, retail investors would be adequately protected and would be able to obtain the benefits that otherwise would be reserved for institutional investors (and on a more limited basis, QPs). Additionally, greater harmonization is beneficial in itself, especially for entities dually registered as broker-dealers and investment advisers. Without it, complying with divergent standards is more challenging, and these entities may choose to default to the stricter and less beneficial standards.

Moreover, it is not clear to us why communications to QPs should be further restricted to those involving private placements. If QP status is meant to be a proxy for financial sophistication and resources, it makes no sense to prohibit QPs from receiving performance projections or targets for more *highly* regulated investments available to retail investors (e.g., mutual funds and ETFs) when they would be permitted for private placements. If FINRA insists on limiting the audience

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<sup>15</sup> SEC Marketing Rule Release at 13078.

<sup>16</sup> *Id.*

<sup>17</sup> We would note that FINRA Rule 2211 (Communications with the Public About Variable Life Insurance and Variable Annuities) conditionally allows use of hypothetical illustrations of rates of return in variable life insurance retail communications and correspondence.

<sup>18</sup> SEC Marketing Rule Release at 13078.

for performance projections and targets to institutional investors and QPs—which, to be clear, we do not support—then further limitations with respect to investment type are unwarranted.

We also recommend further streamlining the conditions, to further align the FINRA and SEC rules. This proposal would incorporate the SEC’s conditions while also requiring FINRA’s own “reasonable basis” condition and proposed Supplementary Material 2210.01. Further streamlining would avoid potentially overlapping, ambiguous, and onerous requirements that could dissuade broker-dealers from using performance projections and targets with their investors. For instance, if registered fund materials are created by the fund (or its distributor) and a third-party broker wishes to use them, it could be difficult for *the third-party broker* to establish that it “has a reasonable basis for the criteria used and assumptions made in calculating the projected performance or targeted return” and “retain...written records supporting the basis for such criteria and assumptions.” Also, we believe the enumerated factors in proposed Supplementary Material 2210.01 could be helpful but would not want compliance with it to be reduced to a formulaic box-checking exercise. In providing any guidance in this area, FINRA should be clear that its applicability and consideration and weighting of any factors will depend on the facts and circumstances of the communication.

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We appreciate having the opportunity to comment on the proposal. If you have any questions, please contact us at (202) 218-3563 or (202) 371-5406, or Mitra Surrell, Associate General Counsel, at (202) 326-5802.

Sincerely,

/s/ Dorothy M. Donohue

Deputy General Counsel

/s/ Matthew Thornton

Associate General Counsel

cc: Joseph Savage, Vice President and Associate General Counsel, Office of General Counsel, FINRA  
Amy Sochard, Vice President, Advertising Regulation, FINRA