



December 15, 2023

Via Electronic Submission

Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: 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 No. SR-FINRA-2023-016

Dear Ms. Countryman:

The Securities Industry and Financial Markets Association (SIFMA)¹ provides comments on FINRA's proposed changes to Rule 2210. Although an additional exception to the rule's general prohibition against the use of performance projections is welcome and we thank FINRA for its efforts, Rule 2210 should be aligned further to the SEC's Investment Adviser Marketing rule ("IA Marketing Rule"). The exception should be broadened to include retail investors. Alternatively, it should include accredited investors and knowledgeable employees and be product-agnostic. FINRA should also clarify expectations for the reasonable basis standard as well as provide other clarifications outlined below.

Background

In Regulatory Notice 2017-06, FINRA requested comment on proposed amendments that would have allowed performance projections to be more broadly distributed than the current proposal. SIFMA, along with other commenters, supported amendments that would have alleviated broker-dealers' competitive disadvantage, lessened regulatory inconsistencies, and eliminated regulatory arbitrage between broker-dealers and investment advisers. Although the new proposal is not as expansive as contemplated in 2017, we appreciate FINRA partially advancing these goals with the proposed exception for institutional investors and qualified

¹ SIFMA is the leading trade association for broker-dealers, investment banks, and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly one million employees, we advocate for legislation, regulation, and business policy affecting retail and institutional investors, equity and fixed income markets, and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. With offices in New York and Washington, D.C., SIFMA is the U.S. regional member of the Global Financial Markets Association (GFMA).

purchasers (QPs) in private placements sold only to QPs, as these investors “...are more likely to have the sophistication and resources to evaluate any performance projections or targeted returns they receive...when making an investment decision.”² The proposed exception would be conditioned on, among other things, the member having 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 a reasonable basis for the projected performance or targeted return. FINRA could advance these goals further by amending the proposal to more closely align with the IA Marketing Rule.

1. Align Rule 2210 more closely with the IA Marketing Rule. Brokers-dealers should be able to provide performance projections and targeted returns to all investors like investment advisers can do today.

Having acknowledged that Rule 2210 differed from the IA Marketing Rule to the detriment of broker-dealers and investors, FINRA should have proposed a more expansive rewrite of Rule 2210 considering recent regulatory developments, including the implementation of the IA Marketing Rule. The proposal should have allowed broker-dealers to communicate projected performance and targeted returns equally to all investors, subject to the same conditions as the IA Marketing Rule, which requires investment advisers to consider the intended audience for the communications. As FINRA acknowledges, retail investors may already receive this information from registered investment advisers.³ SIFMA urges the SEC and FINRA to reconsider the proposal and to provide investors with access to more tools to further FINRA’s goals of contributing to investor protection and encouraging the use of registered broker-dealers by issuers over using unregistered firms or marketing securities directly.

We also urge FINRA to remove the reasonable basis requirement for QPs to further align Rule 2210 with the IA Marketing Rule, which imposes no such requirement.⁴ SIFMA notes that past guidance from FINRA as it relates to the communication of related performance to QPs did not impose such a requirement, as compliance with the other requirements of Rule 2210 provided sufficient investor protection.⁵

2. Alternatively, expand the exception to include accredited investors and knowledgeable employees, and make the exception product-agnostic.

The proposed rule change is too narrowly tailored as it is limited to QPs and should be expanded to include accredited investors and knowledgeable employees of funds that are exempt from registration under Investment Company Act (ICA) Sections 3(c)(1) and 3(c)(7). The

² FINRA, 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, Release No. 34-98977; File No. SR-FINRA-2023-016 (Nov. 17, 2023) at p. 37.

³ *Id.* at pp. 32-33.

⁴ FINRA should remove all requirements above and beyond the IA Marketing Rule for all investors, but at a minimum for QPs.

⁵ Interpretive Letter to Yukako Kawata, Davis Polk & Wardwell (Dec. 30, 2003), <https://www.finra.org/rules-guidance/guidance/interpretive-letters/yukako-kawata-davis-polk-wardwell-general-letter>

exception should not be limited to funds sold only to QPs when accredited investors and knowledgeable employees are also likely to have the sophistication and resources to assess performance projections and targeted returns properly.

The exception should also be product agnostic, allowing QPs in funds that are exempt from registration under ICA Sections 3(c)(1) and 3(c)(5) (and other non-3(c)(7) funds) to receive projected performance and target returns even where those funds are available to non-QPs. Any concerns about indirect distribution of the materials to non-QPs could be managed with the implementation of a requirement that the broker-dealer clearly label the materials as “for QPs only” and instruct QPs that receive the materials not to provide them to non-QPs, similar to conditions that FINRA has utilized previously.⁶

3. Clarify the reasonable basis requirement as it pertains to calculations by third parties.

To effectuate FINRA’s goal of greater broker-dealer participation in the private fund market, FINRA, if it declines to remove the reasonable basis standard, should at least clarify its expectations when a third party is responsible for the criteria and assumptions used to calculate performance projections or targeted returns. Member firms are not involved in drafting marketing materials and do not have the same access to source data and facts used in calculating targeted or projected returns as issuers. As these marketing materials are drafted by the issuers, not broker-dealers, broker-dealers only have a limited ability to make changes to them as issuers typically use the same materials for other institutional investors and seek consistency among all prospective investors.

As proposed, the standard may dissuade broker-dealers from providing performance projections and target returns in certain situations, limiting the proposal’s benefit. In situations where distributing broker-dealers are unable to form a reasonable basis for performance projections or targeted returns calculated by the sponsor or manager of a private fund or another third party, the broker-dealers may be dissuaded from providing such information. It would be reasonable for the broker-dealer to rely upon the certification or representations of the sponsor, manager or party calculating this information (who has far greater access to information than the broker-dealer does), absent information to the contrary. SIFMA notes that broker-dealers have due diligence, suitability, and other obligations under Rule 2210 to ensure reliance is reasonable.

4. Clarify that broker-dealers can determine relevance based on the category of investor, not the characteristics of each specific investor.

The proposed rule change would require a broker-dealer to have policies and procedures reasonably designed to ensure, among other things, that the communication is relevant to the likely financial situation and investment objectives of the investor receiving the communication. To better align with the IA Marketing Rule, which requires the communication be relevant to the intended audience, not the individual investor, FINRA should clarify that broker-dealers can

⁶ See, e.g., Interpretive Letter to Edward D. Macdonald, Hartford Funds Distributors, LLC (May 12, 2015), <https://www.finra.org/rules-guidance/guidance/interpretive-letters/interpretive-letter-edward-p-macdonald-hartford-funds-distributors-llc>

consider the category of investor, rather than an investor's individual characteristics, when ensuring that the communication is relevant to the investor.

5. Confirm that the proposed rule change modifies existing guidance in Regulatory Notice 20-21.

In Regulatory Notice 20-21, FINRA provided guidance that the use of a particular projection, the Individual Rate of Return (IRR), in communications would be inconsistent with Rule 2210 for new investment programs that have no operations, but allowed IRR if the investment program had a combination of realized investments and unrealized holdings in their portfolios if they calculate their IRRs in a manner consistent with GIPS. SIFMA requests that FINRA confirm that the proposed rule change modifies the guidance provided in Regulatory Notice 20-21 to permit the use of IRRs for new private funds and unrealized holdings within a fund.

6. Confirm that a broker-dealer may include performance projections relevant to the time horizon of the investment.

Finally, SIFMA requests that FINRA confirm that a broker-dealer may include projections of investment performance relevant to the time horizon of the investment.

We appreciate your consideration of our comments. Feel free to contact me at 202-962-7300 or bcanepa@sifma.org with any questions.

Respectfully submitted,

Bernard V. Canepa

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