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FINRA Proposes to Amend Rule 2210 to Permit Projected Performance and Targeted Returns in Institutional Communications

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On November 13, 2023, FINRA filed with the SEC a proposal to amendment to Rule 2210 that would create a tailored exception from the general prohibition on projections in marketing materials and other communications with institutional investors, including marketing decks and pitch books for private placements in investment funds and other securities.

FINRA Rule 2210(d)(1)(F) currently prohibits any member from including a projected performance in a written communication — retail or institutional. The amendment would provide a limited exception for performance projections or targeted returns in written communications distributed or made available only to "institutional investors." An "institutional investor" is defined in Rule 2210(a)(4) to include banks, insurance companies, government agencies, employee benefit plans, registered investment companies, registered investment advisers, as well as *any other person (individual or entity) with total assets of at least $50 million*.

In addition, the amendment would permit projections in marketing materials sent or made available only to Qualified Purchasers as defined in Section 2(a)(51)(A) of the Investment Company Act, including an individual, family?owned company or family?related trust with more than $5 million in investments.

FINRA noted that the current restriction is intended primarily to protect investors "who are less able to assess the risks and limitations of using projected performances in making investment decisions."

The exception would be conditioned on the member firm having or making: (1) written policies and procedures reasonably designed to ensure that the communication is relevant to the likely financial situation and investment objectives of the investor and compliance with other applicable requirements; (2) a reasonable basis and records to support the criteria used and assumptions made in calculating the projected performance or targeted return, and (3) prominent disclosure that the projected performance or targeted return is hypothetical in nature and stating that "there is no guarantee that the projected or targeted performance will be achieved.” In addition, the member must provide sufficient information to enable the investor to understand (1) the criteria used and assumptions made in calculating the projected performance or targeted return, including whether it is net of fees and expenses, and (2) the risks and limitations of using the projections or targets in making investment decisions, including reasons why they might differ from actual performance.

FINRA said that the amendment is intended to align broker?dealers’ obligations with those of investment advisers under the new IA Marketing Rule.

The proposal would not change the current prohibitions with respect to other types of retail communications.

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