VOICE OF INDEPENDENT FINANCIAL SERVICES FIRMS AND INDEPENDENT FINANCIAL ADVISORS

VIA ELECTRONIC MAIL

March 27, 2017

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006

Re: Regulatory Notice 17-06; Proposed Amendments to Rules Governing Communications with the Public

Dear Ms. Asquith:

On February 6 2017, the Financial Industry Regulatory Authority (FINRA) published its request for public comment on proposed amendments to FINRA rules governing Communications with the Public (Proposed Amendments).[1] The Proposed Amendments would create an exception to the current prohibition on communications projecting performance, allowing firms to distribute a customized hypothetical investment planning illustration if it does not project the performance of individual securities.

The Financial Services Institute[2] (FSI) appreciates the opportunity to comment on this important proposal. FSI and its member firms strongly support regulatory harmonization among the financial regulators and support FINRA's efforts to establish uniform regulatory requirements for broker-dealers and investment advisers in their communications with the public. The Proposed Amendments resulted from FINRA's retrospective review of existing rules, which FSI believes is essential to efficient regulation. We provide specific supportive comments below.

Background on FSI Members

The independent financial services community has been an important and active part of the lives of American investors for more than 40 years. In the US, there are approximately 167,000 independent financial advisors, which account for approximately 64.5% percent of all producing registered representatives.[3] These financial advisors are self-employed independent contractors, rather than employees of the Independent Broker-Dealers (IBD).

[1] Financial Industry Regulatory Authority, Inc. (FINRA), Regulatory Notice 17-06, Communications with the Public (February 2017), *available at*: http://www.finra.org/industry/notices/17-06.

[2] The Financial Services Institute (FSI) is an advocacy association comprised of members from the independent financial services industry, and is the only organization advocating solely on behalf of independent financial advisors and independent financial services firms. Since 2004, through advocacy, education and public awareness, FSI has been working to create a healthier regulatory environment for these members so they can provide affordable, objective financial advice to hard-working Main Street Americans.

[3] The use of the term "financial advisor" or "advisor" in this letter is a reference to an individual who is a registered representative of a broker-dealer, an investment adviser representative of a registered investment adviser firm, or a

FSI's IBD member firms provide business support to independent financial advisors in addition to supervising their business practices and arranging for the execution and clearing of customer transactions. Independent financial advisors are small-business owners with strong ties to their communities and know their clients personally. These financial advisors provide comprehensive and affordable financial services that help millions of individuals, families, small businesses, associations, organizations, and retirement plans. Their services include financial education, planning, implementation, and investment monitoring. Due to their unique business model, FSI member firms and their affiliated financial advisors are especially well positioned to provide Main Street Americans with the financial advice, products, and services necessary to achieve their investment goals.

FSI members make substantial contributions to our nation's economy. According to Oxford Economics, FSI members nationwide generate $48.3 billion of economic activity. This activity, in turn, supports 482,100 jobs including direct employees, those employed in the FSI supply chain, and those supported in the broader economy. In addition, FSI members contribute nearly $6.8 billion annually to federal, state, and local government taxes. FSI members account for approximately 8.4% of the total financial services industry contribution to U.S. economic activity.[4]

Discussion

FSI appreciates the opportunity to comment on the Proposed Amendments. FSI supports consistency across the financial regulators and commends FINRA's efforts to establish uniform regulatory requirements for communications with the public among investment advisers and broker-dealers.

A. Inconsistency Between FINRA and SEC Rules Favors One Business Model Over Another

Current FINRA rules prohibit broker-dealers and their registered representatives from predicting or projecting performance of an investment strategy. This prohibition is in place to protect investors from spurious, inaccurate, or misleading performance projections of individual investments. However, investment advisers are not subject to such a prohibition under the '40 Act[5] and in fact often provide performance projections to clients as a part of their financial planning or asset allocation process. The resulting inconsistency between regulatory standards may result in competitive imbalances and create opportunities for regulatory arbitrage. Harmonizing the rules for investment advisers and broker-dealers will eliminate confusion for firms and investors.

B. Impact on Dually Registered Reps

This inconsistency between regulatory regimes also creates a lack of clarity over which communications rules apply to financial advisors who act in both the broker-dealer capacity or as a Registered Investment Advisor under the '40 Act depending on which services they are

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dual registrant. The use of the term "investment adviser" or "adviser" in this letter is a reference to a firm or individual registered with the SEC or state securities division as an investment adviser.

[4] Oxford Economics for the Financial Services Institute, The Economic Impact of FSI's Members (2016).

[5] The Investment Advisers Act of 1940, 15 U.S.C. §80b-1et seq. (amended January 3, 2012) *available at* https://www.sec.gov/about/laws/iaa40.pdf

providing to their clients. Firms that are dually-registered or representatives who are dually-registered, may already be providing information regarding projected performance to their investment advisory clients. Allowing dually-registered firms or representatives to align the way they provide projections would simplify compliance and minimize the cost of regulatory oversight.

Given the current lack of regulatory consistency and the confusion that having two standards creates for FSI's dually registered members, FSI supports the Proposed Amendments. The Proposed Amendments allow broker-dealers to utilize asset allocation illustrations and models in the same way that investment advisers do, provided they do not make specific projections about individual investments. Investors benefit from a better understanding of the assumptions on which an advisor's recommendation to pursue a particular investment strategy is based. Allowing advisors to provide projections in this limited context and with sufficient disclosures is beneficial to investors while making it clear that the performance of an individual security is not guaranteed. We further believe the Proposed Amendments include sufficient supervisory requirements for such illustrations: either they can be generated using a template that has been approved by a Registered Principal before its use or distribution, or each illustration can be approved individually prior to its use or distribution in a similar manner to FINRA Rule 3001 (Supervision), providing firms with key flexibility in their use of asset allocation models and illustrations. FSI believes these specific supervisory requirements will help educate investors on options available to them while still protecting them from misleading performance projections.

C. Retrospective Rule Review

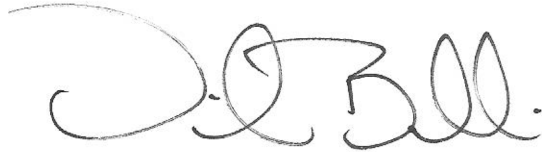
The Proposed Amendments have resulted from FINRA's retrospective review of its rules governing Communications with the Public. Retrospective review of existing rules is essential to smart, efficient regulation. The review is intended to assess whether the rules are meeting their intended objectives and to take steps to maintain or improve their effectiveness while minimizing negative economic impacts. The multi-step process sought comment from the industry, subject matter experts, and outside counsel; and included a cross section of firm sizes and business models. The Proposed Amendments came out of a thoughtful process of examining the Communications with the Public Rules and the process included gathering input from the industry, including FSI, and other stakeholders. FSI and its members applaud FINRA's efforts to reexamine rules, like the Communications with the Public Rules, that they know to be historically frustrating or confusing to their members.

Conclusion

We are committed to constructive engagement in the regulatory process and welcome the opportunity to work with FINRA on this and other important regulatory efforts.

Thank you for considering FSI's comments. Should you have any questions, please contact me at (202) 803-6061.

Respectfully submitted,



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

Via email: pubcom@finra.org

Re: Regulatory Notice 17-06 – Communications with the Public

Dear Ms. Asquith:

The Insured Retirement Institute ("IRI")[1], on behalf of its members, appreciates the opportunity to comment on the Financial Industry Regulatory Authority ("FINRA") proposal to amend FINRA Rule 2210 (Communications with the Public), as described in Regulatory Notice 17-06 (the "Regulatory Notice"). For the reasons outlined below, IRI supports the proposed amendment.

The proposed amendment allows consumers to obtain a customized hypothetical investment planning illustration, subject to all existing FINRA restrictions. As noted by the Regulatory Notice, the proposal would be valuable for consumers because it allows certain types of consumers to obtain more information prior to committing to investment strategies. This proposed amendment would benefit consumers seeking brokerage accounts because it would allow them to obtain projection information that previously was only available to investment advisory consumers. By providing both brokerage and advisory consumers with reasonably likely outcomes of investment strategies, the proposed amendment grants more flexibility to the industry, though again, subject to existing FINRA restrictions.

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[1] IRI is the only national trade association that represents the entire supply chain of the retirement income industry. IRI has more than 500 member companies, including major life insurance companies, broker-dealers, banks, and asset management companies. IRI member companies account for more than 95 percent of annuity assets in the United States, include the top 10 distributors of annuities ranked by assets under management, and are represented by more than 150,000 financial professionals serving over 22.5 million households in communities across the country.

The proposed amendment will be mutually beneficial to the industry and consumers. Because it is consistent with the Investment Advisers Act, it would allow dually registered firms to use the same internal compliance mechanisms for brokerage and advisory clients. This proposed amendment appears uncontroversial for all parties involved, especially considering the benefits generated for clients, who would be empowered to better identify investment outcomes.

IRI and its members agree with several points made in the Regulatory Notice. First, the Regulatory Notice identified “historical performance” as a reasonable basis for performance projections. We agree that this would constitute an appropriate factor. Additionally, our members have indicated that, while there are costs associated with the proposed amendment, by way of registered principal “review and approval,” no other substantial identifiable costs exist related to the amendment’s adoption. Finally, we cannot identify any alternative approaches to this amendment that are as well suited to achieving similar goals.

IRI supports the proposed amendment, but respectfully requests that FINRA clarify a possible inconsistency between the proposed amendment and FINRA Rule 2214 (Investment Analysis Tool). The proposed amendment’s complete prohibition on projections of individual securities may not be entirely consistent with the practical applications of FINRA Rule 2214. In practice, the Investment Analysis Tool from Rule 2214 allows FINRA members to show likely outcomes for certain investments, including individual securities, when displayed as part of an asset allocation strategy. However, the proposed amendment would disallow *any* projections of individual securities and purports to prohibit existing asset allocation projection practices.

Put differently, FINRA Rule 2214 allows FINRA members to produce simulations of investment outcomes “if certain investments are made or certain investment strategies or styles are undertaken”, which helps consumers evaluate risk. The implication from this language is that a FINRA member can demonstrate the likelihood of outcomes for certain investments. However, the proposed amendment states that a FINRA member may show consumers the “projected performance of an asset allocation or other investment strategy, but *not an individual security*.” FINRA should provide more clarity on whether specific securities included in an asset allocation can be shown to consumers, so firms can properly comply.

IRI also believes FINRA should consider expanding the proposed amendment to permit firms to provide their clients with non-customized asset allocation projections based on firm capital market assumptions. Such information, when accompanied by appropriate disclosures, will help investors gauge current and potential future risk, and better understand potential risks associated with their portfolio and their investment strategy.

The Regulatory Notice poses several questions and we would like to briefly respond to two of the questions that we have not yet addressed.

1. The Regulatory Notice asks about the existence of any “single investment products that operate like an asset allocation or other investment strategy for which performance projection might be appropriate.” Our members have suggested that target date funds operate like an asset allocation and may be appropriate for a performance projection.

2. The Regulatory Notice also asks whether "requiring a range of projections…could make the hypothetical nature of a performance projection more apparent." We do not recommend a requirement that consumers be provided a range of projections in a customized hypothetical investment planning illustration. Consumers will likely have the ability to identify suitable investment strategies using a single projection. Because the purpose is to provide consumers with projections of the most reasonably likely outcome, we believe that providing multiple projections would be confusing to consumers.

We appreciate the opportunity to present our members' views on the proposed amendment to FINRA Rule 2210, and we hope you will consider the issues we have raised in this letter. Please feel free to contact me if IRI can provide additional information or to further discuss these issues.

Sincerely,

Jason Berkowitz
Vice President & Counsel, Regulatory Affairs
Insured Retirement Institute

National Leadership for the
Direct Investments Industry

IPA
Investment Program Association

March 27, 2017

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

Re: FINRA's Regulatory Notice 17-06 ("RN 17-06") request for comments regarding proposed amendments to FINRA Rule 2210 (Communications with the Public)

Dear Ms. Marcia Asquith:

The Investment Program Association ("IPA") respectfully submits this letter in response to the request for comments by the Financial Industry Regulatory Authority ("FINRA") on RN 17-06 (regarding proposed rule amendments to FINRA Rule 2210 (Communications with the Public). Our intent is to provide comments we believe will improve the information provided to investors to assist them with decision making in regards to asset classes and investment strategy.

FINRA's PROPOSAL:

FINRA is seeking information on allowing financial professionals affiliated with FINRA the ability to distribute a customized hypothetical illustration that may include the projections regarding asset allocations or other investment strategies, but not an individual security.

IPA's POSITION:

The IPA appreciates FINRA's proactive consideration of the proposed amendments to Rule 2210. We would like to address the current proposal and also suggest a second modification that aligns with the progressive nature of these amendments.

First, we strongly advocate for the approval of the proposed rule amendments for these reasons:

- Providing investors additional information about asset classes under various hypothetical scenarios can assist an investor in making an informed decision.
- If the Department of Labor Fiduciary Duty Rule is enacted as written, it appears that projections will need to be provided with the retirement plan statements.
- In its current form, FINRA 2210 creates inequality among investors and the professionals who serve their needs.

    - FINRA 2210 creates an information disadvantage to certain investors with accounts serviced at broker-dealers.
    - The rule creates a competitive disadvantage to financial professionals affiliated with FINRA by disallowing the use of projections. Conversely, the SEC's

Investment Advisers Act does allow investment advisers to use projections, so long as there is a reasonable basis and the valuation methods are clearly disclosed.

- With the industry trending towards financial professionals who are dual registrants, and which operate as both an investment adviser representative and a registered representative, it is appropriate for FINRA's proposed rule amendments on projections to be aligned with the SEC rules in order to provide equal benefits to all investors, regardless of their financial professional's registration or affiliation.

Secondly, we would suggest further harmonization of Rule 2210 by exempting communications made by broker-dealers strictly to "institutional investors" from the Rule's prohibition of projections.

- FINRA's new broker-dealer status for Capital Acquisition Brokers ("CAB"), which are firms that market debt or equity private placements to institutional investors, relieves CAB firms of several regulatory requirements. However, CAB status is not available to firms that offer retail products. As such, firms that distribute both private placements with institutions and offer retail products cannot take advantage of the CAB status benefits.

- One of the benefits of CAB status is to offer an exemption from Rule 2210 prohibitions on the use of projected returns in the marketing of private placements to institutional investors. This would put firms that do not elect CAB status at a competitive disadvantage in the marketing of their offerings. The FINRA proposals outlined in RN 17-06 do not specifically offer such exemption. If FINRA allows this exemption, it appears no investor protection is foregone by providing projections to "institutional investors" when the fund's targeted returns are typically presented in the offering memorandum.

The IPA believes that retail investors would benefit from transparent performance information regarding asset allocations or other investment strategies, and strongly supports the proposed amendments to FINRA Rule 2210.

Sincerely,

Anthony Chereso
President & CEO, Investment Program Association

P.O. Box 480 | Ellicott City, MD 21041-0480 | (212) 821-9799

www.ipa.com

MONUMENT GROUP

May 17, 2017

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

Re: Regulatory Notice 17-06 – Request for Comments on Proposed Amendments to Rules Governing Communications with the Public

Dear Ms. Asquith:

We recognize that we are submitting this letter beyond the deadline, but we believe it is important to comment on the proposal to amend FINRA Rule 2210 (Communications Rule) to create an exception to the rule's prohibition on projecting performance to permit a firm to distribute a customized hypothetical investment planning illustration that includes the projected performance of an asset allocation or other investment strategy. While we support the proposal and believe that reconsideration of the prohibition on projecting performance is appropriate, we wish to voice our concern that the rule could have unnecessary negative consequences for Monument Group Inc. ("Monument Group") and other FINRA-regulated independent third-party placement agents for private funds.

Background on Monument Group

Monument Group is an independent broker-dealer registered with the Commission and a member of FINRA. Its primary business for over 20 years has been to help investment advisers that manage private investment funds to raise capital from institutional investors. The firm is independently owned and currently employs a total of 24 employees with 16 FINRA licensed registered representatives who, collectively, have over 200 years of experience in the investment business with an average of approximately 18 years.

Monument Group's principal business is to act as placement agent in primary offerings and secondary sales of interests in private funds such as private equity, venture capital, real estate and energy funds. We raise capital solely from institutional investors and provide placement agency services *only* for issuers of private funds – *i.e.*, for funds that are exempt from registration under 3(c)(7) of the Investment Company Act of 1940 (the "Company Act"). Because we act as placement agents for only 3(c)(7) funds, all institutional investors we approach must be both "accredited investors" and "qualified purchasers" for purpose of the Company Act exemptions.

Monument Group acts solely as an intermediary with respect to the placement of fund interests. We do not open or maintain customer accounts; rather, we introduce institutional investors and other qualified purchasers to the fund managers, who are our clients. We provide private placement memoranda, subscriptions documents and other sales material to prospective investors. When a prospective investor purchases, the investor sends a completed subscription agreement and wires funds directly to the fund manager, who approves the investor, accepts the funds and reflects the investment in its records. Monument Group holds no advisory relationship with investors.

SUMMARY

Forecasts and projections ("projections") have a place in securities offerings and securities advice. As the Regulatory Notice (the "Notice") points out, "the Investment Advisers Act does not prohibit the presentation of projections that comply with the antifraud provisions of the Act."

Projections that have a reasonable basis are useful informational tools, when used with other types of information. Private fund managers often use projections in their offering material and, for some types of investments, such as real estate funds, institutional investors and other sophisticated investors expect to receive projected performance information. We believe that, as a general matter, member firms should not be prohibited from using projections that have a reasonable basis. We support the proposal to permit the projected performance of an asset allocation or other investment strategy in a customized hypothetical investment planning illustration, but urge FINRA to permit members to treat the investment objectives of a private fund as an investment strategy designed for multiple clients who share an account. We also urge FINRA to consider, as part of any potential change to its rule prohibiting projections, the unnecessary burdens placed by the current projection prohibition on placement agents to private funds. Finally, we encourage FINRA to permit all member firms to use projected performance with institutional investors and qualified purchasers, as capital acquisition brokers ("CABs") will be permitted to do when the CAB rules go into effect in April. We discuss these three points in further detail below.

DISCUSSION

1. ***Private Funds as Asset Allocation or Investment Strategies for Multiple Clients Who Share an Account***

FINRA's Notice requests comments in seven specific areas. In the sixth request, FINRA asks whether there are "single investment products that operate like an asset allocation or other investment strategy for which performance projections might be appropriate." The Notice states that "the proposal would provide an exception to the prohibition of projections for a customized hypothetical investment planning illustration," with footnote 4 to that sentence clarifying that "a 'customized' investment planning illustration is one designed for a particular client ***or multiple clients who share an account.***" (Emphasis supplied.) We believe that the investment objectives of a private fund are the asset allocation or investment strategy for the fund and thus, in effect, a customized investment planning illustration for an account shared by multiple clients – i.e., the set of limited partners invested in the private fund.

We recognize that the use of projections will not be equally suitable for all private funds. The performance of a fund that invests in only corporate bonds or office buildings in a specified geographic area can be more reliably projected than that of a fund in which the adviser has greater discretion to determine the mix and types of assets. For this reason, the "reasonable basis" determination with regard to the projected performance of the fund should include not only how assets will perform but how accurately the mix of assets acquired can be predicted.

Most private fund managers, however, limit performance projections to those of prior funds, where the portfolio investments have been completed, but exits from such investments have not. A performance projection of that prior fund, accordingly, is self-limiting and can focus only on the projected performance of those specific assets (or of a limited number of other similar, intended investments), for which the fund manager has ample performance information and, certainly, a "reasonable basis" upon which to project the fund's ultimate performance based on those investments. Institutional investors considering investment in the manager's subsequent fund – one with the same or substantially similar investment strategy – would certainly find those projections at least as helpful as the hypothetical illustration of the performance of an asset allocation or investment strategy to a single client would be. We urge FINRA to permit reasonable-basis projections to be used in both cases.

2. ***Current FINRA Rules Prohibiting Projections Place Unnecessary Burdens on Placement Agents for Private Funds.***

It should be noted that the majority of Monument Group's clients are registered under the Advisers Act – or otherwise comply with most Advisers Act rules and with the SEC anti-fraud rules and regulations – which likewise require a reasonable basis for projection information and, consistent with the guidance in the Notice, would also require that marketing materials "clearly and prominently disclose the fact that the illustration is hypothetical," that there is "no assurance that any described investment performance or event will occur," and that "all material assumptions and limitations"[1] are disclosed.

Monument Group works closely with its clients – i.e., private fund managers – to develop marketing strategies and documentation that describe a fund manager's principals, their experience and, quite often, the performance of the manager's prior private equity funds. Due to the longer investment terms for private equity funds, the current fund's marketing materials may include some projections of the performance of portfolio investments made by the manager's prior funds. Our clients consider these materials crucial to marketing their abilities and expect Monument Group to employ them as part of our marketing strategy on their behalf. Indeed, institutional investors often consider strong prior fund performance to be a *sine qua non* for any serious consideration of a possible investment with a particular private equity manager.

In these circumstances, Monument Group often finds itself unable to convey in its own marketing materials what its clients can convey in their own. Yet, the client documents provided by placement agents to investors on their clients' behalf – e.g., a private placement memorandum or a fund "teaser" – often contain the "prohibited" projection information. Placement agents find themselves having to explain to their clients their inability to use certain important information in their own marketing materials. The FINRA projection prohibitions can accordingly have an awkward and potentially negative impact on a placement agent's relationship with its clients and can unnecessarily hinder the quality of a placement agent's services to its clients.[2] We urge FINRA to take these unnecessary burdens on

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1 Notice, p. 3.

2 Notably, the Notice appears to condone the use of projections-related communications by dually registered representatives with their ***retail clients***. The notice states that these dually registered representatives may "choose to align the way they provide projections in their investment advisory business to the proposed amendments, thereby simplifying compliance and minimizing the costs of regulatory oversight." Certainly the same policy considerations – i.e., simplification of compliance requirements and minimization of unnecessary compliance costs and burdens – should be an equally compelling consideration for FINRA in its assessment of a potential change to the prohibition on use of projections by placement agents to private funds vis-à-vis ***institutional investors***.

private fund placement agents into account when considering the scope of any changes to the Communications Rule.

3. *Use of Predicted Performance with Institutional Investors and Qualified Purchasers*

The Notice states that "the general prohibition against performance projections is largely intended to protect *retail investors* from performance projections of individual investments, which often prove to be spurious, inaccurate or otherwise misleading." (Emphasis added.) FINRA has recognized in a number of contexts, such as the Suitability Rule, the filing and supervision provisions of the Communications Rule and, most recently, in the CAB rules, that institutional customers do not require the same protections as retail customers.

CAB Rule 221, governing communications with the public, does not prohibit a CAB from using forecasts or projections. One justification for this difference between the CAB rules and the rules applicable to other FINRA members is that a CAB may sell securities in private placements only to institutional investors as defined in Rule 016(i). That definition includes familiar categories of institutional investors, like banks, insurance companies, investment companies and employee benefit plans. It also includes any person (individual or entity) that has total assets of at least $50 million and any "qualified purchaser" as defined in Section 2(a)(51) of the Investment Company Act of 1940.

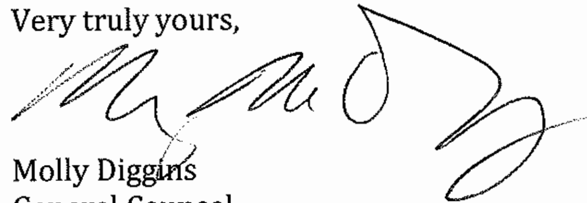
Some FINRA members, like Monument Group, would be able to qualify as a CAB except for technical conditions, like the prohibition on secondary sales. Non-CAB FINRA members should have the same freedom to provide projected performance information to Rule 016(i) institutional investors as CABs, not merely for reasons of competitive fairness and equal treatment, but because the same fundamental principle applies: institutional investors have sufficient sophistication to evaluate the projected performance and the weight to be given to it in the overall investment decision. We urge FINRA to, at a minimum, permit the use of reasonable-basis projected performance in broker material distributed in securities offerings made exclusively to Rule 016(i) institutional investors. This would include all offerings of private funds exempt under Section 3(c)(7) of the Investment Company Act.

CONCLUSION

We urge FINRA: (1) to permit brokers to make reasonable–basis projections about the investment objectives of a private fund as a form of hypothetical illustration for multiple clients sharing an account, (2) to consider, as part of its rule-making with respect to its members' use of projections, the unnecessary burdens imposed on placement agents to private funds by existing prohibitions, and (3) to allow brokers to provide reasonable-basis projections to Rule 0161(i) institutional investors in offerings exclusively to those investors and consistent with other rules applicable to brokers in the context of capital raising for institutional investors. We believe that amending the content standards of Rule 2210 in that way will enable brokers to provide higher quality information to investors in a way that is consistent with the principles of investor protection.

We would be happy to discuss these comments with you or the use of projected performance generally, at your request.

Very truly yours,



Molly Diggins
General Counsel
Monument Group, Inc.

OUTSOURCED GLOBAL MARKETING OF ALTERNATIVE + TRADITIONAL INVESTMENTS

March 27, 2017

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

Re: Regulatory Notice 17-06: Communications with the Public

Dear Ms. Asquith,

I am writing to you today on behalf of the Third-Party Marketer's Association ("3PM") to express the thoughts and concerns of our association regarding the draft provisions proposed in FINRA Regulatory Notice 17-06. While it is our goal to respond to requests for comments in a manner beneficial to the majority of 3PM's members, it should be noted that the views of the commenters involved in preparing this response may not be representative of the views of the entirety of the 3PM membership or our industry group in general.

3PM believes that the initiation of a retrospective rule review is a prudent step to ensure that regulations remain relevant in a changing environment. In this regard, we applaud the steps FINRA is taking in this regard. We do also believe, however, that with respect to RN 17-06 and the amendments contemplated under this notice, that FINRA has not fully and appropriately updated the Communications with the Public standards to properly reflect the realities occurring in the marketplace.

While 3PM's members operate under a varied set of business models, approximately 2/3s of the Association's 3PM members engage in the business of offering of private funds to institutional investors. It is for this subset of our membership for which we will be commenting to this Regulatory Notice.

Rule 2210

FINRA Rule 2210 provides that communications may not predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast. Regulatory Notice 17-06 goes on to state that "The general prohibition against performance projections is largely intended to protect ***retail*** investors from performance projections of individual investments, which often prove to be spurious, inaccurate or otherwise misleading".

RN 17-06 is proposing to provide an exception to this prohibition of projections for a hypothetical investment planning illustration. 3PM believes that the exception proposed by RN 17-06 is warranted, but requests further analysis to consider an exception to the prohibition of projections when offering private securities to institutional investors. 3PM believes that an exception of this nature is consistent with the spirit of the proposed amendment as well as with prevailing guidance as detailed below.

Precedent to Support our Thesis

In general, FINRA Rule 2210 correctly acknowledges the reality that business conducted with institutional investors is different than business conducted with retail investors. Under this rule, the differences inherent in these two investor groups are addressed; communications with retail investors require more stringent supervision and often pre-approval while institutional communications do not. While we believe that FINRA's decision to segregate this rule into components that provide adequate protection to each type of investor based on their experience and knowledge of investments is appropriate, we question why this standard was not applied to the rule in its entirety.

Furthermore, the suitability rule, FINRA Rule 2111, another sales practice rule, also differentiates the suitability process by retail investors and institutional investors. While documentation and suitability assessments for retail investors is very detailed, the approach for institutional investors is more streamlined and straightforward. This again reinforces the belief that retail investors require far more protection than institutional investors who are better able to assess an investment than their less experienced counterparts.

Additionally, FINRA has issued several interpretative letters that support this assertion. One example of this is evident in the letter issued to Mr. Budge Collins of Collins/Bay Island Securities (9/14/2004) regarding the "Use of related performance information in communications with the Public for Private Funds". The response to Mr. Collins, in-part, states "NASD staff believes that the presentation of related performance information to potential investors in 3(c)(7) funds, who are 'qualified purchasers', does not present the same investor protection concerns as the presentation of related performance information in other contexts."

Given the precedent that exists, we believe that FINRA should expand this approach, which is already applied in the same rule, to the prohibition of 'projected performance' discussed in this regulatory notice.

Retail vs. Institutional Investors

It is important to note that in the institutional arena there are a variety of inputs that investor use to determine whether an investment should be considered and ultimately whether an investment should be made. Projected performance is just one part of the equation.

When looking for an investment, investors, specifically institutional investors, want to be able to tell immediately if an investment warrants a further look. Today, when investors are inundated with product, they need a mechanism by which they can shrink down the enormous universe of investments into a small sub-set of strategies at which they can look at more closely. Projected performance is one of the ways they do this.

Once an institutional investor decides to look further at a security, a formal review begins. The due diligence process used by institutional investors is quite exhaustive. While it may differ somewhat by investment product, there are, however, four underlying areas of focus that all institutional investors review before making a judgement on the attractiveness of any investment product.

- First, it starts with an examination of the PEOPLE at the investment manager responsible for the product. Do they have adequate investment knowledge and familiarity with the offered product? How long has the team been working together and do they have any conflicts of interest with investors?

- Second, the institutional investor examines the PHILOSOPHY underlying the investment. Is it a well-articulated investment strategy? Can it be documented; does it make sense? Is there a consistent adherence to the strategy?

- Third, is an evaluation of the PROCESS or investment decision making. Who makes investment decisions? How are they generated, researched, pursued and screened? What are the lines of authority, responsibility and accountability?

- Fourth, is a full evaluation of PERFORMANCE, not just the projected performance. Were the results produced by current people utilizing current process? Was there a review an analysis of funds and benchmark with similar objectives and characteristics?

Institutional Investors realize that market conditions change and that past performance is not that reliable when trying to determine future expected returns. However, past performance may be helpful to complement or strengthen the institution's favorable evaluation of an investment manager's product.

Fund Projections

To understand why we think performance projections should be permitted, it is important to understand how investment managers offering private securities develop performance projections for their funds. Projected performance is not an arbitrary number that is pulled out of thin air, but rather a systematic derivation of several factors that combined result in that projection. It is the rate of return that the investment manager believes is achievable in light of their strategy, current market conditions and its deal flow.

To calculate performance of a Fund of alternative investments, the manager will calculate the Internal Rate of Return (IRR) for each investment in the fund. IRR is defined as the discount rate at which the net present value of a set of cash flows equals zero, where the initial investment is expressed negatively and the returns from real estate investments are expressed positively. In more simple terms, it is the rate at which an investment grows. In this sense, you can think of it as a time sensitive compounded annual rate of return.

For example, please consider an investment manager who is raising capital for a single investment, say an apartment complex. To calculate projected performance, the investment manager will calculate the IRR on the project given the costs of the project relative to the projected revenue it will receive from each investment. The inputs to the process are based on current and historical facts and figures, assumptions that could impact either the cost or revenue of the project as well as the managers experience in the industry. Generally, a formal model that outlines the inputs and assumptions is developed and provided to potential investors who are contemplating an investment. Forecasting returns in this manner is an important component of the investment decision-making process.

As with all investments, the projected performance is not a guarantee that the investment will return a certain percentage, but rather it is an estimate of the return that can be expected. Private Placement Memorandums (PPMs) inherent to the offering of any private security contain disclosures, often with emphasis, stating that there is no guarantee the investment will earn a certain return or that past performance is indicative of future returns. These projected returns are alternatively meant to help the investor determine whether the risks of the investment are justified by the potential rate of return and to compare other potential investments the investor is considering.

When looking at a Fund investment the process is similar although a bit more complex considering the Fund will invest in multiple projects, properties, companies or investments at the same time.

To determining the projected return of the Fund, an investment manager will often start with actual fund performance of its predecessor fund. The manager will then consider other inputs such as the size of the fund, terms of the current fund compared to past funds, current market conditions affecting the strategy, competition as well as any other factors that could impact the projected return.

When management of the Fund begins, the investment manager will model each investment and calculate the IRR to determine the attractiveness of the investment. If the IRR of a new investment exceeds a company's projected performance, then the investment is desirable. If IRR is below the required rate of return, the investment should be rejected.

Projected performance, is not arbitrary. It is based on hard facts. Furthermore, while most of the inputs that go into calculating the IRR are objective, an investment manager has the ability to adjust its model to account for facts that may not be evident based on historical performance.

In the Private Equity market, it is common for managers to come to market several times with funds utilizing the same investment approach. In most cases, the fund size grows each time a new fund is launched. At some point capital commitments, will grow to a point where the manager will no longer be

able to find enough suitable investments that meet its previous targeted return. In such instances, the manager must often look at other investments that are either outside his preferred criteria or that return less than his targeted return. This is often referred to as style drift.

To account for this phenomenon, a manager could adjust its projected performance to reflect this occurrence, signaling investors that something in the Fund approach has changed. Alternatively, if an investor does not have projected performance they will be forced to rely on past performance information which in this case would be misleading at best.

Use of Projected Performance

Investment managers who seek capital for their investment opportunities must be able to clearly and concisely convey their investment thesis and strategy and describe how that process has generated its historical track record. Projected performance is the way investment managers encapsulate all of these factors into a number that accurately and concisely represents their product. This is just one reason that projected performance has become a vital component of modern day investment analysis. Given the importance of this projected performance, calculations of such must be based on a sound and reasonable methodology. This explains why investment managers are constantly developing and refining these figures for accuracy through comprehensive scenario analysis.

Alternatively, institutional investors require projected performance form any of the multitude of investment opportunities available to them. Finite resources such as time and capital dictate that institutional investors employ effective filtering tools to distill large numbers of prospective investment opportunities to a manageable target universe that may ultimately lead to an allocation or two. One of the most common filters used by institutional investors is the data point of projected performance.

Institutional investors that utilize projected performance also pay close attention to the pro forma analysis which generally accompanies closed-end structured investment vehicles or securities such private equity and real estate. These forward-looking performance projections as well as the underlying methodology used to calculate the performance allow institutional investors to gauge a fund’s approach. Simply put, institutional investors use performance projections to weigh the risk/reward attributes of a strategy and assist in understanding a variety of hypothetical illustrations used in the scenario analysis. This information enables the institutional investor to analyze, compare and determine their focus on each investment opportunity accordingly. Comparative analysis is commonly used by institutional investors and projected performance of various investments is what they are comparing.

Given the realities of the market, we believe that a general prohibition on the use of projected performance is unnecessarily restrictive.

Reasonable Basis

When discussing the proposed amendments, Regulatory Notice 17-06 states that "The proposal would require that there be a reasonable basis for all assumptions, conclusions and recommendations, and that the illustration clearly and prominently disclose the fact that the illustration is hypothetical and there is no assurance that any described investment performance or event will occur. All material assumptions and limitations applicable to the illustration would have to be disclosed."

We believe that this same approach could be applied to third party marketers or placement agents soliciting investments from institutional investors when using projected performance for a fund or security they are offering. In such a case, we believe any use of projected performance should be accompanied by a clear and prominent disclosure written by the distributing broker dealer which contains the following information:

- Statement that the broker dealer believes there is a reasonable basis to believe the projected performance is representative of the security or fund it represents
- Statement that the projected performance is hypothetical and there is no assurance that any described investment performance or event will occur.
- Description of the methodology used to develop the projected performance
- Explanation as to why the methodology used is a good predictor of the projected performance of the security or fund
- All material assumptions and limitations applicable to the calculation of the projected performance

Furthermore, we believe that several of the well-established precedents cited by FINRA, in its own rules and those of the SEC, are also applicable to 3PM's case.

To protect the institutional investors we work with, 3PM would also recommend that any projected performance along with the required disclosure, as outlined above, should also receive pre-approval, before use, by a registered principal of the broker dealer who plans to utilize this information. Given that the projected performance is likely to come from the Fund sponsor, the broker dealer's registered principal should be tasked with determining whether there is a reasonable basis to rely on the projected performance based on the methodology, assumptions and limitations provided with the projected performance. This approach would provide an independent assessment and help mitigate the conflict of interest inherent in the fact that the Fund Sponsor is not only projecting performance but is also determining the case for why its use is "reasonable".

Economic Impact Assessment

At the core of our assessment of economic impact is the question of common sense and fairness for the industry. Given this, we suggest a few baseline considerations in this regard:

1. In the case where 100% of the market is held to the same standard, while the economic assessment may still prove problematic, it is at least evenly applied.
2. Similarly, where rule sets are consistent across regulatory agencies in relation to the same business practice, with most firms being required to be regulated by more than one agency, economic impact is consistent.
3. If the rules provided create inconsistency among constituents and/or by regulatory body, this places a greater burden on some firms over others, which creates economic impact that is negative for many market constituents.

3PMs exist, in part, to help level the playing field – ie to assist investment managers without internal sales and marketing resources to be able to compete with those that do, obtain access to capital and to provide small managers and/or strategies newer to the market with access to a broader investor base. Our issue however, is that we ourselves are subject to an uneven playing field.

Regulation that creates inconsistency, or provides one group with an 'advantage' over another is harmful to 3PMs. It is also harmful to our investment manager clients, institutional investors and their constituents which include: pensioners, grant recipients, universities, charitable organizations, etc.

Should the unlevel playing field persist, 3PMs eventually will be forced to choose between exiting businesses that require more resources for a substantially lower probability of earning revenues or putting up with the disadvantages created by the regulation that is supposed to promote a fair market place for all. If investment managers who relied on 3PMs were to lose access to our services, taking many small and mid-sized managers out of consideration by institutions, the largest and most well-funded investment management firms who can 'afford' in house resources and sizeable infrastructures would hold a monopoly on asset gathering.

To an extent this is already the case, with larger investment managers holding a disproportionate share of institutional assets.

The unlevel playing field also hurts:

- Third party marketers who can no longer make a living due to the rising cost of regulation and the detrimental impact of Rules that prevent third party marketers from fairly competing with internal sales professionals
- investment managers who have no way to access institutional capital, will be forced to raise retail assets which is also not easy without a staff to do so

- the investment manager's staff who are out of work when the manager goes out of business because it can't raise assets and earn fees
- institutional investors who will no longer be able to access the strategies of investment managers with no internal sales support
- With no access to smaller managers, investors would be forced to invest with the largest investment managers, many of who do not offer the most competitive performance given their size
- Investments with the largest firms could impact performance causing the investor to underperform their targets
- Missing targets directly impacts the constituents of the institutional investor such as pensioners, grant recipients, universities, charitable organizations, all of whom rely on the institution for funding

It is our hope that regulators like FINRA, the MSRB and SEC will see how small businesses in the financial industry are suffering the consequences of over-regulation which leads to this uneven playing field. While regulatory support might not be the only solution, it would at least help by eliminating unreasonable restrictions on firms working with institutional investors.

Below are some examples and their related considerations:

- While we agree that past performance may not recur and thus understand the potential risk of a 'projection', we believe that this rule is actually forcing investors to rely on past performance if they do not have target returns to evaluate. In addition, the lack of a projected performance gives investors no frame of reference for performance. In some cases, it is more meaningful to provide a data based projected return which may in fact be lower than the past performance and should be in many cases.

  For example, a first-time real estate Fund performed exceptionally well, generating performance around 20%. The investment manager launches a second fund using the same strategy while the market conditions have changed and have lowered the projected performance of the fund. In such a scenario, we believe that a registered representative should be permitted to provide information to a prospective investor with a more realistic projected performance range rather than let the investor believe that the higher performance earned in the first fund will persist and be generated by the second fund.

  In the Private Equity market, it is common for managers to come to market several times with funds utilizing the same investment approach. In most cases, the fund size grows each time a new fund is launched. At some point capital commitments, will grow to a point where the manager will no longer be able to find enough suitable investments that meet its previous targeted return. In such instances, the manager must often look at other investments that are

either outside his preferred criteria or that return less than his targeted return. This is often referred to as style drift.

To account for this phenomenon, a manager could adjust its projected performance to reflect this occurrence, signaling investors that something in the Fund approach has changed. Alternatively, if an investor does not have projected performance they will be forced to rely on past performance information which in this case would be misleading at best.

Being allowed to discuss the targeted return for investment products and services should be permitted to at least some investors, namely institutional investors.

- Since the majority of investment managers third party marketers work with are registered with the SEC, Rules like 2210 which prohibit the use of projected performance do not apply to internal sales and marketing professionals. We believe that this creates an unfair playing field and is detrimental to the goal of fair and open markets.

  Third party marketers are put at a disadvantage when offering product to investors. Fund managers and their internal employees will always discuss the targeted return of an investment. This leads to an uneven playing field in a very competitive market place where many investors will immediately pass on a product that does not show a targeted return. It may even result in the investment manager electing not to hire a Solicitor as they may view, and correctly so, the marketing effort at a disadvantage.

- Should third party marketers choose to exit this business, investment managers will need to find other avenues to offer their services to institutional investors. If this were to occur, institutional investors would have less access to the products that third-party marketers represent and the investment arena would be further monopolized by the largest firms who can afford an internal team infrastructure.

To minimize economic impact of this and subsequent regulation, 3PM suggests a review of the consistency of rules across regulatory bodies in relation to these business practices and regardless of whether the delivery of information is from an internal employee or a third-party marketer. Similarly, 3PM suggests a clear delineation between institutional and retail audiences and standards.

FINRA specifically request comments concerning the following issues:

1. In addition to the economic impacts identified in this proposal, are there other significant sources of impacts, including direct or indirect costs and benefits, of the proposed amendments to the firms and investors? What are these economic impacts and what factors contribute to them? What would be the magnitude of these costs and benefits? Please provide data or other supporting evidence.

Please see the section above entitled Economic Impact Assessment.

4. Are there other alternative approaches FINRA should consider to accomplish the goals described in this proposal? If so, what are those alternatives and why are they better suited?

In RN 17-06, FINRA states that "the general prohibition against performance projections is largely intended to protect retail investors from performance projections of individual investments, which often prove to be spurious, inaccurate or otherwise misleading". We agree with this assessment and as such 3PM would like to see this portion of the advertising rule approached in the same manner as the rest of the Rule; namely by the same segmentation between retail and institutional investors.

Furthermore, we believe that allowing the use of projected performance when marketing securities to institutional investors would be more beneficial to investors rather than detrimental

For example, in the Private Equity market, it is common for managers to come to market several times with funds utilizing the same investment approach. In most cases, the fund size grows each time a new fund is launched. At some point capital commitments, will grow to a point where the manager will no longer be able to find enough suitable investments that meet its previous targeted return. In such instances, the manager must often look at other investments that are either outside his preferred criteria or that return less than his targeted return. This is often referred to as style drift.

To account for this phenomenon, a manager could adjust its projected performance to reflect this occurrence, signaling investors that something in the Fund approach has changed. Alternatively, if an investor does not have projected performance they will be forced to rely on past performance information which in this case would be misleading at best.

5. This Regulatory Notice includes examples of factors that would and would not provide a "reasonable basis" for performance projections under the proposal. Are the historical performance and performance volatility of asset classes appropriate factors that would provide a reasonable basis for performance projections? Are there other examples that FINRA should provide that would further clarify what would constitute a "reasonable" basis for a performance projection?

In addition to the information provided, we believe that the use of specific and relevant market indices, peer group comparisons, and other widely acceptable absolute and relative historical investment performance of a specific investment strategy should also be considered. For example, in the private equity market, it is very common to review performance on a vintage year basis. While in most cases, past performance in and of itself is not a guarantee of future performance, it is however used as a basis to compare other years of performance and to establish a base-line of performance for PE investments. Even the traditional public equity markets utilize past data to estimate the overall return on the stock market and we believe that same should hold for alternative asset classes.

6. The proposal would not permit performance projections for a single security. Securities Act Rule 156, which governs investment company sales literature, provides in part that a statement could be misleading because it includes representations about future investment performance. Are there single investment products that operate like an asset allocation or other investment strategy for which performance projections might be appropriate?

The current marketplace includes many investment products that operate and perform like an asset allocation. Nearly every type of alternative investment category has such a product. A few of the many examples that exist include the following:

- **Hedge Funds**: ***Multi-strategy Funds***. Covers a variety of sub-strategies in the Hedge Fund universe. Can be used by investors to obtain broad hedge fund exposure without investing capital with managers focused in a specific sub-strategy like long/shore, market-neutral, arbitrage, Emerging Markets, Event Driven, Corporate Governance, etc.

- **Real Estate**: ***Core Real Estate Products*** - Covers a variety of sub-strategies in the Real Estate universe. Can be used by investors to obtain broad real estate exposure without investing capital with managers focused in a specific residential, commercial, luxury, raw land or can be used to mimic overall exposure to a sub-category like residential – which might include single family and multifamily properties.

- **Private Equity** – ***Core Private Equity Funds*** - Cover a variety of sub-strategies in the Private Equity universe. Can be used by investors to obtain broad exposure without investing capital with managers focused in a specific sub-strategy like venture capital, buyouts, secondaries or co-investments. Like Real Estate these funds are also further segmented and may include the various stages of a venture capital deal from early to late stage, or differentiate investments by geography, whether it be in the US, or outside the US in developed or emerging markets.

- **Infrastructure Funds.** Infrastructure Funds roll-up a variety of different strategies including Renewable Energy, Non-Renewable Energy, Utilities and Pipelines, Power Generation & Transmission, Transportation. These funds also invest in raw land, parking structures, and hospitals. Not only has infrastructure morphed into its own investment category, but some of its investments also overlap with other sector strategies such as energy. Global Funds will also differentiate investments by geography, and will include allocations to the various sectors in the US and outside the US in both developed or emerging markets.

These single investment products were all designed to provide investors with broad exposure and as such operate like an asset allocation. Given this, there is no reason to differentiate these securities from the rules that govern the performance of an asset allocation or investment strategy.

Furthermore, if these securities, given their similarities to an asset allocation of investment strategy were to be permitted to use projected performance, it would be logical to also allow other securities to use projected performance.

As discussed throughout this comment letter, we believe that performance projections should be permitted when discussing the securities offered by a private fund. We however, do not believe that these projections should be permitted across the board but rather only when the recipient of these projections is an institutional investor.

While we understand that not all institutional investors are the same and that not all are sophisticated enough to determine the appropriateness of an investment, we do believe that most either employ internal staffs that have sufficient experience to make these determinations or utilize the services of an investment consultant who help the investor select the appropriate investments.

This leaves a small group of institutional investors that might not be capable to discern the relevance or reasonableness of projected performance. These investors would, however, not be without protection. In such instances, other FINRA rules would come into play and serve to protect these investors. Some examples of these include FINRA Rule 2090 (Know Your Customer), 2111 Suitability, 2310 (Direct Participation Programs), 5123 (Private Placements of Securities) as well as the guidance provided to members in notices such as NTM 03-71 (Obligations when selling Non-Conventional Investments) and NTM 03-07 (Members Obligations when Selling Hedge Funds).

Given the above we believe that there is a rationale case to permit the use of performance projections when offering securities offered by private funds to institutional investors.

7. The proposal would permit a single projection in a customized hypothetical investment planning illustration. Requiring a range for projections, however, could make the hypothetical nature of a performance projection more apparent. Should the proposal require a range of projections?

While most private Fund Sponsors generally determine a single projection for performance, we would not be averse to insisting that the Fund Sponsors we work with provide a range of projections for performance if FINRA were to consider allowing member firms working with institutional investors as third party solicitors to utilize performance projections.

In addition, we feel that the use of performance projections should be accompanied by a clear and clear and prominent disclosure written by the distributing broker dealer. This coupled with the requirement that performance projections be pre-approved, prior to use, by a registered principal of the broker dealer who plans to utilize this information, would serve to protect institutional investors.

Please see the section above titled "Reasonable Basis" for a further discussion on 3PM's thoughts on disclosure requirements and Principal approval of projected performance.

Thank you for the opportunity to share our thoughts with you regarding this proposal. Please feel free to reach out to me at (585) 364-3065 or by email at donna.dimaria@tesseracapital.com should you have any questions or require additional information pertaining to the proposed amendments to the Communication with the Public rule.

Regards,

<<Donna DiMaria>>

Donna DiMaria
Third Party Marketers Association
Chairman of the Board of Directors and
Chair of the 3PM Regulatory Committee

About the Third-Party Marketer's Association (3PM)

3PM is an association of independent, global outsourced sales and marketing firms that support the alternative and traditional investment management industry worldwide.

3PM Members are properly registered and licensed organizations consisting of experienced sales and marketing professionals who come together to establish and encourage best practices, share knowledge and resources, enhance professional standards, build industry awareness and generally support the growth and development of professional outsourced investment management marketing.

Members of 3PM benefit from:

- Regulatory Advocacy
- Best Practices and Compliance
- Industry Recognition and Awareness
- Manager Introductions
- Educational Programs
- Online Presence
- Conferences and Networking
- Service Provider Discounts

3PM began in 1998 with seven member-firms. Today, the Association has more than 35 member organizations, as well as significant number of prominent firms that support 3PMs and participate in the Association as 3PPs, Industry Associates, Member Benefit Providers, Media Partners and Association Partners.

A typical 3PM member-firm consists of two to five highly experienced investment management marketing executives with, on-average, more than 10 years' experience selling financial products in the institutional and/or retail distribution channels. The Association's members run the gamut in products they represent. Members work with traditional separate account managers covering strategies such as domestic and international equity, as well as fixed income. In the alternative arena, members represent fund products such as mutual funds, hedge funds, private equity, fund of funds and real estate. Some firms' business is comprised of both types of product offerings. Most 3PM's members are currently registered with FINRA or affiliated with a broker-dealer that is a member of FINRA.

For more information on 3PM or its members, please visit www.3pm.org.

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March 27, 2017

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, D.C. 20006-1506

Re: Communications with the Public, FINRA Regulatory Notice 17-06 (February 2017)

Dear Ms. Asquith:

The Investment Company Institute[1] appreciates the opportunity to comment on FINRA's proposed amendments to FINRA Rule 2210 (Communications with the Public) (the "rule").[2] FINRA's proposal follows from its 2014 retrospective review of the rule and other communications with the public rules, which was intended to assess their effectiveness and efficiency.[3]

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[1] The Investment Company Institute (ICI) is a leading global association of regulated funds, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's members manage total assets of US$18.9 trillion in the United States, serving more than 95 million US shareholders, and US$1.6 trillion in assets in other jurisdictions. ICI carries out its international work through ICI Global, with offices in London, Hong Kong, and Washington, DC.

[2] *FINRA Requests Comment on Proposed Amendments to Rules Governing Communications With the Public,* FINRA Regulatory Notice 17-06 (February 2017) (the "proposal"), available at www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-17-06.pdf.

[3] *FINRA Requests Comment on the Effectiveness and Efficiency of its Communications with the Public Rules,* FINRA Regulatory Notice 14-14 (April 2014), available at www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p479810.pdf.

We support FINRA's proposal. If adopted, it would permit FINRA member firms to provide their customers with investment planning illustrations, which could help inform customers' investment decision-making. In addition, we recommend that FINRA enhance the proposal 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.

I. Description of the Proposal

The rule generally prohibits communications that predict or project performance, subject to certain exceptions.[4] The proposed amendments would create a new exception to this general prohibition: one for a "customized hypothetical investment planning illustration that projects performance of an asset allocation or other investment strategy and not an individual security." Use of 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 include related supervisory requirements.

II. ICI's Comments on the Proposal

We support FINRA's proposal. In crafting it, FINRA recognized both the rule's investor protection aims and the informational benefits that illustrations may provide to investors. Illustrations 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 to do so.

FINRA could improve the proposal in two ways, however. First, the proposal would permit only a "customized" illustration, which FINRA describes as "one designed for a particular client or multiple clients who share an account." This would limit unduly the efficacy of this exception. We see no policy reason for requiring customization, particularly given the disclosures that would accompany the illustrations and the supervisory review requirements. (Indeed, supervisory review becomes *easier* when illustrations are more general and broadly disseminated.) While having the ability to customize illustrations is no doubt beneficial (*e.g*., the illustrations could show customer-specific investment sums, goals, and time horizons), more general illustrations also may be useful to investors. For instance, general illustrations provided to multiple investors 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

[4] Specifically, the rule permits hypothetical illustrations of mathematical principles, investment analysis tools (or the written reports they produce), and price targets in research reports.

volatility, and the benefits of compound returns over long time horizons.[5] The rule should permit these types of general illustrations to the same extent that it permits customized illustrations, with each subject to the same safeguards.

Second, FINRA should clarify the scope of the new—and existing—exceptions. Given the ambiguity of their scope, the existing exceptions (particularly the hypothetical illustrations of mathematical principles and investment analysis tools exceptions) have in practice proved to be somewhat limited in the relief that they provide. For instance, in our comment letter on FINRA's retrospective rule review[6] we recommended that FINRA provide additional clarity with respect to the use of *output* from investment analysis tools within educational materials. We pointed out that a member may use the output from an investment analysis tool (*e.g.*, illustrations of the interplay between different asset allocations and different asset withdrawal rates in retirement, and their expected results) in educational materials, and a question existed as to whether the investment analysis tool exception would apply to those materials.[7]

This is just one example of challenges members have faced in interpreting and using the current exceptions in ways that benefit investors. It is possible that the types of general illustrations described above (which could be included in educational materials or otherwise) could fit within one of these existing exceptions. But this is not entirely clear, and members may be reticent to create and use materials of a type that FINRA has not broadly and publicly identified as permissible. FINRA should confirm that these types of practices—designed to educate investors about key investment principles—are consistent with the rule. Both investors and FINRA members would benefit from this additional clarity, which presumably would lead to increased use of tools, illustrations, and materials that improve investor education and comprehension.

FINRA appears to be motivated, at least in part, by the recognition that that the SEC regulates presentation of projections differently under the Investment Advisers Act of 1940 than FINRA does under the rule. We believe there is more work to do in harmonizing these sometimes-inconsistent

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[5] *Cf.* Acting SEC Chairman Michael S. Piwowar, *Remarks at the "SEC Speaks" Conference 2017: Remembering the Forgotten Investor* (Feb. 24, 2017)(explaining the importance to investors of concepts such as risk-return tradeoffs and modern portfolio theory), available at www.sec.gov/news/speech/piwowar-remembering-the-forgotten-investor.html.

[6] Letter from Dorothy Donohue, Acting General Counsel, ICI, to Marcia Asquith, Office of the Corporate Secretary, FINRA, dated May 23, 2014, available at www.finra.org/sites/default/files/NoticeComment/p519148.pdf.

[7] We understood that FINRA appeared to permit this practice, however, provided that: (i) no investment products are mentioned (whether generically or specifically); (ii) the recipients of the material have access to one of the member's online investment analysis tools; (iii) the material "advertises" the proprietary investment analysis tools that are available on the member's web site; and (iv) the material shows multiple outcomes and allows the investor to "interact" with the printed charts (*e.g.*, the investor may select their own withdrawal rate, asset allocation, and number of years in retirement and find the resulting probability of success). We encouraged FINRA to formalize this position in the rules.

standards. Still, adoption of the proposed amendments—particularly if FINRA enhances the proposal as outlined above—would be a welcome first step.

. . . . .

We appreciate having the opportunity to comment on the proposal, and we stand ready to assist FINRA in any way that we can. If you have any questions, please contact me at (202) 218-3563 or Matthew Thornton at (202) 371-5406.

Sincerely,

/s/ Dorothy Donohue
Deputy General Counsel

Alexander C. Gavis
Senior Vice President &
Deputy General Counsel

Fidelity Investments
FMR LLC Legal Department
200 Seaport Blvd., V7A, Boston, MA 02110

March 27, 2017

By Electronic Mail (pubcom@finra.org)

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

RE: Proposal to Amend Communications with the Public Rule to Permit the Distribution of Customized Hypothetical Investment Planning Illustrations that Include the Projected Performance of an Asset Allocation or Other Investment Strategy (Regulatory Notice 17-06)

Dear Ms. Asquith:

Fidelity Investments[1] appreciates the opportunity to comment on the proposed amendments to the Financial Industry Regulatory Authority's ("FINRA") rules governing communications with the public.[2] The proposed amendments are another step by FINRA in implementing the recommendations of its *Retrospective Rule Review Report,* published in December 2014.[3]

Fidelity supported FINRA's retrospective review of the communications rules and provided extensive comments regarding how certain aspects of the rules (which were first enacted in 1980) could be updated to address current communications preferences of investors.[4] With these proposed amendments, FINRA is attempting to harmonize its rules regarding the use of projections in broker-dealer communications materials with regulations pertaining to registered

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[1] Fidelity is one of the world's largest providers of financial services. The firm is a leading provider of investment management, retirement planning, portfolio guidance, brokerage, benefits outsourcing and many other financial products and services to more than 20 million individuals and institutions, as well as through 5,000 financial intermediary firms.

[2] FINRA *Regulatory Notice 17-06* (Feb. 2017), at www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-17-06.pdf.

[3] *FINRA Communications with the Public, Retrospective Rule Review Report* (Dec. 2014), at https://www.finra.org/sites/default/files/p602011.pdf.

[4] *See, e.g., Letter from Alexander C. Gavis, Senior Vice President & Deputy General Counsel, Fidelity Investments, to Ms. Marcia E. Asquith, Office of the Corporate Secretary, FINRA,* dated May 23, 2014; *Letter from Alexander C. Gavis, Fidelity Investments, to Ms. Marcia E. Asquith, Office of the Corporate Secretary, FINRA, dated July 2, 2015.*

Fidelity INVESTMENTS

investment advisors under rules of the Securities and Exchange Commission. Fidelity suggested such a harmonization in its comments to FINRA's retrospective review of communications along with other commenters. For many years, FINRA has prohibited the use of projections by broker-dealers in communications materials, with only a few limited exceptions, and this has served to limit broker-dealers' flexibility in providing useful analyses to their clients and customers.

FINRA Rule 2210(d)(1)(F) currently states that communications may not (1) predict or project performance, (2) imply that past performance will recur, or (3) make any exaggerated or unwarranted claim, opinion or forecast. The current rule does not prohibit the use of (1) hypothetical illustrations of mathematical principles, (2) specific types of investment analysis tools, and (3) price targets contained in research reports. FINRA's proposed rule change provides a further exception to the prohibition on use of projections by allowing for "a *customized* hypothetical investment planning illustration that projects performance of an asset allocation or other investment strategy and not an individual security." [5]

In support of the proposed amendments, FINRA states that "information regarding the expected performance of an asset allocation or other investment strategy that does not project the performance of individual securities could better inform an investor about assumptions upon which the recommendation to pursue such a strategy is based," and it further notes that "investment advisers often present performance projections in communications with their clients, particularly in communications concerning financial planning or asset allocation."[6] We agree and believe that the proposed amendments will greatly inform and benefit investors and further permit FINRA staff to focus its limited resources on categories of communications that may involve greater risks.

Fidelity strongly supports FINRA's efforts in modernizing this rule. While the proposed amendments are a very good step forward, we recommend below several changes to the proposal that will provide additional flexibility in the use of projections by member firms with clients and customers and will clarify ambiguous language.[7]

First, Fidelity recommends that FINRA use a word other than "customized" in the proposed amendments. FINRA indicates that a customized illustration is "one designed for a particular client or multiple clients who share an account."[8] An assumption is that FINRA's proposed use of "customized" was intended to prohibit practices that could include the wide-spread dissemination of hypothetical illustrations of performance for marketing purposes. While

[5] *Regulatory Notice* 17-06, at pp. 9-10.

[6] *Regulatory Notice* 17-06, at pp. 2-3.

[7] Fidelity also supports the comments submitted to FINRA by the Investment Company Institute and the Securities Industry and Financial Markets Association, on March 27, 2017.

[8] *Regulatory Notice* 17-06, at Endnote 4.

Fidelity Investments

Fidelity agrees that these communications should not be widely disseminated solely for promotional purposes, we feel strongly that there are uses for these communications beyond one-to-one *customized* interactions that could provide valuable, educational content to existing and potential clients without an increased risk that the projection will be used inappropriately.

The word "customized" connotes a bespoke quality, meaning each projection is specifically crafted or designed for use with a particular individual. We believe that there are substantial public benefits in allowing firms to disseminate more broadly to investors communications that contain hypothetical illustrations of potential performance that are personalized *and* standardized. For example, customers who are considering retirement will benefit from receiving a personalized communication with an analysis that provides a projection of their retirement assets at retirement and whether there may be a gap in what they anticipate and what is illustrated based upon reasonable modeling. This type of personalized communication provides a very useful catalyst for investors in saving further or in discussing their financial situation with a financial representative.

To address this concern, Fidelity recommends that FINRA instead use already adopted language in Rule 2211(b)(5)(B) that addresses the use of projections with annuity products.[9] That rule allows for hypothetical illustrations "which reflect factors relating to the individual customer's circumstances." Further it states that "[i]n retail communications and correspondence which include hypothetical illustrations, member firms may provide a personalized illustration which reflects factors relating to the individual customer's circumstances." This change would clarify the customer specific element of the communication with terms member firms are already familiar with, instead of creating a new standard for customization and potentially driving FINRA to provide further interpretative guidance and supplementary materials on what customization means.

Second, Fidelity recommends that FINRA change the language -- "a specific security" (in the proposed Rule 2210(d)(1)(F)(iv)) and "an investment" (in the language of the existing Rule 2210(d)(1)(F)(i)) to "a specific investment" in both. This change would better align and harmonize the language between the proposed and existing rule, without losing the intended purpose of the prohibition on projections of performance of a specific investment.

FINRA should also delete the reference to "investment strategy" in the existing Rule 2210 (d)(1)(F)(i), so there is no conflict or confusion with this language and the permissive language regarding projections of performance in Proposed Rule 2210 (d)(1)(F)(iv), which provides for the use of such projections in hypothetical planning illustrations based on an asset allocation or other investment strategy.

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[9] Rule 2211(a)(5)(B) state: "In retail communications and correspondence which include hypothetical illustrations, member firms may provide a personalized illustration which reflects factors relating to the individual customer's circumstances. A personalized illustration may not contain a rate of return greater than 12% and must follow all of the standards set forth in subparagraph (A), above."

We provide a redlined version of these recommended changes below.

Rule 2210(d)(1) (red text indicates the proposed rule):

(F) Communications may not predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast; provided, however, that this paragraph (d)(1)(F) does not prohibit:

(i) A hypothetical illustration of mathematical principles provided that it does not predict or project the performance of a specific investment ~~or investment strategy~~;

(ii) An investment analysis tool, or a written report produced by an investment analysis tool, that meets the requirements of Rule 2214; ~~and~~

(iii) A price target contained in a research report on debt or equity securities, provided that the price target has a reasonable basis, the report discloses the valuation methods used to determine the price target, and the price target is accompanied by disclosure concerning the risks that may impede achievement of the price target; and

(iv) A ~~customized~~ hypothetical investment planning illustration that reflect factors relating to an individual customer's circumstances and projects performance of an asset allocation or other investment strategy and not ~~an individual security~~ a specific investment, provided that:

a. there is a reasonable basis for all assumptions, conclusions and recommendations; and

b. the illustration clearly and prominently discloses:

(I) that the illustration is hypothetical;

(II) that there is no assurance that any described investment performance or event will occur; and

(III) all material assumptions and limitations applicable to the illustration.

* * *

The proposed amendments address longstanding discrepancies between FINRA communications rules and SEC rules regarding investment advisors. While not completely parallel to advisor regulations, the proposed rule changes will provide flexibility to broker-dealers in assisting clients and customers in understanding how their investment strategies may perform in the future, and thus greatly helping with current planning decisions.

Fidelity recommends that FINRA next focus on harmonizing its rules and interpretations regarding the use of related performance in broker-dealer retail communications with SEC interpretations under the Investment Advisers Act of 1940. We also recommend that FINRA address additional communications regulations that have an impact on the delivery of clear and compelling communications to investors. In our previous comment letters, we recommended that FINRA focus on principle based disclosure solutions across all forms of communications including those through social media and mobile and wearable devices, as well as addressing regulations and policies that have affected the amount of disclosure in print advertising.

Fidelity appreciates the opportunity to comment on FINRA's proposed rule amendments.

Sincerely yours,

/s/ Alexander C. Gavis

Alexander C. Gavis
Senior Vice President & Deputy General Counsel

Copies to:
Mr. Robert Cook, CEO and Chairman
Mr. Robert Colby, Chief Legal Officer
Mr. Thomas Selman, Executive Vice President
Mr. Joseph Price, Senior Vice President
Mr. Thomas Pappas, Vice President and Director
Mr. Joseph Savage, Vice President and Counsel
Ms. Amy Sochard, Senior Director
Financial Industry Regulatory Authority

March 7, 2017

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

RE: Regulatory Notice 17-06 Communications with the Public

Dear Ms. Asquith,

The Equity Dealers of America (EDA) is pleased to file this comment letter on behalf of its membership in support of the proposed amendment to FINRA Rule 2210.

The EDA is a Washington D.C. based trade association that exclusively represents the interests of middle market financial services firms who provide “Main Street” businesses with access to capital and advise hardworking Americans how to create and preserve wealth. The EDA has a geographically diverse membership base, which includes BB&T Securities (NC), D.A. Davidson & Co. (MT), Hilliard Lyons (KY), Hilltop Securities (TX), Janney Montgomery Scott (PA), JMP Group (CA), KeyBanc Capital Markets (OH), Piper Jaffray (MN), Raymond James Financial (FL), Robert W. Baird & Co. (WI), Stephens Inc. (AR), Stifel Nicolaus & Company (MO), William Blair & Company (IL), and Wunderlich Securities (TN).

The proposal to amend Rule 2210 would provide EDA members with the ability to utilize a customized hypothetical investment planning illustration (the “Illustration”) in communications with their clients. Providing registered representatives (“RR”) of EDA members with the flexibility to use the Illustration with their clients when discussing asset allocation and investment strategies as set forth in the Regulatory Notice 17-06, even if we ultimately decide not to use it, ***would place our members on a level playing field with stand-alone investment advisor’s*** that are not subject to the existing FINRA prohibition. As the notice indicates, stand-alone investment advisors can use the Illustration with their clients because they not prohibited from doing so under the U.S. Securities Exchange Commission rules currently applicable to them. We believe that the proposed amendment is a common-sense way to make certain that FINRA regulations do not inadvertently create an incentive for clients to choose one business model over another.

We also agree with FINRA that permitting RRs to use the Illustration and discuss the underlying assumptions upon which the recommendations are based will serve to better inform investors about the recommended investment strategies.

We do not believe that FINRA needs to require a RR to provide a range of projections associated with the Illustration. We believe that decision should be left up to the RR and his/her client.

We strongly believe that RRs should be able to present an Illustration for certain single investment products that operate similar to a diversified asset allocation model (i.e. ETFs) or other broad investment strategies (i.e. balanced funds, target retirement funds, etc.). The very nature of these types of financial products demand that they be included in what an RR can present to investors.

Thank you for the opportunity to comment on FINRA Regulatory Notice 17-06, and please feel free to contact me if you have any further questions regarding this submission.

Sincerely,

Christopher A. Iacovella
Chief Executive Officer
Equity Dealers of America

Center for Clinical Programs

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In Person:
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Investor Advocacy Clinic

March 27, 2017

VIA EMAIL TO pubcom@finra.org

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

Re: Proposed Amendments to FINRA Regulatory Notice 17-06, Proposed Changes to Rule 2210 Governing Communications with the Public

Dear Ms. Asquith,

Thank you for the opportunity to comment on FINRA's proposal to amend its Rule 2210, allowing brokers to communicate hypothetical performance projections of investment strategies to individual investors. The Georgia State University College of Law Investor Advocacy Clinic represents individual investors who have suffered losses resulting from broker misconduct but are unable to obtain a lawyer due to the relatively modest sizes of their claims. While most of our clients excel at their jobs, their expertise rarely extends to investing; in fact, most of them have very limited investment experience. As a result, our clients tend to place great trust in their brokers and rely significantly on their representations when making investment decisions. This reliance makes our clients particularly susceptible to misleading communications by their brokers. An investment professional's lack of communication or failure to disclose critical information, often benefitting the broker at the investor's expense, stands at the center of many of our clients' claims. It is critical that any attempt to change the current rules governing communications with the public take this reality into account.

Brokers should not be allowed to communicate hypothetical performance projections to their clients without owing to them the duties of a fiduciary. If FINRA chooses to allow this amendment without holding brokers to the fiduciary standard, several changes to the proposed rule are required to protect individual investors. First, broader disclosures are necessary to ensure that investors understand precisely the nature of the communications with which they are presented. Second, all projection-related communications and the means used to generate them must be subject to strict document retention guidelines and automatically discoverable in any subsequent dispute.

1. **Brokers and Investment Advisers Must First be Placed on Equal Fiduciary Footing.**

An expansion of a broker's fiduciary responsibilities to match those of investment advisers must accompany any proposed expansion of their ability to present projection-based communications. The current duality of treatment of projections-related communications between investment advisers and brokers reflects the difference in fiduciary standards that apply to each. Oversimplified projections-related communications presented by brokers to their clients present a high risk of misleading small investors who place great trust in their brokers' representations. If brokers are to have the same ability as investment advisers to present hypothetical performance projections to their clients, they must also be subject to the same fiduciary duties and responsibilities.

2. **Broader Disclosures, Including a Range of Projections, are Necessary to Prevent Individual Investors from Being Misled.**

Because projections-related communications present a high risk of misleading small investors, the illustration disclosures must be not only clear and prominent but also both comprehensive and specific. While we fully endorse FINRA's underlying goal to "better inform investors about recommended investment strategies, including the underlying assumptions upon which the recommendations are based,"[1] our concern is that the proposed presentation of a "customized hypothetical investment planning illustration that projects performance"[2] may mislead small investors instead. A mere statement that the illustration is hypothetical and that no assurance can be made that a particular projection will occur[3] does little to actually prevent misleading the individual investor. Including a broad range of projections, both positive and negative, can help mediate any oversimplification and present a more realistic picture to the individual investor by communicating variation and uncertainty. Presenting a range rather than a single figure visually emphasizes the hypothetical nature of the projections.

Furthermore, in order for the hypothetical illustration to actually "disclose[] . . . all material assumptions and limitations applicable,"[4] it is imperative that the illustration unambiguously and specifically disclose all information used to generate it. This includes both the method used to generate the illustration and the specific factors used to arrive at the projection, in particular the factors that render the particular illustration "custom."[5] For this purpose, it is also important that the disclosures include an explanation of the "reasonable basis"[6] behind the projections. In order to protect the investors and prevent unnecessary litigation, this reasonableness standard must be stringent and its boundaries clearly delineated. Moreover, all disclosures should be written in an

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[1] *See* FINRA Regulatory Notice 17-06 at 4, available at http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-17-06.pdf (February 10 2017).
[2] *See* FINRA Regulatory Notice 17-06 Attachment A at 8.
[3] *See* FINRA Regulatory Notice 17-06 at 3.
[4] *See* FINRA Regulatory Notice 17-06 Attachment A at 10.
[5] *See* FINRA Regulatory Notice 17-06 at 6 n.4 ("A 'customized' investment planning illustration is one designed for a particular client or multiple clients who share an account.")
[6] *See* FINRA Regulatory Notice 17-06 Attachment A at 10.

investor-friendly fashion to ensure they are well understood by the target, lay audience.

3. **All Projections-Related Communications and Means by Which These are Generated Must be Subject to Stringent Retention Guidelines and Automatically Discoverable.**

Projections-related communications, it and the means by which they are generated, including any documents regarding their reasonableness, must be subject to stringent document retention guidelines. Similarly, as such documents directly reflect the suitability analysis conducted by the broker and communicated to the individual investor, it is equally important that any projections-related communications be presumptively discoverable in case of a dispute and explicitly included in FINRA's Discovery List 1. This automatic discoverability should extend to the methods used to generate the illustrations and any factors considered as well as any related supervisory activity.

In conclusion, we do not believe that brokers should be allowed to communicate hypothetical performance projections to their clients without owing to them the duties of a fiduciary. The carrot of communicating projections must come with the stick of a fiduciary relationship and its attendant responsibilities. In case FINRA does choose to implement this rule, more comprehensive and specific disclosures are necessary to prevent misleading investors, and automatic discoverability of all projections-related communications must be required to protect investors in case of a dispute.

Thank you for the opportunity to comment, and we welcome any questions FINRA may have regarding this letter.

Best regards,

Majda Muhic
Student Intern

Nicole Iannarone
Assistant Clinical Professor

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March 27, 2017

VIA ELECTRONIC MAIL

Ms. Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, D.C. 20006-1506

Re: FINRA Regulatory Notice 17-06
Communications with the Public: FINRA Requests Comment on Proposed Amendments to Rules Governing Communications with the Public

Dear Ms. Asquith:

We are submitting this letter on behalf of our client, the Committee of Annuity Insurers (the "Committee"),[1] in response to Regulatory Notice 17-06, *Communications with the Public* (the "Notice"), issued by the Financial Industry Regulatory Authority, Inc. ("FINRA") on February 27, 2017.[2]

The Notice solicits comments on proposed amendments (the "Proposed Amendments") to FINRA Rule 2210 that were developed as part of FINRA's retrospective review of its rules governing communications with the public. The retrospective review was launched by Regulatory Notice 14-14, *Retrospective Rule Review: FINRA Requests Comment on the Effectiveness of its Communications with the Public Rules*, which was issued by FINRA on April 8, 2014. The findings were subsequently published in a December 2014 report on the assessment phase of the retrospective review.

The Notice requests comment on the Proposed Amendments, which would create an exception to the prohibition on projecting performance. Currently, FINRA Rule 2210 prohibits member use of communications that predict or project performance. The Proposed Amendments would provide an exception to this prohibition on projections to permit the use of customized hypothetical investment planning illustrations. Members would be permitted to use illustrations to project performance of an asset allocation or other investment strategy, but not an individual security. The use of a customized hypothetical investment planning illustration would require that the member meet certain conditions. In particular, the proposal would require that there be a "reasonable basis" for all assumptions, conclusions and recommendations. In addition, these illustrations would be required to clearly and prominently disclose: (1) that the illustration is hypothetical; (2) that there is no assurance that any

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[1] The Committee was formed in 1981 to address legislative and regulatory issues relevant to the annuity industry and to participate in the development of securities, banking, and tax policies regarding annuities. For over three decades, the Committee has played a prominent role in shaping government and regulatory policies with respect to annuities, working with and advocating before the SEC, FINRA, CFTC, IRS, Treasury, Department of Labor, as well as the National Association of Insurance Commissioners (NAIC) and relevant Congressional committees. Today, the Committee is a coalition of many of the largest and most prominent issuers of annuity contracts. The Committee's member companies represent more than 80% of the annuity business in the United States. A list of the Committee's member companies is attached as Appendix A.
[2] The Notice is available at http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-17-06.pdf.

Eversheds Sutherland (US) LLP is part of a global legal practice, operating through various separate and distinct legal entities, under Eversheds Sutherland. For a full description of the structure and a list of offices, please visit www.eversheds-sutherland.com.

described investment performance or event will occur; and (3) all material assumptions and limitations applicable to the illustration. The proposal would also prescribe supervisory requirements for the illustrations.

COMMITTEE COMMENTS

The Committee appreciates the opportunity to submit comments in response to the Notice. The Committee is generally supportive of the Proposed Amendments and more broadly of FINRA's efforts to create an exception to the prohibition on projections that would allow members to better inform investors about recommended investment strategies. To that end, the Committee offers the following comments on the Proposed Amendments.

Interplay with Rules Governing Variable Product Illustrations. The Notice does not explicitly mention hypothetical illustrations for variable products or refer to FINRA Rule 2211, which applies to communications with the public about variable life insurance and variable annuities (together, "variable products"). The Committee notes that FINRA Rule 2211 currently permits the use of various types of hypothetical and personalized illustrations for variable products. FINRA staff guidance under this rule has permitted various types of hypothetical illustrations for variable products including "random rate" illustrations. It does not appear that the Proposed Amendments would affect FINRA Rule 2211 or the ability of member firms to continue to provide hypothetical illustrations for variable products in reliance on FINRA Rule 2211 and staff guidance. Nonetheless, the Committee requests that FINRA confirm the Committee's understanding that the Proposed Amendments would not adversely impact FINRA Rule 2211 or directly or indirectly impose any additional requirements on variable product hypothetical illustrations used by member firms in reliance on FINRA Rule 2211.

Use of Projections in Connection with a Single Security. The Proposed Amendments would not permit the use of performance projections for a single security. The Notice requests comment on several questions, the sixth of which asks whether there are "single investment products that operate like an asset allocation or other investment strategy for which performance projections might be appropriate?" The Committee submits that a variable annuity, which permits the contract owner to allocate contract value in accordance with an asset allocation strategy, may be an example of a "single security" for which the hypothetical illustrations contemplated by the Proposed Amendments would be appropriate. Accordingly, the Committee suggests that FINRA consider modifying the Proposed Amendments to permit hypothetical investment planning illustrations for a single security, such as a variable annuity product.

Relatedly, the Committee would like to remind FINRA that in 2009 FINRA proposed amendments to NASD IM-2210-2, the predecessor rule for FINRA Rule 2212, that would have permitted, among other things, hypothetical illustrations of variable products utilizing historical index performance history.[3] The Committee was strongly supportive of the proposed amendments to FINRA Rule 2212, including the amendments to permit illustrations utilizing historical index performance history. While for various reasons FINRA ultimately withdrew the proposed amendments to FINRA Rule 2212, the Committee continues to be supportive of initiatives to permit the use of historical index performance in variable annuity illustrations.

Reasonable Basis Requirement. As a condition for the use of a customized hypothetical investment planning illustration, the Proposed Amendments would require that members be able to demonstrate that "there is a reasonable basis for all assumptions, conclusions and recommendations."[4] The Notice provides examples of factors relevant to a "reasonable basis" determination, and requests comment on appropriate factors. In the Notice's list of requests for comment, the fifth request asks for comment on the "reasonable basis" requirement. The Committee believes that the Proposed Amendments should not require a

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[3] *See* SEC Release No. 34-61108, 74 Fed. Reg. 65180 (Dec. 9, 2009), File No. SR-FINRA-2009-070.
[4] *See* proposed Section (d)(iv)(a) of Rule 2210 in Attachment A to Regulatory Notice 17-06.

member to demonstrate a "reasonable basis" for all assumptions, conclusions and recommendations underlying a hypothetical illustration. This standard could be understood to require that a member predict the likely outcome for all assumptions, conclusions and recommendations underlying a hypothetical illustration. Under the Proposed Amendments, members would already be required to provide customers with adequate disclosures as to the underlying assumptions and limitations applicable to the illustration. However, the addition of a "reasonable basis" requirement for assumptions, conclusions or recommendations creates the risk of subjectivity. Whether a combination of factors is sufficient, or whether a member places an unreasonable emphasis on any one factor, may lead to uncertainty as to whether there is a "reasonable basis" for an assumption, conclusion or recommendation. Moreover, there may be some assumptions for which it may not be practicable to form a "reasonable basis," such as a customer's likely life span. The Committee believes that requiring members to clearly and prominently disclose: (1) that the illustration is hypothetical; (2) that there is no assurance that any described investment performance or event will occur; and (3) all material assumptions and limitations applicable to the illustration, should be considered an adequate safeguard for the protection of investors. Accordingly, the Committee recommends that the "reasonable basis" requirement be removed from the Proposed Amendments.

Review and Approval Requirements. The Proposed Amendments would require a registered principal to review and approve each investment planning illustration before use or distribution, but allows alternative review and supervision requirements in the case of illustrations based on templates. In the case of illustrations based on templates, the Proposed Amendments would require that a registered principal review and approve each template, and supervise and review the illustrations in the same manner as required for supervising and reviewing correspondence under FINRA Rule 3110. The Committee is supportive of a supervisory approach that treats illustrations as "correspondence" under FINRA rules. However, the Proposed Amendments requirement of prior approval of every non-template illustration appears to suggest that any hypothetical illustration not based on a template is necessarily a Retail Communication. Understandably, if an illustration is not based on a template, then it would be unique to the customer for whom the illustration is prepared and would therefore meet the definition of "correspondence" in FINRA Rule 2210. Requiring prior review and approval for each non-template illustration would be inconsistent with the supervisory approach that FINRA adopted for correspondence and would create a heightened supervisory requirement for investment planning illustrations as compared to other correspondence. The Committee recommends that FINRA continue to impose a uniform supervisory framework for correspondence under FINRA Rule 3110, and treat illustrations permitted under the Proposed Amendments, whether or not based on templates, as correspondence within such framework.

Impact on Existing Interpretive Guidance. The Committee notes that the Proposed Amendments may impact existing interpretive guidance, and suggests that FINRA consider clarifying the continued applicability of this guidance in connection with moving forward with the Proposed Amendments. For example, FINRA's General Counsel office issued an interpretive letter in 1998 indicating that NASD Rule 2210, the predecessor to FINRA Rule 2210, prohibits the use of performance projections by persons dually-registered with a member firm and an investment adviser.[5] This letter, which appears to apply the FINRA communication rules to materials relating to investment advisory services, has presented obstacles and challenges for member firms that are dual registrants or affiliated with an investment adviser. The Committee recommends that FINRA withdraw or modify the interpretive letter to clarify that material used by member firms and/or their registered persons intended primarily to promote investment advisory services conducted under the auspices of a registered investment adviser should not be viewed as subject to FINRA's communication rules.

Also, the Committee notes that member firms have relied on longstanding guidance permitting the use of blended fund family performance in certain asset allocation illustrations.

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[5] *See* FSC Sec. Corp., FINRA Interpretive Letter, http://www.finra.org/industry/interpretive-letters/july-30-1998-1200am (July 30, 1998).

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This guidance was published in the November 1996 edition of the Regulatory and Compliance Alert. The Committee believes that member firms continue to rely on this guidance for variable annuity asset allocation illustrations. The Committee requests that FINRA confirm that this guidance continues to be in force in connection with FINRA's moving forward with the Proposed Amendments.

CONCLUSION

The Committee appreciates the opportunity to provide these comments to FINRA. Please do not hesitate to contact Clifford Kirsch (212.389.5052 or CliffordKirsch@eversheds-sutherland.com), or Susan Krawczyk (202.383.0197 or SusanKrawczyk@eversheds-sutherland.com), if you have any questions regarding these comments.

Respectfully submitted,

EVERSHEDS SUTHERLAND (US) LLP

BY: Clifford Kirsch BAH
Clifford Kirsch

BY: Susan Krawczyk BAH
Susan Krawczyk

FOR THE COMMITTEE OF ANNUITY INSURERS

EVERSHEDS
SUTHERLAND

Appendix A

THE COMMITTEE OF ANNUITY INSURERS

AIG
Allianz Life
Allstate Financial
Ameriprise Financial
Athene USA
AXA Equitable Life Insurance Company
Fidelity Investments Life Insurance Company
Genworth Financial
Global Atlantic Life and Annuity Companies
Great American Life Insurance Co.
Guardian Insurance & Annuity Co., Inc.
Jackson National Life Insurance Company
John Hancock Life Insurance Company
Life Insurance Company of the Southwest
Lincoln Financial Group
MassMutual Financial Group
Metropolitan Life Insurance Company
Nationwide Life Insurance Companies
New York Life Insurance Company
Northwestern Mutual Life Insurance Company
Ohio National Financial Services
Pacific Life Insurance Company
Protective Life Insurance Company
Prudential Insurance Company of America
Symetra Financial Corporation
The Transamerica companies
TIAA
USAA Life Insurance Company
Voya Financial, Inc.

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March 27, 2017

Ms. Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, N.W.
Washington, DC 20006-1506

Re: FINRA Regulatory Notice 17-06 – Proposed Amendments to Rules Governing 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 arbitration proceedings. 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 (hereinafter "FINRA") related to investor protection.

FINRA Regulatory Notice 17-06 seeks comments on proposed amendments to FINRA Rule 2210, which currently prohibits, *inter alia*, communications with the public that predict or project performance, or imply that past performance will recur. The proposed amendments would provide a limited exception to this prohibition, permitting customized hypothetical investment planning illustrations that may project returns for a given "asset allocation or other investment strategy", but not the performance of an individual security. Under the proposed amendments, the exception would be applicable to all firms (including those with only an online platform) and may be used to provide specific current (and prospective) customers with such illustrations.

There would of course be requirements that must be met before a firm could use a customized hypothetical illustration pursuant to the exception. First, there must be a "*reasonable basis* for all assumptions, conclusions, and recommendations" contained in the illustration (emphasis added). Second, the illustration must "clearly and prominently disclose the fact that [it] is hypothetical and that there is no assurance that any described investment performance or event will occur." Third, a registered principal must pre-approve the template to be used (such as one provided by a reliable off-the-shelf software package) to generate the illustration to be provided to the customer(s) or, if not using a template, must pre-approve each illustration before it is used or distributed.

Officers and Directors
President: Hugh D. Berkson, OH
EVP/President-Elect: Marnie C. Lambert, OH
Secretary: Andrew Stoltmann, IL
Treasurer: Samuel B. Edwards, TX
Robert S. Banks, Jr., OR
Michael Edmiston, CA
Christopher J. Gray, NY
Scott C. Ilgenfritz, FL
Christine Lazaro, NY
Mark E. Maddox, IN
Angela H. Magary, MA
Peter J. Mougey, FL
David Neuman, WA
Joseph C. Peiffer, LA
Jeffrey R. Sonn, FL
Robin S. Ringo, *Executive Director*

PIABA generally supports changes to the communications rule that enhance investor education and inform customers of the need for (and potential results of) proper asset allocation, sector concentration, diversification, and other investment strategies. But PIABA is concerned with some key aspects of the proposed amendments for reasons set forth below:

First, FINRA's stated rationale that permitting registered representatives who are not dually-registered to use the same kind of illustrations investment advisers have been using with advisory clients will "better harmonize regulatory standards" just is not true. The fact remains that until FINRA, the Securities and Exchange Commission, Congress, the President or the Department of Labor establishes a uniform fiduciary standard to govern both broker-dealers and registered investment advisers, the "regulatory standards" cannot be harmonized. Only a uniform fiduciary standard can ensure that register2d representatives act in investors' best interests and alleviate the confusion and financial harm caused by the current regulatory environment. Simply changing one rule, of many, to allow a broker-dealer/registered representative to provide a customer with a hypothetical illustration that a dually-registered firm/broker can already provide does not "even the playing field" for registered representatives (or make things less complicated for investors[1]). There remains a patch work of statutory and common law across the country under which some brokers are held to fiduciary standard and others are not. Indeed, if anything, the proposed amendments will only further confuse customers as to what duty of care the person handing them the illustration projecting the performance of their investment strategy owes them. If it is an illustration for a discretionary investment advisory account, the advisor will be held to a fiduciary standard, whereas if the illustration is in a traditional brokerage account, the broker may only be held to a suitability standard (or whatever standard is applied in that particular jurisdiction). Will the "reasonable basis" factors be applied differently (using the lower suitability standard) for the registered representative's illustration than for an investment advisor's illustration? If so, a customer with more than one type of account and/or financial representative/firm will probably not know on which illustration(s) to rely in making investment decisions. PIABA believes investor confusion should be minimized rather than made worse, which is what it seems likely the proposed amendments will do.

Second, PIABA is concerned that illustrations projecting hypothetical returns for future time periods may confuse unsophisticated retail investors by creating the impression that the projected returns are more certain than they actually are. The experience of PIABA members is that a projection of future performance based on, for example, *historic returns of 8-9%* for a given asset allocation or other investment strategy, is too often viewed by the average investor as a forecast or prediction of how their investments will perform going forward (regardless of the disclaimers and limitations that may be clearly stated on the illustration). It is PIABA members' experience that boilerplate statements that the illustrations are hypothetical or that "past performance is not indicative of future results," as contemplated by the proposed amendments are not enough. Unfortunately, financial professionals

[1] Under the current regulatory structure, investors can be faced with varying standards covering the same financial advisor depending on "which hat" a dually-registered advisor may be wearing at any given point in time. Three out of four investors don't understand that the current laws and rules impose different duties on brokers and investment advisers according to a 2010 survey conducted for the Consumer Federation of America (CFA), AARP, and the North American Securities Administrators Association (NASAA), among others. *See* http://bit.ly/1Npodra (last accessed March 26, 2017). A 2015 study also confirmed that most retail investors think their financial advisor – regardless of which type of advisor he or she is – is a fiduciary. Further, according to a February, 2015 report by the Council of Economic Advisers, investors suffer $17 billion in losses annually due to conflicted advice they receive from financial advisors under the existing regulatory system. *See* "Fiduciary – Do Investors Know What It Means" accessible at http://349ab54c3b58919c6638-ff70f51d4942f2bbd11ba0e41cfec577.r51.cf2.rackcdn.com/Fiduciary%20Whitepaper.pdf (last accessed March 26, 2017).

too often convince customers to ignore the written warnings as "just something the company has to say" and tell them that the principal in their investment account, insurance policy or annuity will grow at the reflected historical rate for the foreseeable future. We have seen many instances of people making life-altering decisions, like taking early retirement or taking large systematic withdrawals, based on someone they trust telling them that their principal will grow at a certain rate and they can "afford" to do so. Given that some financial professionals advising customers on how to manage and grow their savings sometimes paint too rosy of a picture for customers, PIABA strongly prefers not creating a new opportunity for brokers to tell investors whatever it takes to get the assets under management or invested in a particular manner.

Third, as noted in FINRA Regulatory Notice (Request for Comment issue no. 5), PIABA is concerned about the lack of more specific guidance as to how the firm/broker should determine what assumptions or factors are appropriate to for any given illustration (beyond that a "reasonable basis" might be established by using certain factors, as long "unreasonable emphasis" is not put on any one of the factors). FINRA Regulatory Notice 17-06 provides examples of what might establish "reasonable basis" such as:

> … [R]eference to the historical performance and performance volatility of asset classes, the duration of fixed income investments, the effects of macroeconomic factors such as inflation and changes in currency valuation, the impact of fees, costs and taxes, and expected contribution and withdrawal rates by the customer.

It appears that the firm/broker would have a lot of latitude in deciding what factors are considered for any given illustration. PIABA is alarmed by that prospect because an illustration is only as good as the assumptions on which it is based. For example, if the historical performance of a given investment strategy is not taken back far enough, the resulting illustration may not include certain adverse market conditions in the past. The result is that an investor receiving such an illustration may be unprepared for volatility in returns. Thus, that investor may end up making investment decisions, like concentrating in equities for maximum growth, without regard for the potential of a significant correction in the stock market. There would simply be no realistic acknowledgement of the potential risks of such a strategy.

Fourth, as noted in FINRA's Regulatory Notice (Request for Comment issue no. 7), PIABA strongly believes FINRA must add specific language that identifies certain uniform factors that must be considered for certain types of illustrations, if the proposed amendments are going to be implemented. Moreover, FINRA needs to specify that more than one projection may be reasonable under certain circumstances. PIABA is not suggesting that customers be handed a dozen projections that only serve to confuse them, but there could be circumstances in which it may be appropriate to use more than one illustration to paint the most complete (and accurate) picture for an investor. At a minimum, the firm/broker should be required to provide a specified *range* of market conditions to demonstrate possible widely varying performance results. FINRA may also want to consider including language such as that used in FINRA Rule 2211(b)(5) (Hypothetical illustrations of rates of return in variable life insurance retail communications and correspondence) which, for example, allows combinations of assumed investment returns with some limitations, including requiring that one of the returns is a 0% gross rate. Rule 2211(b)(5) explains the purpose of this "is to demonstrate how a lack of growth in the underlying investment accounts may affect policy values and to reinforce the hypothetical nature of the illustration."

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In summary, PIABA supports the proposed amendments to FINRA Rule 2210 set forth in Regulatory Notice 17-06 as they may benefit the investing public, but urges FINRA to consider refining the proposed language and issuing guidance to minimize investor confusion. PIABA thanks you for the opportunity to comment on this important topic.

Very truly yours,

Marnie C. Lambert
PIABA President

New York State Bar Association

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Comments on FINRA's Proposed Amendments to Rules Governing Communications with the Public

BUSINESS LAW SECTION
SECURITIES REGULATION COMMITTEE

BLS #2 March 30, 2017

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

Re: Regulatory Notice 17-06 – Request for Comments on Proposed Amendments to Rules Governing Communications with the Public

The Securities Regulation Committee of the Business Law Section of the New York State Bar Association appreciates the invitation from FINRA in Regulatory Notice 17-06 to comment on FINRA's proposal to amend the Communications Rules.

The Committee is composed of members of the New York State Bar Association, a principal part of whose practice is in securities regulation. The Committee includes lawyers in private practice and corporation law departments. A draft of this letter was reviewed by certain members of the Committee. The views expressed in this letter are generally consistent with those of the majority of members who reviewed and commented on the letter in draft form. The views set forth in this letter, however, do not necessarily reflect the views of the organizations with which its members are associated, the New York State Bar Association or its Business Law Section.

INTRODUCTION

Forecasts and projections (in this letter, "projected performance" or "projections") have a place in securities offerings and securities advice. As the Regulatory Notice points out, "the Investment Advisers Act does not prohibit the presentation of projections that comply with the antifraud provisions of the Act."

Section 27A of the Securities Act of 1933 ("Securities Act") and Section 21E of the Securities Exchange Act of 1934 each provide a safe harbor for forward-looking statements that meet the requirements of those sections, specifically to encourage issuers to make forward-looking financial information available to the public. Certain private fund managers use projections in their offering materials and, for some types of investments, such as real estate funds, institutional investors and other sophisticated investors expect to receive projected performance information.[1]

[1] *See* Mark Klock, *Two Possible Answers to the Enron Experience: Will It Be Regulation of Fortune*

Opinions expressed are those of the Section/Committee preparing this memorandum and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee.

Projections that have a reasonable basis are useful informational tools, when used with other types of information. We believe that, as a general matter, member firms should not be prohibited from using projections that have a reasonable basis. However, we support the proposal to permit the projected performance of an asset allocation or other investment strategy in a customized hypothetical investment planning illustration, and urge FINRA to specifically permit a member to recommend a security, such as an exchange-traded fund ("ETF"), that tracks or represents an asset allocation or investment strategy. We also urge FINRA to permit all FINRA member firms to use projected performance with institutional investors and qualified purchasers, as capital acquisition brokers ("CABs") will be permitted to do when the CAB rules go into effect in April. We discuss these two points below.

DISCUSSION

Public and Private Funds as Asset Allocation or Investment Strategies

At the end of the Regulatory Notice, FINRA requests comments in seven specific areas. In the sixth request, FINRA asks whether there are "single investment products that operate like an asset allocation or other investment strategy for which performance projections might be appropriate." The answer is yes. All public and private funds embody an asset allocation or investment strategy; the relevant question is whether the asset allocation or investment strategy is sufficiently transparent and predictable[2] to provide a reasonable basis for projected performance.

Registered investment companies, whether ETFs or open-end funds, that track stock indexes provide a high degree of transparency and predictability about how the assets of the fund will be invested. Sector funds, which invest in specific business sectors, can also have a great degree of transparency and predictability about how their assets will be invested. If a broker can provide projected performance with a reasonable basis about an index or business sector, and there is a fund that closely tracks the index or sector, the broker should be able to recommend the purchase of securities in the fund as a way to replicate the performance of the index or sector.

Unit investment trusts ("UITs") are investment companies that operate as closed-end funds: they disclose the portfolio of securities or assets they intend to buy, close the offering when the disclosed offering amount has been raised, and purchase the assets. UITs do not generally make additional investments after they begin operation, and management is generally limited to making

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Tellers or Rebirth of Secondary Liability?, 28 J. CORP. L. 69, 98–99 (2002) (noting that investors seek forward-looking information because "the whole point of investing is to move current wealth forward through time"); Homer Kripke, *The SEC, The Accountants, Some Myths and Some Realities*, 45 N.Y.U. L. REV. 1151, 1197 (1970) (observing that "members of the financial community determine the value of a security by the capitalization of projected future income"); Susanna Kim Ripken, *Predictions, Projections, and Precautions: Conveying Cautionary Warnings in Corporate Forward-Looking Statements*, 2005 U. ILL. L. REV. 929, 931 (2005) ("The investing public craves the release of forward-looking information from corporations because it provides investors with guidance in formulating investment decisions based on the future expectations of companies."). *See also*, Lanny Schwartz and Hilary Seo, *Targeted Returns under FINRA's Communications Rules*, N.Y.L.J. (Mar. 24, 2014) (investors naturally expect to see targeted returns as part of their evaluation of fund investments).

[2] The term "predictable," as used here with respect to an asset allocation or investment strategy, refers to how the strategy will be applied in the future, not the predictability of performance of the strategy. For example, an investment strategy that will track the Dow Jones Average, rebalancing periodically as required, is highly predictable with respect to implementation of the strategy.

decisions about when to sell assets. The asset allocation in a UIT is transparent and predictable. In this case as well, if a broker is able to provide reasonable-basis projected performance for the assets to be purchased by the UIT, the broker should be able to recommend the UIT shares as a way to achieve the performance of the assets.

There are private funds that provide similar transparency and predictability about their asset allocation and investment strategy. This is true of private real estate funds that disclose the real estate properties to be purchased, and real estate funds that operate in a specific sector, such as triple net leased office buildings or storage facilities in a particular geographic area. Similarly, private equity funds that target companies with a specified maturity in specific businesses, such as health clubs, locksmiths or florists, and in specific geographic areas, can also offer transparency and predictability about their asset allocations. Here again, if a broker can provide a reasonable-basis predicted performance with respect to the assets or sector in which the fund will invest, the broker should be able to provide projected performance information about the fund.

In each of the situations described, the key tests should be whether the asset allocation or investment strategy of the fund is transparent and predictable, and whether there is a reasonable basis for projecting the performance of the asset allocation or investment strategy.

Use of Predicted Performance with Institutional Investors and Qualified Purchasers

The Notice states that "the general prohibition against performance projections is largely intended to protect *retail investors* from performance projections of individual investments, which often prove to be spurious, inaccurate or otherwise misleading." (Emphasis added.) FINRA has recognized in a number of contexts, such as the Suitability Rule, the filing and supervision provisions of the Communications Rule and, most recently, in the CAB rules, that institutional customers do not require the same protections as retail customers.

CAB Rule 221, governing communications with the public, does not prohibit a CAB from using forecasts or projections. One justification for this difference between the CAB rules and the rules applicable to other FINRA members is that a CAB may sell securities in private placements only to institutional investors as defined in Rule 016(i). That definition includes familiar categories of institutional investors, like banks, insurance companies, investment companies and employee benefit plans. It also includes any person (individual or entity) that has total assets of at least $50 million and any "qualified purchaser" as defined in Section 2(a)(51) of the Investment Company Act of 1940.

Regular FINRA members should have the same freedom to provide projected performance information to Rule 016(i) institutional investors as CABs, not merely for reasons of competitive fairness and equal treatment, but because the same fundamental principle applies: institutional investors have sufficient sophistication to evaluate the projected performance and the weight to be given to it in the overall investment decision.

In the Notice, FINRA addressed the anticipated benefits of the proposed amendment which include, inter alia, that such projections "could better inform investors about the recommended investment strategies, including the underlying assumptions upon which the recommendations are based." FINRA further noted that it "anticipates that these benefits would largely accrue to clients that do not have investment advisory accounts and, as a result, are not already receiving projections-related communications." We would add that a principal objective of the securities laws, and the Securities Act in particular, is to ensure that investors have adequate information to enable them to evaluate prospective investments.

We are aware that, while FINRA permits the use of some related performance information in offerings to institutional customers only, FINRA has not permitted information prohibited for use with retail customers to be provided to institutional customers in offerings to both institutional and retail customers.[3] As previously noted, we believe that reasonable-basis projected performance should be permitted for use with retail as well as institutional customers, as part of a complete mix of relevant and material information thereby aligning with the basic objectives of the Securities Act and satisfying the additional benefits proposed by FINRA. However, if FINRA continues to be concerned about the use of projected performance in sales material prepared by brokers (as distinguished from material prepared by issuers) FINRA should, at a minimum, permit the use of reasonable-basis projected performance in broker material distributed in securities offerings made exclusively to Rule 016(i) institutional investors. This would include all offerings of private funds exempt under Section 3(c)(7) of the Investment Company Act. It would also include offerings of investment company and REIT shares, as well as other securities, that, pursuant to the offering terms, are available for purchase exclusively by Rule 016(i) institutional investors. Finally, wholesale brokers who deal exclusively with institutional intermediaries such as other brokers and investment advisers should be permitted to provide projected performance information to those intermediaries, even in offerings in which retail investors may participate, in a manner consistent with the interpretive letter on related performance information provided to Hartford Funds Distributors, LLC (May 12, 2015).

CONCLUSION

We propose permitting brokers to (1) make reasonable–basis projections about an asset allocation or investment strategy and then to recommend securities that implement that strategy in a transparent and predictable manner and (2) provide reasonable-basis projections to Rule 0161(i) institutional investors in offerings exclusively to those investors. We believe that amending the content standards of Rule 2210 in that way will enable brokers to provide higher quality information to investors in a way that is consistent with the principles of investor protection.

We would be happy to discuss these comments with you or the use of projected performance generally, at your request.

Chair of the Committee : Anastasia Rockas, Esq.

Drafting Committee:
Peter W. LaVigne, Chair
Salim Katach
Kristine Koren
Marcia B. Moulon-Atherley
Morris Simkin

[3] Letter to Collins/Bay Island Securities (Sept. 14, 2004).

CREDIT SUISSE

CREDIT SUISSE ASSET MANAGEMENT, LLC
One Madison Avenue
New York, NY 10010
212 325 2000

March 27, 2017

VIA ELECTRONIC MAIL

Marcia E. Asquith
Senior Vice President and Corporate Secretary
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1500

Re: FINRA Regulatory Notice 17-06, Communications with the Public

Dear Ms. Asquith:

Credit Suisse Securities (USA) LLC ("Credit Suisse") appreciates the opportunity to comment on FINRA Rule 2210 and its application generally, as discussed in Regulatory Notice 17-06 ("Notice 17-06"). Notice 17-06 follows a retrospective review that FINRA conducted regarding its rules governing communications with the public. In the Notice, FINRA proposes to allow greater flexibility to broker-dealers to use hypothetical performance, subject to a number of safeguards, in order to "better inform investors about the recommended investment strategies, including the underlying assumptions upon which the recommendations are based" and to allow clients to receive the same types of projections-related communications from broker-dealers as they do from investment advisory firms. Although the proposal described in Notice 17-06 focuses exclusively on provision of projected performance to retail investors, we believe that the themes addressed in the letter are even more relevant and important in the institutional context. We therefore urge FINRA to couple the changes FINRA proposes to make to Rule 2210 regarding retail communications with appropriate changes to Rule 2210 for institutional communications. In particular, we urge FINRA to: (A) exempt institutional communications from the provisions of Rule 2210(d)(1)(F) to permit the use of hypothetical[1] performance in institutional communications; (B) allow institutional communications to show both hypothetical and historical performance gross of fees provided that the communication prominently

[1] We use the terms "hypothetical performance" and "projected performance" interchangeably to mean all types of estimated information referenced in FINRA Rule 2210(d)(1)(F), including projections, back-tested performance, simulations, hypotheticals and related performance.

discloses fund fees and expenses; (C) clarify that target performance provided in institutional communications would not be projected performance and may be included in such communications so long as there is a reasonable basis for the target return and the communication explains the circumstances under which the target would not be achieved; (D) in connection with institutional communications and subject to appropriate disclosure regarding the basis for such information, exclude from the definition of projected performance, information regarding specific investments made or to be made by a private fund or a related fund; and (E) clarify that model-based projections and back-tested performance may provide a reasonable basis for projected performance and target returns in institutional communications.

We believe that these changes would benefit investors by allowing funds to provide prospective investors with the information that these investors uniformly request and need in order to evaluate private fund investments – both at inception and throughout the life of the fund. Moreover, by allowing broker-dealers to provide a more expansive set of information to investors about a fund's strategy (consistent with what may be provided by investment advisers), FINRA would help to eliminate confusion currently caused by the use of different types of offering materials by investment advisers and broker-dealers due to the different regulatory standards provided by the Securities and Exchange Commission (the "SEC") and FINRA. We also believe that disclosure standards should not disadvantage funds that use registered broker-dealers to assist in marketing their products or disincent funds from using registered broker-dealers. Finally, we believe that the changes we describe are necessary to strengthen and expand our U.S. capital markets by expanding the information available to institutional accounts and encouraging issuers to participate in the U.S. market. As the SEC has acknowledged in other contexts, the securities markets benefit from provision of more information to investors[2] and projections and forward-looking information provide investors with an important means of evaluating investments.[3] Current FINRA guidance does not allow for use of projections by broker-dealers unless expressly requested by an investor and then, only in connection with a one-on-one meeting with a particular investor representative. This approach results in an unlevel playing field in which some investors receive more information than others. In addition, providing simulations and projection tools to investors to allow them to evaluate and "test" the thesis underlying an investment strategy is consistent with regulatory efforts to make disclosure more relevant and user-friendly to investors.[4] In our experience, institutional investors want to carry out a rigorous simulation of fund

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[2] *See, e.g.*, Securities Offering Reform Release No. 33-8591 (July 19, 2005), 70 FR 44722 at 44725 (Aug. 3, 2005)(stating, in respect to free writing prospectuses "consistent with our belief that investors and the securities markets will benefit from greater permissible communications by issuers while retaining appropriate liability for these communications, we have sought to address the need for timeliness of information for investors by building on existing statutory provisions and processes without mandating delays in the offering process that we believe would be inconsistent with the needs of issuers for timely access to the securities markets and capital.")

[3] Safe Harbor Rule for Projections, Rel. No. 33-6084, 44 Fed. Reg. 38,810 (June 25, 1979)(Noting that the SEC adopted the rule expressly to encourage the disclosure of projections and forward-looking information by issuers, as recommended by the Sommer Report).

[4] *See* Concept Release on Business and Financial Disclosure Required by Regulation S-K; 17 CFR Parts 210, 230, 232, 239, 240 and 249; Release Nos. 33-10064, 34-77599; File No.S7-06-16; RIN 3235-AL78, 81 Fed. Reg. 23,916 (Apr. 22,

performance prior to investing and look to funds and broker-dealer placement agents to provide them with the information necessary to "kick the tires".

We do not believe that maintaining a broad prohibition on the use of projected performance is necessary. Actions against persons who offer securities based on misleading disclosure should and can be brought under the anti-fraud provisions of the federal and state securities laws. A separate prohibition by FINRA is not necessary to protect the markets. All broker-dealer communications must be fair and balanced and comply with federal and state anti-fraud provisions.

FINRA has recognized that many institutional accounts are sufficiently sophisticated and able independently to evaluate recommendations and investments so that they do not require the protections of FINRA rules, such as those of the customer-specific suitability standard under Rule 2111. We ask FINRA to acknowledge that broker-dealers may provide to these same sophisticated investors the target return, related performance, performance simulations, hypothetical performance, back-tested returns and projection information these investors routinely seek as part of their due diligence process.

A. Exempt Institutional Communications from Rule 2210(d)(1)(F)

In connection with the proposed exemption from the projected performance prohibition discussed in Notice 17-06, FINRA made an important observation about the policy objective underlying the prohibition. Notice 17-06 states that the prohibition was designed primarily to protect "retail" investors.[5] The clear implication of the language is that the standard was not intended to focus on "institutional" investors. This distinction is consistent with the exemption for institutional communications from the filing requirements in Rule 2210 and the more permissive approval requirements for institutional communications provided by Rule 2210 for institutional communications. Those exemptions recognize that a mandated review process is not necessary for marketing materials given the greater sophistication of institutional investors.

Similarly, the suitability standard under FINRA Rule 2111 distinguishes between retail investors and institutional investors.[6] Although Rule 2111 provides an exemption only if, among other requirements, a broker-dealer makes a determination that an institutional investor is able to evaluate the risks underlying the particular investment, the Rule does not provide a parallel exemption with respect to retail investors – even if the broker-dealer were to determine that the retail investor was able

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2016)(describing the initiative by the Division of Corporation Finance to consider ways to improve disclosure to benefit investors); Fast Act Disclosure Modernization and Simplification, Pub. L. No. 114-94, 129 Stat. 1312 (2015)(Requiring a study of Regulation S-K to "evaluate methods of information delivery and presentation" and "maintaining the informativeness of disclosure").

[5] *See* Notice 17-06, p. 2 "The general prohibition against performance projections is largely intended to protect retail investors from performance projections of individual investments, which often prove to be spurious, inaccurate or otherwise misleading."

[6] The exemption in Rule 2111(b) applies to "institutional accounts" as defined in FINRA Rule 4512(c).

to evaluate the risks.[7] As a result, the suitability standard, which arguably is the central requirement for broker-dealer conduct, is a recognition that it is reasonable not to prescribe specific conduct requirements for broker-dealers when dealing with sophisticated institutional investors but, instead, to rely exclusively on general anti-fraud principles, such as those inherent in Rule 1210 (Standards of Commercial Honor and Principles of Trade), to deter bad conduct.

Consistent with FINRA's general recognition that institutional investors do not need the same specific protections as retail investors with respect to broker-dealer communications, we respectfully request that FINRA take this opportunity to exempt institutional communications altogether from the projected performance prohibitions of Rule 2210(d)(1)(F). In our view, providing such an exemption would benefit both investors and our U.S. capital markets generally by allowing funds to be marketed with more complete information thereby allowing investors to make a better informed investment decision. In order to ensure that the recipients of the communications are the sophisticated users to whom the communications are addressed, funds could be required to include prominent disclosures and "health warnings" on the materials advising that they are intended exclusively for sophisticated and experienced institutional accounts, such as registered investment advisers.

B. Allow Institutional Communications to Show Performance on a Gross Basis

As a policy matter, FINRA has required performance information to be shown net of fees.[8] This position follows the position taken by the SEC staff in a no action letter requiring performance figures to reflect fees.[9] We understand that this type of presentation may be appropriate for retail investors. However, in our experience it is not appropriate for institutional investors. Prospective investors in private equity, real estate and credit funds generally ask to see financial returns and estimated returns regarding portfolio company investments in the form provided by the portfolio company. Portfolio company reporting is done on a gross basis rather than on a net basis. Use of net information instead of the gross financial information provided by the portfolio companies results in investor confusion because the financial information provided by the fund differs from that provided by the portfolio company. We respectfully request that FINRA allow marketing materials for funds marketed through broker-dealers to provide performance information to institutional accounts,

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[7] Rule 2111(b) provides: "A member or associated person fulfills the customer-specific suitability obligation for an institutional account, as defined in Rule 4512(c), if (1) the member or associated person has a reasonable basis to believe that the institutional customer is capable of evaluating investment risks independently, both in general and with regard to particular transactions and investment strategies involving a security or securities and (2) the institutional customer affirmatively indicates that it is exercising independent judgment in evaluating the member's or associated person's recommendations. Where an institutional customer has delegated decisionmaking authority to an agent, such as an investment adviser or a bank trust department, these factors shall be applied to the agent."

[8] *See, e.g.*, FINRA Letter to Edward P. Macdonald, Hartford Funds Distributors, LLC (May 12, 2015)(the "FINRA Hartford Letter")(conditioning provision of related performance information to institutional accounts on such performance being "net of fees and expenses of Related Accounts, or net of a model fee that is the highest fee charged to any account managed in the strategy.")

[9] Clover Capital Management, Inc., SEC No-Action Letter, 86-87 CCH Dec., Fed. Sec. L. Rep (CCH) ¶78,378 (Oct. 28, 1986).

including, without limitation, related performance (which FINRA has authorized broker-dealers to include in marketing materials provided to investors that are qualified purchasers – which is a lower standard than institutional accounts)[10] on a gross basis provided that the fees and expenses charged by the fund are also clearly and prominently disclosed in the same materials. This is consistent with the specific requests for presentations that we receive from investors. In addition, preparation of pro forma return information for specific underlying investments, which is particularly important to institutional investors when evaluating whether to invest in a private equity, real estate or credit fund, is extremely difficult to do on an investment by investment basis and may not be accurate because management fees are applied on a fund level.

C. Clarify either that Target Returns are not Projected Performance or that they May be Included in Institutional Communications

Target returns are provided to prospective investors for the purpose of describing the intended risk profile of a fund or investment. Unlike a projection, a target return does not purport to be an estimate of future returns. Instead, a target return is designed to help prospective investors evaluate how the risk profile of a fund will fit into the investor's portfolio and investment objectives. Prospective investors in private funds and, in particular, private equity, real estate and credit funds, require target return information about the fund itself and its underlying investments before they can begin to evaluate a fund. For certain institutional investors, the level of the target returns reflected in the marketing materials is critical in selecting which internal portfolio manager should be selected to evaluate the proposed investment since prospective investments are often ranked by risk/return profile.

FINRA has suggested in enforcement actions that target returns may constitute "projected performance" of the type prohibited by Rule 2210(d)(1)(F). We do not agree that target returns are projections. As discussed in Notice 17-06, we believe that target returns are more akin to a price target used in research reports and should be allowed in both institutional and retail communications so long as the returns are premised on reasonable basis assumptions and include a full and fair description of the investment's risk profile.

To the extent that FINRA believes that target return information is inherently subject to misunderstanding by unsophisticated investors, we ask that FINRA distinguish between retail and institutional investors and exempt the use of target returns in institutional communications. Institutional investors employ sophisticated diligence teams to review prospective investments and

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[10] FINRA Letter to Yukako Kawata, Esq., Davis Polk & Wardwell (Dec. 30, 2003), at http://www.finra.org/industry/interpretive-letters/december-30-2003-1200am (finding that prior FINRA guidance that prohibited members from presenting related performance information in sales material for private equity funds did not apply to presentation of related performance information to prospective investors in funds exempt from registration under the Investment Company Act of 1940 by virtue of Section 3(c)(7)); *see also* FINRA Letter to Bradley J. Swenson, ALPS Distributors, Inc. (Apr. 22, 2013), at http://www.finra.org/industry/interpretive-letters/april-22-2013-1200am (authorizing the use of pre-inception index performance in communications regarding certain exchange traded products distributed solely to "institutional investors" as defined in FINRA Rule 2210(a)(4)) and FINRA Hartford Letter (authorizing disclosure of performance information related to related mutual funds and accounts managed by the same adviser or sub-adviser to financial intermediaries in connection with wholesale distribution of mutual funds).

those personnel closely scrutinize target information and are well-able to evaluate the information in order to make an informed investment decision.

D. Confirm that Estimated Returns about Underlying Fund Investments provided to Institutional Accounts are not Subject to Rule 2210(d)(1)(F)

The relief that FINRA has proposed in Notice 17-06 distinguishes between projections relating to investment strategy and projections relating to individual securities. The Notice acknowledges that "information regarding the expected performance of an asset allocation or other investment strategy that does not project the performance of individual securities could better inform an investor about assumptions upon which the recommendation to pursue such a strategy is based."[11]

In the context of private equity, real estate and credit funds, projections regarding the investment strategy are essential to the diligence process of institutional investors and involve estimates and information regarding the projects in which the funds seek to invest. In the real estate fund context, for example, investment strategy is detailed by region, types of real estate holdings and sample investments made by other funds, including realized or expected returns. Similarly, in the private equity context, funds may describe the investment strategy by providing examples of previous investments and estimated returns on prior investments that are still in the process of being monetized. In our view, these disclosures describe the strategy pursued by the fund and are not projections relating to securities of the type prohibited by Rule 2210(d)(1)(F). We ask that FINRA confirm our interpretation of the requirement and allow broker-dealers and funds marketed through broker-dealers to institutional accounts to provide this type of information to prospective investors just as investment advisers and funds not marketed through broker-dealers are already allowed to do. As Notice 17-06 recognizes, expanding the ability of broker-dealers to describe a fund's investment strategy would "better harmonize regulatory standards and allow firms to communicate, subject to limitations, information regarding the expected performance of an asset allocation or other investment strategy."[12]

E. Clarify that Model Returns and back-tested performance can provide a Reasonable Basis for Projected Performance and Target Returns in Institutional Communications

The SEC and the common law have historically allowed investment advisers to provide investors with different types of hypothetical performance so long as the assumptions underlying the hypotheticals are disclosed, the presentation is not misleading and the adviser has a reasonable basis for the projections.[13] Other regulatory or self-regulatory authorities also allow intermediaries to

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[11] Notice 17-06 at p. 2.

[12] *Id.* at 4.

[13] *Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 47-48 (2d Cir.), *cert. denied,* 439 U.S. 1039 (1978) ("...a potential investor can reasonably assume that an investment advisor has a reasonable basis in fact for making predictions. Representations and opinions made without factual basis and in reckless disregard of their truth or falsity are therefore actionable"); *Marx v. Computer Sciences Corp.*, 507 F.2d 485, 489 (2d Cir. 1974).

provide projected performance in communications with the public, including to both retail and institutional investors, so long as the presentations are fair and not misleading, the projections have "a reasonable basis in fact" and the intermediary who uses the projections keeps a copy in its files of the basis for its analysis.[14] In Notice 17-06, FINRA explained that its proposal to allow broker-dealers to distribute customized hypothetical investment planning illustrations to retail investors is conditioned on there being a reasonable basis for the projections. In explaining what is meant by "a reasonable basis," FINRA notes that "historical performance and performance volatility of asset classes, the duration of fixed income investments, the effects of macroeconomic factors such as inflation and changes in currency valuation, the impact of fees, costs and taxes and expected contribution and withdrawal rates by customers" might be sufficient to establish a "reasonable basis" for projected performance whereas "basing a projection upon hypothetical back-tested performance" or on "past performance of particular investments by an asset manager" would not be.[15]

Institutional investors generally require performance data in evaluating private fund investments. In situations where a portfolio manager does not have an established track record, model-based performance or back testing may be the only approaches available to provide performance information and a basis to support hypothetical performance. Model based results as well as back tested data, so long as they are prepared in a balanced manner, are appropriately labelled and include assumptions, can provide useful information for prospective investors regarding a new fund's financing needs, expected cash flow, investment mix and risk profile and investment timeline, among other things. This information – even if illustrated through model-based examples -- enhances the investor's understanding of the underlying strategy, allows the investor to understand the manager's approach and highlights questions that the prospective investor may have regarding the assumptions and strategy. Model returns can also provide a yardstick for institutional investors to use to track performance of investments going forward. We believe that the information provided through models is understood by institutional investors and is an essential part of their due diligence process – particularly in situations where a fund manager does not have a track record. As a result, we respectfully request that FINRA clarify that use of model-based results and back testing, if conducted in a fair and balanced manner, would provide a reasonable basis for supporting projected performance and target returns to institutional accounts, as defined in FINRA Rule 4512(c).

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[14] *See* NFA Compliance Rule 2-29; Use of Past or Projected Performance; Disclosing Conflicts of Interest for Security Futures Products (Aug. 21, 2001)(Allowing for the use of past or projected performance in communications with the public subject to specified conditions including that the projected performance have a reasonable basis in fact and that records be maintained showing how performance was calculated); and U.K. Financial Conduct Authority Conduct of Business Sourcebook (allowing for simulated performance, hypothetical performance, future performance and projections by regulated intermediaries, treating such written communications as "non-real time promotions," and requiring such communications to be clear, fair and not misleading; use with retail investors is expressly allowed but subjects the publisher to certain additional restrictions).

[15] Notice 17-06 at 3.

We appreciate the opportunity to comment on Notice 17-06 and on FINRA Rule 2210, more generally. We would be pleased to discuss our comments with FINRA or to provide FINRA with assistance as it proceeds to evaluate its Rule. Please do not hesitate to contact the undersigned at 212-325-4495 or roger.machlis@credit-suisse.com regarding this letter.

Sincerely yours,

Roger Machlis
General Counsel – International Wealth Management, Asset Management
Managing Director
Credit Suisse Securities (USA) LLC

Wells Fargo Advisors
Regulatory Policy
One North Jefferson Avenue
St. Louis, MO 63103
HO004-095
314-242-3193 (t)
314-875-7805 (f)

March 27, 2017

Via E-mail: ***pubcom@finra.org***

Ms. Marcia E. Asquith
Executive Vice President, Board and External Relations
FINRA
1735 K Street, NW
Washington, DC 20006-1500

RE: Regulatory Notice 17-06: Communications with the Public – FINRA Requests Comment on Proposed Amendments to Rules Governing Communications with the Public

Dear Ms. Asquith:

Wells Fargo Advisors[1] ("WFA") appreciates the opportunity to comment on the Financial Industry Regulatory Authority's ("FINRA") Proposed Amendments to Rules Governing Communications with the Public, set forth in Regulatory Notice 17-06 (the "Proposal")[2].

WFA is a dually registered broker-dealer and investment advisor that administers approximately $1.5 trillion in client assets. It employs approximately 15,086 full-service financial advisors in branch offices in all 50 states and 3,899 licensed bankers in retail bank branches across the United States. WFA and its affiliates help millions of customers of

[1] "Wells Fargo Advisors" is the trade name for Wells Fargo Clearing Services, LLC ("WFCS"), a dually-registered broker-dealer and investment adviser, member FINRA/SIPC, and a separate non-bank affiliate of Wells Fargo. "First Clearing" is the trade name for WFCS's clearing business, providing services to unaffiliated introducing broker-dealers. WFCS is affiliated with Wells Fargo Advisor Financial Network ("FiNet"), a broker-dealer also providing advisory and brokerage services. For the ease of this discussion, this letter will use WFA to refer to all of those brokerage operations.
[2] Regulatory Notice 17-06, Communications with the Public – FINRA Requests Comments on Proposed Amendments to Rules Governing Communications with the Public (February 2017).
http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-17-06.pdf

varying means and investment needs obtain the advice and guidance they need to achieve their financial goals. Furthermore, WFA offers access to a full range of investment products and services that retail investors need to pursue these goals.

I. BACKGROUND

In April of 2014, FINRA launched a retrospective review of its communications with the public rules[3] to assess their effectiveness and efficiency. In December of that year, FINRA published a report[4] on its review concluding that while the communications rules have been effective at addressing the problems they were intended to mitigate, stakeholders identified a number of areas where it was believed the investor protection objectives and economic impacts do not align or where the rules could be made more effective or efficient.

II. CURRENT PROPOSAL

FINRA is proposing to amend Rule 2210 to create an exception to the rule's prohibition on projecting performance. This proposed exception would permit a firm to distribute a customized hypothetical investment planning illustration that includes the projected performance of an asset allocation or other investment strategy, but not an individual security, subject to specified conditions. The exception would be available for all firms, including firms that operate only an online platform, and could be used with both current and prospective customers.[5]

The Proposal will also establish specific supervisory requirements for the permitted illustrations. A firm could use a template to generate the permitted illustration, which would require a registered principal to approve the template before use or distribution. If a firm does not employ a template, registered principal review would be required for each illustration before use or distribution.[6]

III. DISCUSSION

WFA supports FINRA's proposed amendment to Rule 2210 to allow an exception to the rule's prohibition on projecting performance. We believe the proposed amendment will allow firms to better inform investors about recommended investment strategies, including the underlying assumptions upon which recommendations are based. WFA notes that this exception will especially benefit those investors that may only have access to such projections through investment advisors. That is, the exception will serve clients by leveling the playing

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[3] FINRA Regulatory Notice 14-14, Retrospective Rule Review – FINRA Requests Comment on the Effectiveness and Efficiency of Its Communication with the Public Rules, *available at:* http://www.finra.org/sites/default/files/NoticeDocument/p479810.pdf

[4] FINRA Retrospective Rule Review Report: Communications with the Public, December 2014. http://www.finra.org/sites/default/files/p602011.pdf

[5] See *supra* note 2, p.3

[6] *Ibid.*

field so that they can receive consistent projections whether from a broker-dealer or investment adviser.

A. FINRA Should Consider Expanding the Proposed Exception

WFA believes further exceptions to the rule's prohibition on projecting performance should be considered. Specifically, WFA requests that FINRA consider expanding the rule to allow firms to provide clients non-customized asset allocation projections based on firm capital market assumptions.

WFA feels that forward-looking capital market assumptions illustrating a projected growth rate, volatility measures, yield and/or downside risk (with appropriate disclosures) are vital information for an investor in gauging current as well as future potential risk, and help promote a client's understanding of their portfolio. Accordingly, we ask that FINRA expand the exceptions available to firms to allow use of non-customized asset allocation projections based on firm capital market assumptions which will enable clients to better understand and assess potential risks of the investment strategy.

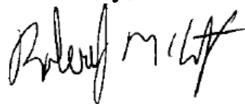
B. WFA Seeks Clarification on Supervision of this Proposal for Electronic Communications

The Proposal outlines specific supervisory requirements for the permitted illustrations. FINRA advises that if a firm chooses to use an approved template to generate the permitted illustration, these illustrations would have to be reviewed in a manner similar to correspondence under FINRA Rule 3110.[7] Does FINRA envision any changes to a firm's supervision of electronic communications under Rule 3110 as a result of this Proposal, such as obtaining additional supervisory approval whenever the template is used? In other words, for permitted illustrations submitted through electronic communications, would a firm have to undertake additional requirements to comply with the Proposal, or does FINRA feel that current supervisory processes suffice for the changes outlined in the Proposal?

IV. CONCLUSION

WFA appreciates the opportunity to provide feedback to FINRA's Proposal. If you would like to discuss this issue further or need additional information, please contact me at (314) 242-3193 or robert.j.mccarthy@wellsfargoadvisors.com.

Sincerely,



Robert J. McCarthy
Director of Regulatory Policy

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[7] *Ibid.*

I am in favor of the proposed amendments, as detailed in the Notice.

Neal E. Nakagiri
President, CEO, CCO
NPB Financial Group, LLC
3500 W. Olive Avenue, Ste 300
Burbank, CA 91505
818-827-7132

Via Online Submission

March 27, 2016

Marcia Asquith
Office of the Corporate Secretary
FINRA
1735 K St., NW
Washington, DC 20006-1506

Re: FINRA Regulatory Notice 17-06: Proposal to Amend Communications with the Public Rule to Permit the Distribution of Customized Hypothetical Investment Planning Illustrations that Include the Projected Performance of an Asset Allocation/Investment Strategy

Dear Ms. Asquith:

The Money Management Institute[1] appreciates the opportunity to comment on FINRA's Regulatory Notice 17-06[2] requesting comment on proposed amendments ("Proposal") to the rules governing communications with the public ("Rule 2210") to create an exception to Rule 2210's prohibition on projecting performance by permitting a firm to distribute customized hypothetical investment planning illustration that includes the projected performance of an asset allocation or other investment strategy, but not an individual security. We laud FINRA's Proposal to extend greater flexibility to firms provide to useful and informative hypothetical performance illustrations to customers and prospects. We believe such illustrations can be extraordinarily helpful in conveying basic concepts regarding investments, including risk (including market specific- and investment specific- risks and risk-reward trade-offs), volatility, diversification, compounded growth, market cycles, the potential of loss and the opportunity cost of not adequately preparing for retirement. Narrative and disclosures alone cannot always effectively convey the complexity of the markets or the many potential consequences that could result from disparate investment choices.

In support of the general thrust of the Proposal, we wish to relay the following specific observations and concerns that we have regarding FINRA's Proposal:

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[1] MMI is the national organization for the advisory solutions industry. MMI represents a broad spectrum of investment advisers that manage separate accounts, as well as sponsors of investment consulting programs. MMI provides a forum for the advisory solutions industry's leaders to address issues and better serve investors. Through industry advocacy, educational initiatives, regulatory affairs, publications, data reporting and professional networking, MMI supports and advances the growth of advisory solutions. MMI's membership is comprised of firms that offer comprehensive financial consulting services to individual investors, foundations, retirement plans, and trusts; related professional portfolio management firms; and firms that provide long-term services to sponsor, manager, and vendor firms. MMI is a leader for the advisory solutions industry on regulatory and legislative issues.

[2] Regulatory Notice 17-06 (Communications with the Public) (February 2017), available at http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-17-06.pdf.

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1. Projections are an Important Educational tool

FINRA's own experience with investment analysis tools ("IA Tools") should serve as "Exhibit A" in the examination of the utility of dynamic illustrations to help customers and prospects visualize their own investment needs and probabilities.[3] Countless studies have shown that a substantial portion of US investors are not saving enough for retirement because they underestimate their retirement needs or overestimate the ability of their current savings to meet those needs.[4] The probability that a customer or prospect will fail to meet his or her retirement needs can be displayed in striking relief in an IA Tool and can help redirect focus and priorities towards a better prepared financial future. FINRA's permitting IA Tools to co-exist with traditional marketing material ushered in a significant breakthrough in investment education. Similarly, projections can help a customer or prospect envision gaps and unmet needs in their planning. An equally important developmental and educational breakthrough can accompany the responsible use of investment projections.

Robo advisers and the omnipresence of visual interfaces by way of smart phones and other devices should lead us to accept that an entire contingent of our investing demographic wants to receive and processes information differently. They learn differently and are at home with visual analytics. They marshal vast resources, leverage sophisticated data and deploy information from a tablet smaller than a sheet of paper. Such media can enhance the user environment in which projections are delivered, providing a user experience that educates and informs and seeks to meet the needs of a growing digital generation. In the context of digital wealth advice, there is no hindrance (either in analytics, design, data or construction) that would prevent a projection, including a dynamic projection hosted on an electronic platform, from providing a reasonable basis, delivering material disclosures and not omitting material information consistent with FINRA rules. In fact, dynamic (*e.g.*, not on a static sheet of paper) projections developed by digital wealth adviser platforms could also permit the type of more complex, interactive, customizable, educational analytics that would serve digital natives and meet the needs of an increasingly digitally connected demographic.

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[3] *See* FINRA Rule 2214.

[4] *See e.g.*, *Will Americans Ever Become Savers? The 14th Retirement Confidence Survey*, 2004, Employee Benefit Research Institute Issue Brief No. 268 (April 2004) (noting that only about four in ten workers have taken steps to calculate how much they need to save by the time they retire in order to live comfortably in retirement); *See also The 2017 Retirement Confidence Survey: Many Workers Lack Retirement Confidence and Feel Stressed About Retirement Preparation*, Employee Benefit Research Institute Issue Brief No. 431 (March 2017) (reviewing worker estimates for adequate retirement savings).

2. Basing Projections on Past Events and Actual Investments

The Proposal states that "*basing a projection upon …the past performance of particular investments by an asset manager would not be reasonable*." We suggest FINRA reconsider its position given that capital market assumptions and modeling of potential future performance of asset classes or the components of an asset allocation might in fact be based on thoughtful and detailed analysis of how such assets performed in the past, including during different market cycles. Careful cataloguing of the interrelationship of past market prices, market movements and market events serves to inform (but not predict or guarantee) potential market outcomes in the future. The likelihood that specific securities or asset classes behave in correlation with the market or at variance with it may be analyzed by examining how such security or asset class behaved during similar periods in the past. Otherwise, a projection would be mere speculation and not based on any empirical evidence and would be completely unmoored from any reasonable analytical framework. Prohibiting the use of past (historical) specific security data as a substantial basis (or partial basis) for a projection could reduce projections to mere guesswork. For example, a projection based on the historical performance of an asset managers composite strategy provides information about the correlation and interrelationship between different securities and asset classes with respect to the market and during different market environments as a whole, and is completely different from an illustration that picks one security and extrapolates a future market price.

For the same reason, prohibiting the use of the historical data of specific securities as a basis for a projection forces such projections to rely on other proxies available – such as the use of indices as proxies to model asset classes. Although, in many circumstances, models based index data is educational and illustrative of investment behavior, because of its composition as an amalgam of different data inputs, index data can behave differently than individual security data. Depending on the analysis and the particular investment concept, product or service illustrated, a closer, apples to apples, comparison using specific securities (or composite of securities) may be a better, more faithful illustration of a point sought to be conveyed (*e.g.*, the likelihood of achieving a particular goal, or risk and return characteristics) and meet FINRA's policy objective of better informing investors.

To be sure, we advocate that any illustration relying on historical analysis would have to be clear that past behavior may not be repeated and that such asset classes or individual securities could perform differently, even in substantially similar market conditions.

3. FINRA Should Clarify what is Meant by Customized Illustrations

It is not entirely clear what the Proposal would classify as a "'customized' hypothetical investment planning illustration." This concern is particularly true where not all investment allocation programs or strategies are

equally customizable.[5] Also, the Proposal posits the acceptable use of a "reliable" off-the shelf software package to produce such "customized" illustrations. These two elements separately, and in combination, lead to possibilities that are unclear as to their acceptability under the new Proposal.

A wide spectrum of customizable inputs could be permitted by a particular "reliable" off-the-shelf software package. What is not clear, however, is which such inputs would help meet the appropriate standard of customization. For example, does sufficient customization exist only as to one or more investment allocation(s) being used? Does the customization element relate to the investment objectives and investment profile of the recipients? Does the customization relate to the underlying investments in the asset allocation projection? Or is the customization requirement met if a particular (even if otherwise generic projection) was prepared for a specific customer or prospect? Can several different customers or prospects be provided with the same or substantially similar customized projection? Without clarification, firms will be left to divine what level of customization is required by the Proposal, if adopted.

Further, and more to the point, bespoke illustrations are expected for customizable products. In contrast, investment allocations of broad applicability (and without customization) do not generally produce customized illustrations. FINRA's suitability rule provides a safe harbor for firms' use of asset allocation models that are, among other things, based on "generally accepted investment theory."[6] These models often take into account the historic returns of different asset classes over defined periods of time, but are very general models, not "customized" to a particular individual or account. It is not clear from the Proposal that a projection of such a general model would meet the correct standard of customization required. Prohibiting a projection of a model based on generally acceptable investment theory would seem an arbitrary and illogical limitation as such as illustration could have value to an investor or prospect.

4. FINRA SHOULD HARMONIZE ITS APPROACH WITH THAT OF THE SEC

As FINRA recognized, the public has, for decades, benefitted from performance projections in illustrations compliant with the Investment Advisers Act of 1940 ("Advisers Act"), as amended, in the context of financial planning or asset allocations, among others. For this reason, we would urge FINRA to consider harmonizing its own position with that of the Securities and Exchange Commission ("SEC") and its staff in permitting the same latitude permitted by the SEC.

FINRA's restrictions of the general use by its members of related performance presentations, even under very particularized conditions and with explanatory disclosure, consistent with the guidance and precedent

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[5] We are not referring to investment advisory programs availing themselves of the safe harbor provisions of Rule 3a-4 under the Investment Company Act of 1940, but of brokerage programs not subject to the Advisers Act.

[6] FINRA Rule 2111 Suitability (FAQ) available at https://www.finra.org/industry/faq-finra-rule-2111-suitability-faq. Rule 2111.03 provides a safe harbor for firms' use of asset allocation models that are, among other things, based on "generally accepted investment theory."

under the Investment Company Act of 1940, as amended, has not diminished the use of such materials.[7] Quite the contrary, the accessibility of such illustrations (in non-FINRA materials) has been enhanced by the ubiquity of the Internet. Its pervasive use, in the more than twenty years since the issuance of the SEC staff guidance, has not been deemed *per se* misleading by any venue with competence regarding the subject (provided the related performance illustrations are consistent with SEC guidance). In fact, certain regulators require the presentation of related performance,[8] fully embracing the standards and limits imposed by the SEC.[9] Denying customers and prospects insightful information about a FINRA member's competence, investment style, among others, that such clients and prospects can obtain about an industry competitor seems an illusory prohibition, or at least a prohibition that serves to the detriment of FINRA members generally.

Such harmonization should exist within the guardrails imposed by the Advisers Act and Rule 2210, as applicable, prohibiting misleading communications and communications containing material omissions. Not doing so perpetuates dysfunctional regulatory arbitrage; preserves an unlevel playing field, particularly with respect to new market entrants such as robo advisers; and prevents customers and prospects from accessing effective, educational and practical explanatory materials simply because they choose, for cost, convenience or other motives, a self-directed or commission-based brokerage channel over an asset-based advisory channel. The delivery channel should not impose the content standard.

In addition, Proposal appears narrowly tailored to the financial planning context (*e.g.*, preparation and delivery of an investment plan or proposal to financial planning clients). This is a small subset of the broad spectrum of products and services offered by firms, including those that are dually-registered or have affiliated broker-dealers. If firms should be reading the Proposal to only permit performance projections in such a narrow context, the Proposal defeats the concept of better harmonization with the regulatory standards for investment advisers, which broadly permits performance projections largely irrespective of delivery channel or service line.

5. FINRA SHOULD RECOGNIZE AN INSTITUTIONAL CARVE-OUT

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[7] *See* Interpretive Letter to Yukako Kawata (Dec. 30, 2003) available at http://www.finra.org/industry/interpretive-letters/december-30-2003-1200am; *see also* Interpretive Letter to Michael D. Udoff, Securities Industry Association (October 2, 2003) *available at* (http://www.finra.org/industry/interpretive-letters/october-2-2003-1200am.

[8] *See* CFTC Harmonization of Compliance Obligations for Registered Investment Companies Required to Register as Commodity Pool Operators (August 12, 2013) *available at* http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/federalregister081213.pdf (requiring that the commodity pool operator of a registered investment company with less than three years operating history is required to disclose the performance of all accounts that have investment objectives, policies and strategies substantially similar to those of the offered pool).

[9] *See, e.g.*, ITT Hartford Mutual Funds No Action Letter (Feb. 7, 1997)(fund may include in marketing material for other funds managed by the same adviser with investment objectives, policies and strategies substantially similar to those of the fund); Nicholas Applegate Mutual Funds No Action Letter (Aug. 6, 1996)(fund may include in prospectus information for private accounts managed by the fund's adviser with investment objectives, policies, and strategies substantially similar to those of the fund).

As we advocated in the preceding section, the delivery channel should not impose a different content standard, but the sophistication of the recipient could reasonably do so. FINRA imposes a high bar in its definition of "Institutional Investors,"[10]and such definition recognizes the ability of such parties to fend for themselves in analyzing communications distributed to them. The breadth of analytic resources and the sophistication of market and security analyses for the consumption of sophisticated industry professionals should not be limited by content standards designed, rightfully, to protect retail investors. In fact, SEC guidance recognizes that whether a communication could be deemed misleading or confusing turns on the sophistication of the investor.[11] An analyst holding a graduate degree in advanced mathematical modeling who is scrutinizing a projection for his or her firm's investment hardly needs the cautionary disclosures "indices are not available for direct investment" or "investments may involve risk." Such elementary cautions have a place in retail materials, but border on the nonsensical in materials directed to Institutional Investors who can avail themselves of analysts, experts and specialists to scrutinize more complex illustrations.

For Institutional Investors to analyze securities offerings and properly conduct due diligence of products they may offer to their clients, a higher order of analysis and analytical tools may be necessary. Limiting projections to the simpler, more digestible illustrations more appropriate for retail investors may correspondingly limit the ability of an Institutional Investor to test the assumptions and limitation of an investment allocation or strategy. Institutional Investors should be able to require and receive projections and performance illustrations either reducing or broadening the analytical focus, positing blended performance, alternate facts, data or market environments, to adequately assess the theoretical underpinnings of an investment allocation or strategy.

We make the above recommendation fully supporting the provisions codified in Rule 2211 prohibiting the dissemination of institutional material to retail investors. We also recommend an institutional carve-out that in no way diminishes the obligation to provide communications that are not misleading and that do not contain material omissions.

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We appreciate the opportunity to comment on the Proposal. While we are concerned about several aspects of the Proposal, we believe it is an important step forward in providing meaningful information to customers and prospects in helping them make investment decisions.

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[10] *See* Rule 2210(a)(4).

[11] *See, e.g., Triad Asset Management, Inc.* (available April 22, 1993); *Mills-Price & Associates, Inc.* (available July 15, 1992); *Bypass Wall Street, Inc.* (available January 7, 1992); *Clover Capital Management, Inc.* (available July 19, 1991); *Investment Company Institute* (available September 23, 1988); *Covato/Lipsitz, Inc.* (available October 23, 1981); *Edward F. O'Keefe* (available April 13, 1978); *Anametrics Investment Management* (available May 5, 1977).

Please feel free to contact us if we can be of further assistance to FINRA. In particular, in the areas where we have proposed that FINRA considers alternatives to the Proposed Rule, MMI would welcome the opportunity to assist FINRA staff.

Sincerely,

Craig D. Pfeiffer
President & CEO
Money Management Institute

NASAA

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202/737-0900
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March 24, 2017

Submitted electronically to pubcom@finra.org

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006

RE: Regulatory Notice 17-06: Communications with the Public

Dear Ms. Asquith:

On behalf of the North American Securities Administrators Association, Inc. ("NASAA"),[1] I am pleased to submit the following comments in response to Regulatory Notice 17-06: Communications with the Public (the "Proposal"), in which FINRA seeks comments on proposed amendments to FINRA Rule 2210 (Communications with the Public). The proposed amendments would "create an exception to the rule's prohibition on projecting performance to permit a firm to distribute a customized hypothetical investment planning illustration that includes the projected performance of an asset allocation or other investment strategy, but not an individual security, subject to specified conditions." NASAA appreciates the opportunity to offer its comments.

Initially, FINRA notes that the Proposal is "intended to better harmonize regulatory standards" between broker-dealers and investment advisers. The Proposal highlights that "investment advisers often present performance projections in their communication with their clients, particularly concerning financial planning or asset allocation," and that "the Investment Advisers Act does not prohibit the presentation of projections that comply with the antifraud provisions of the Act." NASAA shares the desire where appropriate for further regulatory harmonization, but only to the extent that it does not undermine investor protections.[2] In our

[1] The oldest international organization devoted to investor protection, NASAA was organized in 1919. NASAA's membership consists of the securities administrators in the 50 states, the District of Columbia, Canada, Mexico, Puerto Rico, and the U.S. Virgin Islands. NASAA is the voice of securities agencies responsible for grass-roots investor protection and efficient capital formation.

[2] *See*, *e.g.*, Letter from A. Heath Abshure, Arkansas Securities Commissioner and NASAA President, to Elizabeth Murphy, Secretary, SEC, dated July 5, 2013 *available at* http://www.nasaa.org/wp-content/uploads/2011/07/NASAA-Fiduciary-Duty-Letter-final-07052013.pdf; Letter from Mike Rothman, Minnesota Commissioner of Commerce and NASAA President, to Brent J. Fields, Secretary, SEC, dated Nov. 28, 2016 *available at* http://nasaa.cdn.s3.amazonaws.com/wp-content/uploads/2011/07/NASAA-Comment-on-FINRA-Seniors-Proposal.pdf.

President: Mike Rothman (Minnesota)
President-Elect: Joseph Borg (Alabama)
Past-President: Judith Shaw (Maine)
Executive Director: Joseph Brady
Secretary: Shonita Bossier (Kentucky)
Treasurer: Michael Pieciak (Vermont)
Directors: Kevin Anselm (Alaska)
Melanie Senter-Lubin (Maryland)
Thomas Cotter (Alberta)
Pamela Epting (Florida)

view, the Proposal's effort to permit broker-dealers to present performance projections and hypothetical investment planning illustrations raises very significant concerns.

Investment advisers generally are compensated on a fee only basis for providing investment advice tailored to individual investors, and investment advisers owe their clients ongoing fiduciary duties to act in their clients' best interests. Broker-dealers, however, receive transaction-based compensation at the point of sale and are held to lower suitability standards when making recommendations. We are mindful, and remain vigilant, to ensure clarity on the boundary between providing investment advice as a business (as an investment adviser does) versus incidental to broker or dealer activities (as broker-dealers do).[3] Broker-dealers that advertise hypothetical portfolios, which presumably would require ongoing monitoring to maintain the advertised strategies and investment allocations, but that are not dually registered as investment advisers risk crossing the line into unregistered investment advisory activity or misleading investors as to the nature of their services. Given these inherent regulatory differences, the Proposal's goal to "level the playing field" between broker-dealers and investment advisers when it comes to advertising hypothetical performance is a tall order and appears likely to result in further confusion and blurring or crossing of regulatory lines.

The fiduciary duties investment advisers owe their clients affords investors greater protections than does the suitability standard applicable to broker-dealers. This higher standard of care mitigates the potential risks of investment advisers using projections. An investment adviser must be able to defend any alleged impropriety by showing that the adviser acted in the client's best interest. A broker must only show that its recommendation was suitable, not necessarily the customer's best option.

While NASAA commends FINRA's attempt to make investment information more accessible to retail investors that do not have advisory accounts, the Proposal as currently designed would appear more likely to mislead than to inform investors. As FINRA noted in its release, there are already four exceptions to the prohibition on projections: hypothetical illustrations of mathematical principles, investment analysis tools, price targets in research reports, and certain projections concerning security futures and options. These exceptions are based on quantifiable metrics that would be difficult to distort. The projections contemplated under the Proposal, though, are much more susceptible to manipulation or bias. Furthermore, in

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[3] Section 202(a)(11) of the Investment Advisers Act of 1940 defines investment adviser as "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities." However, "any broker or dealer whose performance of such services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor" is exempted from the definition of investment adviser. *See* 15 U.S.C. § 80b-2. Therefore, any broker-dealer whose advisory activity is more than incidental to it brokerage services may meet the definition of an investment adviser and become subject to the regulatory requirements applicable to investment advisers.

contrast to the design of the Proposal, a certain degree of backtesting would appear virtually inevitable in the creation of any hypothetical portfolio.[4]

While the Investment Advisers Act does not prohibit an investment adviser from utilizing projections, the SEC has issued an extensive line of no action letters and taken enforcement actions that provide guidance to investment advisers on the uses of hypothetical or model performance.[5] NASAA members have also cautioned investment advisers about the use of projections through examinations and enforcement actions.[6] The Proposal as currently framed fails to provide the regulatory rigor necessary for the presentation of hypothetical performance. The Proposal would require FINRA members to make certain disclosures about hypothetical performance and present "all material assumptions and limitations applicable to the illustration," but this general guidance lacks the regulatory depth that exists for investment advisers.

If FINRA moves forward with a rule permitting a customized hypothetical investment planning illustration that includes the projected performance of an asset allocation or other investment strategy, any such rule should clarify—with specificity—the required disclosures and provide guidance for how members may calculate and present projections. For example, FINRA must consider, among other things:

- How its members are to calculate fees, costs, or commissions in relation to how hypothetical performance is presented;
- How its members must compose an asset allocation or investment strategy for projection;
- How a projection would have a reasonable basis where it was inconsistent with the historical performance of the asset allocation; and
- What is meant by "clearly and prominently" under the Proposal.

Moreover, any rule amendments allowing the types of communications discussed in the Proposal should require disclosure of the underlying securities that make up the customized hypothetical investment planning illustration. FINRA should also consider requiring broker-dealers to inform investors if the broker-dealer's past projections proved to be inaccurate.

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[4] The Proposal does not sufficiently address backtesting. Our understanding of the Proposal is that FINRA would view any advertised hypothetical portfolio that benefitted in its development from backtesting as *per se* fraudulent. But because a certain degree of backtesting would seem virtually inevitable in the creation of any hypothetical portfolio, as drafted, the Proposal appears unworkable.

[5] *See* Clover Capital Management, Inc., SEC No-Action Letter (pub. avail. Oct. 28, 1986). *See also In re* Schield Management Company et al., SEC Release No. IA-1872 (May 31, 2000); *In re* The Dreyfus Corporation and Michael L. Schonberg, SEC Release No. IA-1870 (May 10, 2000); *In re* LBS Capital Management, Inc., SEC Release No. IA-1644 (July 18, 1997); Association for Investment Management and Research, SEC No-Action Letter (pub. avail. Dec. 18, 1996); Bramwell Growth Fund, SEC No-Action Letter (pub. avail. Aug. 7, 1996); J.P. Morgan Investment Management, Inc., SEC No-Action Letter (pub. avail. May 7, 1996); Investment Company Institute, SEC No-Action Letter (pub. avail. Aug. 24, 1987); Scientific Market Analysis, SEC No-Action Letter (pub. avail. Mar. 24, 1976).

[6] *See*, *e.g.*, *In re Ashland Partners et al.*, Wash. Secs. Div. Order No. S-10-279-14-FO01, 2014 WL 10589090 (July 29, 2014).

NASAA fears that without more detailed guidance, the door will be open for broker-dealers to mislead and confuse investors with customized hypothetical investment planning illustrations.

In NASAA's view, the Proposal requires further development to address the important issues raised above, whether through further revisions to the text of the rule or through guidance. NASAA would welcome an opportunity to discuss these issues further. If you have any questions about these comments, please contact NASAA's General Counsel, A. Valerie Mirko, at vm@nasaa.org or (202) 737-0900.

Sincerely,

Mike Rothman
NASAA President
Minnesota Commissioner of Commerce

WELLINGTON MANAGEMENT ADVISERS, INC.
280 Congress Street, Boston, MA 02210 USA

T +1.617.951.5000
www.wellington.com

WELLINGTON
MANAGEMENT

March 27, 2017

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

VIA EMAIL: pubcom@finra.org

RE: Regulatory Notice 17-06 Communications with the Public

Dear Ms. Asquith:

Wellington Management Advisers, Inc. ("**WMA**") is a limited purpose broker-dealer affiliate of Wellington Management Company LLP ("**Wellington Management**") created solely to support Wellington Management and its affiliates in distributing their sponsored and/or managed funds. WMA registered representatives market funds only to institutional investors and/or qualified purchasers, including public funds, central banks, insurance entities, endowments, foundations, retirement plan sponsors, financial intermediaries, and family offices. Wellington Management is a private partnership registered with the Securities and Exchange Commission as an investment adviser. As of December 31, 2016, Wellington Management manages $979 billion in assets across a wide variety of equity, fixed income and asset allocation strategies.

WMA appreciates the opportunity to comment on the proposed amendments to Rule 2210 described in FINRA Regulatory Notice 17-06 (the "**Proposing Release**"). We support permitting firms to distribute customized hypothetical investment planning illustrations that include the projected performance of an asset allocation or other investment strategies. We agree that this information is valuable to institutional and other sophisticated investors, and Wellington Management routinely receives requests from its advisory clients and prospects for such illustrations. As noted in the Proposing Release, there is no similar prohibition on performance projections in the Investment Advisers Act of 1940, as amended (the "**Advisers Act**") or the rules promulgated thereunder, so the proposed amendments to Rule 2210 would bring the FINRA regulations in line with the rules applicable to registered advisers. Permitting member firms to utilize hypothetical planning illustrations, subject to a reasonable basis standard is an excellent step towards accomplishing FINRA's goal of better informing investors about the expected performance of a strategy.

We also urge FINRA to consider additional amendments to Rule 2210 that would further harmonize FINRA regulations with Advisers Act requirements with respect to performance projections of specific funds. Under the Advisers Act, an investment adviser may show projections of investment strategy performance (subject to general antifraud requirements) but current FINRA rules prohibit an affiliated member firm such as WMA from using similar projections when the investment strategy is offered as a fund. We believe these projections would provide prospective fund investors valuable information for their due diligence purposes, and we encourage FINRA to consider permitting member firms to similarly use projections of fund performance with institutional investors or qualified purchasers,

subject to the same conditions set forth in the Proposing Release (i.e., there is a "reasonable basis" for all assumptions, conclusions and recommendations and clear disclosure that the information is hypothetical).

We recognize that projected fund performance may not be appropriate for all investors, so we recommend that member firms only be permitted to use fund performance projections with institutional investors or qualified purchasers. FINRA has recognized that communications provided solely to institutional investors or qualified purchasers do not raise the same investor protection concerns as sales materials provided to retail investors,[1] and our experience with institutional investors and qualified purchaser clients and prospects suggest that these projections would be a valuable component of their overall due diligence. As a result, we believe that harmonizing the requirements of Rule 2210 with the requirements of the Advisers Act with respect to performance projections would allow member firms to provide greater information to their clients, further accomplishing the goals of the Proposing Release.

We applaud FINRA's efforts with respect to the Proposing Release. Please feel free to contact Lance Dial, Managing Director and Counsel at 617-289-3686 if you would like to discuss further.

Sincerely,

Molly Shannon
President
Wellington Management Advisers, Inc.

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1 See, e.g., Letter from Joseph E. Price, Senior Vice President, FINRA to Edward P. Macdonald (Hartford Funds Distributors, LLC) (May 12, 2015); Letter from Thomas M. Selman, Senior Vice President, NASD, to Yukako Kawata (Davis Polk & Wardwell) (Dec. 30, 2003).

M Holdings Securities, Inc.℠ Member FINRA/SIPC

March 23, 2017

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

Re: FINRA Regulatory Notice 17-06: Communications with the Public

Dear Ms. Asquith:

M Holdings Securities, Inc. ("M Securities") is pleased to submit the following comments in support of the proposed amendments to FINRA Rule 2210 set forth in Regulatory Notice 17-06.

M Securities is a dually-registered broker-dealer and registered investment advisory firm and a wholly-owned subsidiary of M Financial Group ("M Financial"), one of the nation's largest independent financial services design and distribution networks. M Financial has more than 155 member firms throughout the United States and abroad which offer a high level of service, support and expertise in the ultra-affluent and corporate markets. M Financial is singularly focused on delivering access to a diverse selection of investment and insurance products and services through M Securities.

The proposed amendments to Rule 2210 may affect M Securities differently than other industry members. M Securities does not generally utilize projections on asset allocations in the investment space. We are, however, permitted to make hypothetical illustrations using assumed projections related to insurance-based securities such as variable annuities and variable universal life insurance policies under FINRA Rule 2211. The proposed changes to Rule 2210 would provide us with the ability to make reasonable projections using similar assumptions across multiple strategies and asset allocations, which could provide customers with more factual information to better compare financial alternatives and make informed choices. Ultimately, M Securities believes that providing its customers with consolidated summaries of mathematical principles and projections of various strategies in an easy-to-understand format, with supporting documents attached, would benefit the customer's ability to compare various allocations, their cost implications, and tax consequences.

M Securities supports the change to a "reasonable basis" requirement because each individualized investment strategy has specific features and costs. Rather than establishing rigid,

M Holdings Securities, Inc.™ Member FINRA/SIPC

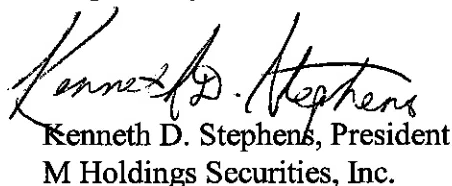
one-size-fits-all requirements for all strategies or asset allocations, we believe it is appropriate for projections to be reasonably tailored to each strategy because those tailored projections will more accurately highlight the features and consequences associated with each strategy and better inform the investing public.

M Securities agrees that providing a range of projections in relation to customized hypothetical investment planning illustrations could highlight the hypothetical nature of a performance projection and further protect customers. Ranges of projections are double-edged swords, however; they can aid customers and decrease the risk of deception, but they can also increase the level of confusion for customers. Rather than establishing an inflexible requirement of a range of data points, we believe it is more appropriate to include projection ranges as one factor, among many, to consider when determining the reasonable basis of a given projection.

Finally, M Securities agrees that the proposed changes to Rules 2210 will align the pubic projection requirements for the brokerage and investment advisory spaces. This alignment not only allows broker-dealers to compete more effectively with stand-alone investment advisors, since they will then offer the same projections, but it also provides a second and important benefit. Dually-registered firms, such as M Securities, have two sets of rules to comply with in relation to projections and the disparate rules make it difficult to know which side of the house – brokerage or advisory – the representative, advisor, or agent is working in. Establishing one set of rules that apply to both registered representatives and investment advisors will streamline the application of supervision and compliance duties at dually-registered firms, and will help eliminate customer confusion.

We thank you for the opportunity to comment on FINRA Regulatory Notice 17-06. Please contact us should you have any questions regarding our submission.

Respectfully submitted,



Kenneth D. Stephens, President
M Holdings Securities, Inc.

M Financial Plaza | 1125 NW Couch Street, Suite 900 | Portland, OR 97209 | phone 503.232.6960 | fax 503.238.1621

March 27, 2017

Via email

Ms. Marcia E. Asquith
Executive Vice President, Board and External Relations
Office of the Corporate Secretary
FINRA
1735 K Street NW
Washington, DC 20006-1506

Re: Communications with the Public, FINRA Regulatory Notice 17-06

Dear Ms. Asquith,

ACA Compliance Group ("ACA") appreciates the opportunity to comment on FINRA's proposed amendments to FINRA Rule 2210 (Communications with the Public) as described in FINRA Regulatory Notice 17-06, which, if adopted, would create an exception to the Rule's prohibition on the inclusion of performance projections in certain communications. ACA is a leading provider of regulatory compliance products and solutions, cybersecurity and risk assessments, performance services, and technology solutions to regional, national, and global firms in the financial services industry. With offices worldwide, ACA clients include leading investment advisers, private fund managers, commodity trading advisors, investment companies, and broker-dealers. ACA regularly assists our clients with designing and implementing policies and procedures to comply with rules governing communications with the public. The issue of performance advertising, and in particular the differences in performance advertising standards among different regulators, has been a continuing challenge to our clients, many of which are registered in multiple capacities.

FINRA's proposal notes that "[t]he general prohibition against performance projections is largely intended to protect retail investors from performance projections of individual investments, which often prove to be spurious, inaccurate or otherwise misleading." We agree that the use of performance projections should be used only in limited circumstances and with clear and appropriate disclosures and supervisory procedures, particularly with respect to retail customers and investors. We support the proposed amendments and believe that they will help to align the regulatory approaches taken with respect to broker-dealers and investment advisers. However, we suggest that FINRA also consider permitting its members to use projected performance in communications that relate to private offerings that are provided only to institutional investor customers.[1]

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[1] Private offerings include, but are not limited to, private investment funds excluded from the definition of investment company under Sections 3(c)(1) and 3(c)(7) of the Investment Company Act of 1940, as amended.

In our experience, private fund managers that are dually-registered, or that engage broker-dealers to assist in fundraising activities on behalf of the private funds they manage, often struggle with the disparate regulatory approaches to marketing materials applied to broker-dealers and investment advisers.[2] The difference in requirements is particularly notable with respect to projected returns.

As an example, an SEC-registered investment adviser that is raising capital for a new private equity fund may include projected performance returns for existing investments in the new fund's pitch book and other sales-related materials ("Marketing Materials"), provided that the assumptions and risks related to those returns are fully and accurately disclosed.[3] There is no SEC rule applicable to investment advisers that expressly prohibits projected performance returns. However, if that same adviser were to hire a broker-dealer to help sell interests in the fund, the broker-dealer could not use Marketing Materials that include projected investment returns without running afoul of existing FINRA content standards, such as FINRA Rule 2210(d)(1)(F). As a result, the investment adviser in this example would need to either cease using the projected performance returns, which many institutional private fund investors expect to see, or, alternatively, create separate Marketing Materials for use by the broker-dealer. The first option could put the adviser at a disadvantage compared to its peers, and the second could result in prospective investors receiving materially different information.

Similarly, a real estate fund offering interests in properties with existing leases may be able to provide highly material information about projected returns (for example, how existing lease payments are scheduled to escalate and when those leases expire) – but a broker-dealer selling that fund would not be able to provide that same information.

Our experience is that institutional investors routinely request performance estimates, including projected performance returns. These investors expect to receive such information from fund managers when evaluating potential and existing private fund investments. When forward-looking performance returns are accompanied by sufficient disclosures regarding the risks, assumptions, and bases for such projections, institutional investors are capable of evaluating the information and understanding the risks associated with such investments. Therefore, allowing broker-dealers to provide projected performance returns to their institutional investor customers would not, as a matter of course, result in inaccurate or misleading information. This approach also would be consistent with FINRA's approach to certain other advertising issues, where it has allowed communications to institutional investors that would not be permitted with respect to

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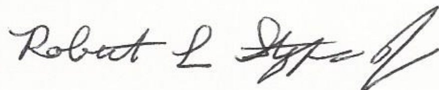
[2] The SEC Staff Study on Investment Advisers and Broker-Dealers (January 2011) (available at http://www.sec.gov/news/studies/2011/913studyfinal.pdf), produced in response to Section 913 of the Dodd-Frank Act, noted the difference in broker-dealer and investment adviser advertising standards, and recommended that they be harmonized.

[3] For purposes of this example, we assume that the adviser is complying with all applicable SEC rules and regulatory guidance with respect to the inclusion of projected performance returns in its Marketing Materials.

individual investors.[4] In addition, as we have noted, it would be consistent with the existing SEC approach to investment adviser regulation.

ACA recommends that FINRA consider expanding the current proposal, or offering separate additional amendments to Rule 2210, to allow for the use of projected performance in communications with institutional investor customers with respect to private offerings. We would expect that any additional amendments would include the "reasonable basis" and disclosure requirements outlined in FINRA's current proposal.[5]

Sincerely,



Robert L. Stype, Jr.
Managing Partner

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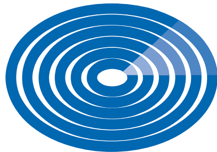
[4] *See, e.g.*, Interpretive Letter to Edward P. Macdonald, Hartford Funds Distributors, LLC (May 12, 2015) (provision of related performance information to institutional investors) (available at http://www.finra.org/industry/interpretive-letters/may-12-2015-1200am); Interpretive Letter to Bradley J. Swenson, ALPS Distributors, Inc. (April 22, 2013) (use of pre-inception index performance information in institutional communications) (available at http://www.finra.org/industry/interpretive-letters/april-22-2013-1200am).

[5] The proposal requires "that there be a reasonable basis for all assumptions, conclusions and recommendations, and that the illustration clearly and prominently disclose the fact that the illustration is hypothetical and there is no assurance that any described investment performance or event will occur. All material assumptions and limitations applicable to the illustration would have to be disclosed."



Odeon Capital Group LLC
750 Lexington Avenue
New York, NY 10022
212-257-6970

April 26, 2017

VIA ELECRONIC MAIL

Phillip Shaikun
Vice President & Associate General Council
FINRA

Jeanette Wingler
Associate General Counsel
FINRA

Dear Mr. Shaikun & Ms. Wingler,

On behalf of Odeon Capital Group ("Odeon"), CRD# 148493, I am pleased to submit this letter in response to the FINRA Regulatory Notice 17-16 (the "Notice"), requesting comment on a proposal to provide for a limited Desk Commentary Safe Harbor. Odeon is a growing broker/dealer servicing a primarily institutional client base with sales, trading, research, and investment banking services across equity and fixed-income asset classes.

Odeon is pleased to support efforts to reduce the subjectivity that revolves around the definition of "Research" under Rule 2241 while also providing for a reduction in the amount of unnecessary oversight and controls in regard to those market commentaries that exist in the "grey area" that results from such subjectivity. It is our opinion that extreme cautiousness in practice, which is essentially the byproduct created by the vagueness of the Rule, is a detriment to the effective servicing of our institutional clients and provides for an unfair uncompetitive standing in comparison to non-regulated entities that provide similar market commentary.

Odeon's clients are generally large sophisticated investors. Odeon provides what it believes is a useful combination of fundamentally driven equity and fixed-income research products under Rules 2241 and 2242 (the "Rules"), and also market and trading oriented commentary ("Commentaries") that it believes would not be construed as "Research" except due to the subjectivity of Rules 2241 and 2242 . Out of an effort to always remain firmly and unquestionably compliant in its activities, Odeon procedures in regard to Commentaries provide for supervisory pre-approval prior to dissemination. The pre-approval process was created due to the subjective language in the Rules and exists to date even though 99% of reviewed Commentaries would not conceivably be determined to be Research under the Rules and are allowed to be then distributed without modification. These pre-approvals provide for a delay in dissemination which ultimately devalue the Commentaries as timeliness is critical in the markets in which our clients trade. They also increase the burden on supervisory staff members whose time could be better spent on other activities.

Odeon is also aware, and has had continual conversations with clients in this regard, that the service landscape is teeming with competitive options for essentially the same types of Commentary which it provides: often by unregulated entities that service the same clients as Odeon. These unregulated providers are in many cases able to send broader and timelier information than Odeon or other regulated member firms. Clients, when faced with the decision to compensate Odeon for its Commentary, would have to decide the value of these services when they may in fact receive less robust information in a less than timely fashion vs other non-regulated entities. Eliminating this information service disparity is critical to the success of member firms and their regulated offerings.

Odeon believes that the protections outlined in the proposed Safe Harbor in regard to conflict management, the institutional recipient requirement and associated negative consent, and the required "Health Warning" disclaimer language are appropriate and substantially provide for a workable and adequately narrow framework. The required re-authoring of policies and procedures would be minimal and manageable by most firms without incurring excessive new costs. However, Odeon would appreciate clarity on certain points in regard to the "Author, Content, Recipient" conditions of the Safe Harbor.

Specifically, Odeon would like to highlight the importance of the "Author" phrasing of "primarily engaged". There may be instances whereby a registered representative would be primarily engaged in sales activities and authoring Commentary, but would occasionally and infrequently be authoring Research under the rules and be Series 86/87 licensed

and properly supervised for those activities accordingly. The happenstance Research publication, or the fact the individual is licensed to produce Research, should not preclude the Safe Harbor for their primary function of sales and the production of Commentary.

A second specific point is in regard to the "Content" phrasing as it would exist in practice. As described in the Notice, the Commentary should contain "only brief, short-term observations about trading activity, trading opportunities, market conditions, economic statistics, or company results, or regarding another recent recommendation or research". The term "trading opportunities" is critical to the usefulness of the Safe Harbor as Odeon would use it in practice. Specifically, Odeon Commentary does not provide for a "Rating" or a "Price Target" as is used on Odeon's fundamental Research product, i.e. a "Buy, Sell, Hold" with a definition of each and a 12-month price target. However, for Commentary of "trading opportunities" as Odeon sees them, there would be in some cases a short term recommendation. For example, "clients should buy ZZZ going into the earnings report this afternoon" or "a short on ZZZ at these levels is warranted" both provide for an opinion of short-term trading ideas and should be allowed under the Safe Harbor as they do not provide for a fundamental analysis of a security and don't provide the robust content typically found in a Research report. To this effect, "Rating" should be further clarified in the Safe Harbor language to be a fundamental Research "Rating" not a short term opinion on a trading opportunity as described in these examples. Odeon does not believe that sophisticated institutional clients would confuse these short terms trading opinions with formal Research "Ratings", but as the language in the Safe Harbor doesn't fully define "Rating" vs. "trading opportunity", that language should be expanded to eliminate any possible ambiguity.

Thank you for the opportunity to submit these comments.

Sincerely,

Christopher Tolla
Chief Compliance Officer

WEALTHFORGE
SECURITIES

VIA ELECTRONIC MAIL

March 27, 2017

Joseph E. Price
Senior Vice President
FINRA
Corporate Financing/Advertising Review
pubcomm@finra.org

Re: Comment on Proposed Amendments to Rules Governing Communications with the Public

Dear Sir or Madam:

WealthForge Securities, LLC ("WealthForge")[1] welcomes the opportunity to comment on the proposed amendments to the rules governing communications with the public (FINRA Rules 2210, 2241, and 3110), in particular request for comment 6.[2]

WealthForge primarily works in the private placement market, conducting offerings under the federal 506(b) and 506(c) exemptions. Since January 2014, WealthForge evaluated over 600 private placement offerings, accepted and administered more than 400 private placement offerings, of which, as of the date of this correspondence, 195 were securities of real estate funds or securities issued by special purpose entities (SPE) whose pooled assets were used for real estate related projects. As part of its private security offerings administration, WealthForge's advertising review included many hundreds of public communication pieces regulated by FINRA Rule 2210; of which, the majority were for funds or Special Purpose Entities ("SPE") directly related to real estate.

Request for Comment 6: Are there single investment products that operate like an asset allocation or other investment strategy for which performance projections might be appropriate?

Comment: Certain real estate backed products, particularly real estate funds that contain multiple and diverse real estate assets in the portfolio, may operate like an asset allocation or other investment strategy. An asset allocation into the private securities issued by a real estate development company may diversify an investor's investment over many projects with different return expectations and different asset classes, and should be allowed to use performance projections in certain circumstances.

Background: Most issuers, who have engaged WealthForge, historically have not conducted previous securities transactions utilizing a broker-dealer. While no requirement exists for an issuer of private securities to utilize a broker-dealer, one reasonably concludes that in regard to regulatory oversight, investor protection, and market effectiveness, it is likely a better outcome for both the investor and the market if a private security offering were administered by FINRA registered and regulated broker-dealer. Based on our own research of the SEC's Form D filings, most real estate related private security transactions do not utilize a broker-dealer – both in terms of the number of closed transactions and the dollar volume raised.

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[1] WealthForge Securities, LLC is a registered broker-dealer with FINRA. Under its membership agreement WealthForge is licensed to sell private placements, engage in merger and acquisition advisory services, fairness opinions, underwriting and Reg A services.
[2] Regulatory Notice 17-06 (February 2017).

Having evaluated hundreds of real estate private security offerings, WealthForge believes that there are real estate investment products, primarily investments into a diverse real estate fund, which would operate like an asset allocation or other investment strategy, for which performance projections should be allowed. Additionally, WealthForge believes that there is a reasonable approach that would also allow the use of projections for some other single investment products in specific cases.

Evaluating an offering based solely upon an expected internal rate of return (IRR) is unwise;[3] however, industry participants use the IRR and cash-on-cash (CoC) attributes as part of their potential investment evaluation, and expect those attributes to be present in communications from the issuer. If it is true that potential investors expect to see IRR and/or CoC projections when evaluating real estate offerings, an expectation which is forbidden by FINRA's rules for offering materials distributed by a broker dealer and his associated representatives, other than an issuer prepared private placement memorandum, it is a deterrent for real estate private security issuers to allow their offerings to be administered by a SEC registered and FINRA member broker dealer. This self limiting outcome leaves investors without the protection afforded by a broker-dealer and the securities regulations, which they enforce.

This existing market force impediment is inconsistent with FINRA's mission to provide investor protection and to promote market integrity. The Firm expends significant effort to educate issuers on acceptable communication relying on FINRA's communications with the public rules. Consistently, throughout these discussions, real estate issuers are steadfast in their insistence that these rules unfairly put them at a competitive disadvantage in a market where anticipated IRR and CoC return are benchmarks used by sophisticated investors in evaluating the quality of offerings and which are prevalent if not prominent in the communications for private placements not administered by a registered broker-dealer.[4]

Absent a communications rules change by FINRA, which enables broker-dealer communications to be consistent with the market segment vernacular, these offerings are likely to continue principally outside the antiseptic light of the regulatory framework. Alternatively, an escalation in Securities and Exchange Commission enforcement actions targeting unregistered broker-dealer activities may create a market reality, different from today, where the cost of non-compliance for the private securities issuer may compel them to seek broker-dealers for their offering administration. An outcome where a private security offering administered by a broker-dealer is desired rather than circumvented, would be beneficial to both investor and market.

Funds with multiple assets

Real estate private security offerings occur in a spectrum from an SPE investing in a single fix and flip residence to large scale Delaware Statutory Trusts or non-public REITs. We contend that these real estate funds are essentially investment strategies and thus performance projections should be allowed.

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[3] Jason Wald, "Understanding Internal Rate of Return (IRR) in Real Estate Investing," CrowdStreet, available at https://www.crowdstreet.com/education/article/what-internal-rate-return-irr/; EquityMultiple, "The Limits of Internal Rate of Return for Real Estate Revenue," Equities.com, available at https://www.equities.com/news/internal-rate-of-return-doesn-t-tell-everything-about-real-estate-revenue; "What IRR Can Tell Investors About Real Estate Investments," Realty Mogul, available at https://www.realtymogul.com/resource-center/articles/what-irr-can-tell-investors-about-real-estate-investments.
[4] Current Offerings, CrowdStreet, available at https://app.crowdstreet.com/properties/?_ga=1.65168686.1067091199.1488487236; Offerings, RealCrowd, available at https://www.realcrowd.com/offerings; Investment Opportunities, Carlton Crowdfund, available at https://carltoncrowdfund.com/crowdfunding-deals/; Origin Investments, Investments, available at https://www.origininvestments.com/investments/.

A real estate investment fund containing multiple real estate assets should be considered an investment strategy because these funds typically consist of multiple distinct real estate assets, to meet a specific asset allocation goal, and the assets often have an income producing history, which serves as the basis of a reasonable hypothetical return illustration. For example; a fund holding multiple commercial real estate assets may specifically acquire assets in different markets executing a strategy to hedge against regional downturns, or a fund may choose to concentrate in a specific subset of commercial real estate such as hotels, franchises of restaurants or multi-family residential. Or, a fund may choose to be more specific in its investments and only invest as the general partner in other real estate funds. All are illustrative of options that a real estate fund may choose in the formation and allocation of its pooled capital. In each alternative, the underlying assets have historical income (rent rolls, occupancy rates, or historical contractual returns) on which to base an illustration that would be similar to investment allocation strategy within a specific sector.

Real Estate Private Security Offerings

Staff should allow hypothetical projections when those projections are based on historical returns from a specific asset. For example, a real estate fund holding specific assets may have experienced an average return of 7% per year for the last four years and anticipate that that return will continue based on a reasonable economic forecast. In that case, with proper disclosure that past performance does not guarantee future outcomes, and a robust investment risk disclosure, the fund should be able to communicate with potential subscribers what it believes is a reasonable and good faith expectation of future return. The projection would be based on demonstrated performance and, with proper disclosure, would be reasonable and informative to investors. Unlike many asset allocation or investment strategies, there are hard assets underlying these funds, principally real estate, which have verifiable worth, and, depending on the type of real estate, may produce regular income and a reasonable expectation that they will have appreciation over some horizon.

Staff should allow hypothetical CoC projections for offerings where projected performance is currently demonstrated. In the case of a fund's historical returns, the postulation is that it is reasonable to provide investors with a projection of potential returns when that projection is based on performance that is currently demonstrated. Investors in real estate utilize the CoC metric to calculate the cash income earned on the cash invested in a property. In some cases, a real estate fund's assets may already demonstrate an on-going CoC return for investors. In that case, the issuer should be allowed to advertise that return as historical and to project an on-going return based on that demonstrated performance. A stout disclosure set should accompany this projection, including the required "past performance does not guarantee future outcomes" and a description of the underlying assumptions, and calculation of the CoC number.

Conclusion

WealthForge Securities believes that FINRA's Advertising Department should permit the use of projections for certain real estate related private securities. In particular, FINRA should allow the use of IRR projections for real estate funds containing multiple assets, as they act more like an investment strategy than an individual security. Relatedly, FINRA should allow the use of projected IRR and projected CoC in circumstances where the security being sold is for a real estate fund with assets that have historical returns or are currently demonstrating an on-going cash-on-cash yield.

Sincerely,

WealthForge Securities LLC
CRD # 152550

March 27, 2017

By Electronic Mail to *pubcom@finra.org*

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20549-1090

Re: FINRA Regulatory Notice 17-06: Proposal to Amend Communications with the Public Rule to Permit the Distribution of Customized Hypothetical Investment Planning Illustrations that Include the Projected Performance of an Asset Allocation/Investment Strategy

Dear Ms. Asquith:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to respond to FINRA's request for comment on Regulatory Notice 17-06 ("RN 17-06" or the "Proposal"),[2] which proposes amendments to FINRA's Communications with the Public Rule (FINRA Rule 2210). The Proposal would create an exception to the rule's prohibition on projecting performance to permit a firm to distribute a customized hypothetical investment planning illustration that includes the projected performance of an asset allocation or other investment strategy, but not an individual security, subject to specified conditions.

I. Executive Summary of Comments

SIFMA applauds FINRA's retrospective rule review efforts. SIFMA believes this process should facilitate the identification of outdated and inefficient rules and

[1] SIFMA is the voice of the U.S. securities industry. We represent the broker-dealers, banks and asset managers whose nearly 1 million employees provide access to the capital markets, raising over $2.5 trillion for businesses and municipalities in the U.S., serving clients with over $18.5 trillion in assets and managing more than $67 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

[2] Regulatory Notice 17-06 (Communications with the Public) (February 2017), available at http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-17-06.pdf (last visited March 23, 2017).

interpretations while also recognizing and balancing investor protection concerns. We believe that the Proposal reflects the benefits of the rule review process. SIFMA believes that FINRA can further advance its laudable efforts with respect to FINRA Rule 2210 by:

- Clarifying its position with respect to basing projections on past or current particular investments; and
- Accounting for differences between retail and institutional investors.

SIFMA's comments are further discussed in the various sections of this comment letter.

II. Rule Assessment and Proposal Processes

The Proposal is an outgrowth of FINRA's retrospective rule review process.[3] In December 2014, FINRA published a report assessing its rules related to communications with the public.[4] FINRA stated in the report that "the rules and FINRA's administration of them may benefit from some updating and recalibration to better align the investor protection benefits and economic impacts."[5] To that end, the report included several recommendations to enhance the effectiveness and efficiency of the rules.[6]

SIFMA applauds FINRA for its efforts in undertaking an extensive, multi-step assessment process in connection with the Proposal. We understand that FINRA met with and solicited feedback from a broad range of interested parties.[7] The resulting report reflects a thorough and thoughtful data collection and analytic process. Further, the Proposal reflects careful consideration of the feedback and recommendations of interested parties, including SIFMA and its member firms. We encourage FINRA to expand its use of these assessment techniques beyond proposals related to the retrospective rule review process. We believe FINRA, member firms, and investors would benefit from FINRA

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[3] *See* News Release: FINRA Launches Retrospective Rule Review (April 8, 2014), available at https://www.finra.org/newsroom/2014/finra-launches-retrospective-rule-review (last visited March 20, 2017). *See also*, FINRA Retrospective Rule Review Report: Communications with the Public (December 2014), available at https://www.finra.org/sites/default/files/p602011.pdf (last visited March 6, 2017) and FINRA Regulatory Notice 14-14 (Retrospective Rule Review – Communications with the Public) (April 2014), available at http://www.finra.org/sites/default/files/NoticeDocument/p479810.pdf (last visited March 23, 2017).

[4] FINRA Retrospective Rule Review Report: Communications with the Public (December 2014), available at https://www.finra.org/sites/default/files/p602011.pdf (last visited March 6, 2017).

[5] *Id*. at 12.

[6] *See id*.

[7] *See generally* FINRA Retrospective Rule Review Report: Communications with the Public, at 5-6 (December 2014), available at https://www.finra.org/sites/default/files/p602011.pdf (last visited March 6, 2017).

applying a similar level of economic analysis, and transparency, to most if not all of its rule proposals.

SIFMA commends FINRA for engaging in a retrospective rule review process. SIFMA believes the process will result in changes to existing rules that increase the rules' effectiveness and efficiency without adversely impacting their investor protection goals. SIFMA hopes that FINRA will continue its retrospective rule review process, re-evaluating rules and interpretations on an ongoing basis to ensure they are still relevant and meeting their underlying investor protection mandates in a cost effective and efficient manner.

III. Overview of the Proposal

The Proposal arises from FINRA's assessment of its current Communications with the Public rule and existing guidance in connection with the retrospective rule review. In its Communications with the Public Rule Review Report, FINRA stated "[o]ne area that drew frequent comment involved the restrictions on predictions or projections and performance standards. Many stakeholders favored more permissive use of predictions or projections and alternative performance standards (e.g., hypothetical and back-tested performance, related performance, model performance and targeted returns) and greater clarity with respect to the current requirements."[8] As a result of this analysis, FINRA concluded the Communications with the Public rule could benefit from certain changes to "better align the investor protection benefits and the economic impacts" of the rule.[9]

Specifically, in RN 17-06, FINRA proposes to amend FINRA Rule 2210 to create an exception to the rule's prohibition on projecting performance to permit a firm to distribute a "customized hypothetical investment planning illustration that includes the projected performance of an asset allocation or other investment strategy, but not an individual security."[10]

The Proposal provides an exception to FINRA Rule 2210's prohibition of projections for a customized hypothetical investment planning illustration. The proposed exception would be available for all firms, including firms that operate only an online platform. The proposed exception also could be used with both current and prospective

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[8] *Id.* at 3.

[9] *See generally* FINRA Retrospective Rule Review Report: Communications with the Public, at 12 (December 2014), available at https://www.finra.org/sites/default/files/p602011.pdf (last visited March 6, 2017).

[10] *See generally* Regulatory Notice 17-06 (Communications with the Public) (February 2017), available at http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-17-06.pdf (last visited March 6, 2017).

customers. The hypothetical investment planning illustration may project an asset allocation or other investment strategy, but not the performance of an individual security.

The Proposal requires that there be a reasonable basis for all assumptions, conclusions and recommendations, and that the illustration clearly and prominently disclose the fact that the illustration is hypothetical and there is no assurance that any described investment performance or event will occur. All material assumptions and limitations applicable to the illustration would have to be disclosed.

The Proposal also establishes specific supervisory requirements for the permitted illustrations.

Subject to our comments below, SIFMA believes that these changes will improve the effectiveness and efficiency of the rules without compromising their underlying investor protection goals.

IV. Recommended Changes and Requests for Clarification and Guidance

SIFMA supports the investor protection objectives of the Communications with the Public rule. SIFMA believes that the rule has been largely effective in meeting its intended investor protection objectives.

As a general matter, SIFMA believes the proposed amendment in RN 17-06 would better align the rule's investor protection benefits and economic impacts. Importantly, the Proposal enhances our member firms' ability to provide retail investors with only brokerage accounts access to potentially useful projections currently available to investment advisory clients.

SIFMA respectfully suggests that FINRA consider the following changes to the Proposal, which we believe are consistent with the objectives underlying FINRA's proposed amendment to Rule 2210.

A. Clarification Regarding Basing Projections on Actual Investments

In connection with the Proposal, FINRA states that "basing a projection upon … the past performance of particular investments by an asset manager would not be reasonable."[11] It may be helpful to clarify this point. For example, what if a projection included in communication covered by Rule 2210(d) was based on a variety of factors, and one of the factors was the asset manager's experience with investments? Permitting the factoring of an asset manager's experience with particular investments may support a higher degree of confidence in the projection. If the Proposal does not permit any use of

[11] *See* FINRA Notice 17-06, at 3.

past performance of particular investments, FINRA should consider this issue in future rulemaking efforts. Factoring an asset manger's performance with particular investments into projections may be balanced by heightened disclosure standards, particularly with less sophisticated investors. In this way, principle based rules would provide an easier path to establishing a regulatory scheme with respect to projections.

B. Accounting for Investor Sophistication in Communication Rules

In its request for comment, FINRA raised the important issue of dually-registered firms and consistency between projection related practices for clients with investment advisory accounts versus those with only brokerage accounts.[12] Again, SIFMA commends FINRA for focusing on this point as it helps to better harmonize the communications available to all retail clients. However, in response to FINRA's requests, SIFMA offers that the proposal may not do enough to align the use of projections in communications to institutional investors because of relative flexibility available under the principle-based regulations applicable to investment advisers.

FINRA Rule 2210 already distinguishes between communications to retail investors and institutional investors.[13] In numerous ways, Rule 2210 distinguishes principal approval, filing requirement, and content standards applicable to each type of communication. In doing so, FINRA has sought to limit the definition of "institutional investors" under 2210 to those that FINRA believes "have either the sophistication required to scrutinize member sales material without the benefit of the filing and more prescriptive content standards applicable to retail communications, or have the resources necessary to hire an outside party with this sophistication."[14]

Unlike many retail investors, sophisticated institutional investors desire information on return targets and projections. And, in line with FINRA's objective in limiting the definition of institutional investors, these investors have a better ability to understand the validity of assumptions and practices used in preparing the projections. Finally, existing anti-fraud standards would continue to serve as important controls on inadequate disclosure and other misleading practices.

SIFMA respectfully requests FINRA consider, as part of its ongoing effort to improve its rules, distinguishing the content standards applicable to projections in retail communications versus institutional communications. While the Proposal represents an important advancement on the use of projections, FINRA can use future rulemaking

[12] *Id.* at 5, Request for Comment 2 and 3.

[13] *Compare* FINRA Rule 2210(a)(3) and (a)(5) as well as FINRA Rule 2210(b)(1) and (b)(3). *See also* the filing requirements applicable only to retail communications under FINRA Rule 2210(c).

[14] *See* Securities Exchange Act Release 34-66681, at 11 (March 29, 2012).

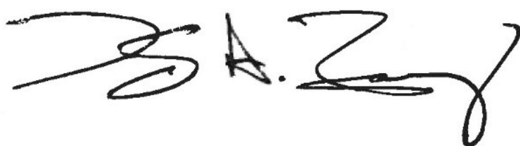
efforts to further distinguish the controls reasonably necessary for institutional communications from those in place for retail communications.

V. Conclusion

SIFMA appreciates the opportunity to comment on the Proposal. SIFMA commends FINRA for undertaking an evaluation of its Communications with the Public in an effort to find ways to improve the rule's effectiveness and efficiency. SIFMA believes the comments included in this letter should foster FINRA's efforts to update these rules and align the rules' costs and investor protection benefits. We look forward to a continuing dialogue with FINRA and working together on this Proposal.

If you have any questions or would like additional information, please contact Kevin Zambrowicz, Managing Director & Associate General Counsel, SIFMA, at (202) 962-7386 (kzambrowicz@sifma.org), or our counsel, Ronak Patel, Kelly Hart, at (512) 495-6444 (ronak.patel@kellyhart.com).

Very truly yours,



Kevin A. Zambrowicz
Managing Director &
Associate General Counsel

cc: Evan Charkes, Co-Chair, SIFMA Compliance & Regulatory Policy Committee
Mary Beth Findlay, Co-Chair, SIFMA Compliance & Regulatory Policy Committee

Ronak Patel, Kelly Hart