

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-98977; File No. SR-FINRA-2023-016)

November 17, 2023

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change to Amend FINRA Rule 2210 (Communications with the Public) to Permit Projections of Performance of Investment Strategies or Single Securities in Institutional Communications

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on November 13, 2023, the Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to amend FINRA Rule 2210 (Communications with the Public). Currently Rule 2210 prohibits projections of performance or targeted returns<sup>3</sup> in member communications, subject to specified exceptions. The proposed rule change would allow a member to project the performance or provide a targeted return with respect to a security or asset allocation or other investment strategy in an institutional communication or a communication distributed solely to qualified purchasers as defined in the Investment Company Act of 1940

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> Targeted returns reflect the aspirational performance goals for an investment or investment strategy. Projections of performance reflect an estimate of the future performance of an investment or investment strategy, which is often based on historical data and assumptions. Projections of performance are commonly established through mathematical modeling. See Investment Advisers Act Release No. 5653 (December 22, 2020), 86 FR 13024, 13081 n.699 (March 5, 2021) and accompanying text.

(“Investment Company Act”) that promotes or recommends specified non-public offerings, subject to stringent conditions to ensure these projections are carefully derived from a sound basis.

The text of the proposed rule change is available on FINRA’s website at <http://www.finra.org>, at the principal office of FINRA and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Rule 2210’s General Prohibition of Projections and Its Exceptions

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.<sup>4</sup> The general prohibition against performance projections is intended to protect investors who may lack the capacity to understand the risks and limitations of using projected performance in making investment decisions.

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<sup>4</sup> See FINRA Rule 2210(d)(1)(F).

This general standard does not prohibit certain types of communications, however. First, Rule 2210 allows a hypothetical illustration of mathematical principles, provided it does not predict or project the performance of an investment or investment strategy.<sup>5</sup> The “hypothetical illustration of mathematical principles” exception to the prohibition of projections applies to tools that serve the function of a calculator that computes the mathematical outcome of certain assumed variables without predicting the likelihood of either the assumed variables or the outcome. For example, this exception applies to a calculator that computes a net amount of savings that an investor would earn over an assumed period of time with assumed variables of rates of returns, frequency of compounding, and tax rates.<sup>6</sup>

Second, the general prohibition on projections does not preclude a member from employing an investment analysis tool, or a written report produced by an investment analysis tool, that includes projections of performance provided it meets the requirements of FINRA Rule 2214 (Requirements for the Use of Investment Analysis Tools).<sup>7</sup> FINRA adopted the predecessor to Rule 2214 in 2004 to allow members to offer or employ technological tools that use a mathematical formula to calculate the probability that investment outcomes (such as reaching a financial goal) would occur.<sup>8</sup>

An “investment analysis tool” is an interactive technological tool that produces simulations and statistical analyses that present the likelihood of various investment outcomes if certain investments are made or certain investment strategies or styles are undertaken, thereby serving as an additional resource to investors in the evaluation of the potential risks and returns

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<sup>5</sup> See FINRA Rule 2210(d)(1)(F)(i).

<sup>6</sup> On the other hand, this exception would not apply to a calculator that predicted the likelihood of achieving these assumed variables and outcomes. See Notice to Members 04-86 (November 2004), n.3.

<sup>7</sup> See FINRA Rule 2210(d)(1)(F)(ii).

<sup>8</sup> See Notice to Members 04-86, supra note 6.

of investment choices.<sup>9</sup> Investors may use an investment analysis tool either independently or with the assistance from a member and may receive written reports generated by the tool that include projected performance that is consistent with Rule 2214's requirements.<sup>10</sup>

Third, members may include a price target 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 risks that may impede achievement of the price target.<sup>11</sup>

In addition, a communication with the public regarding security futures or options may contain projected performance figures (including projected annualized rates of return), provided that the communication meets specified requirements.<sup>12</sup> Among other things, the communication must be accompanied or preceded by a standardized risk disclosure statement, the communication may not suggest certainty of the projected performance, parameters relating to such performance figures must be clearly established, and the projections must disclose and reflect all relevant costs, commissions, fees, and interest charges (as applicable).<sup>13</sup>

#### Need for an Additional Exception

FINRA understands that some broker-dealer customers, in particular institutional investors, request other types of projected performance that the current rules do not allow. These customers may request information that includes projections of performance or targeted returns concerning investment opportunities to help them make informed investment decisions but are

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<sup>9</sup> See FINRA Rule 2214(b).

<sup>10</sup> For a more detailed discussion of the differences between FINRA Rule 2214 and the proposal, see Comparison to Projections Permitted by FINRA Rule 2214, infra.

<sup>11</sup> See FINRA Rule 2210(d)(1)(F)(iii).

<sup>12</sup> See FINRA Rules 2215 (Communications with the Public Regarding Security Futures) and 2220 (Options Communications).

<sup>13</sup> See FINRA Rules 2215(b)(3) and 2220(d)(3).

unable to receive this information from members due to the prohibition on projections. For example, a member's views regarding the projected performance of an investment strategy or single security may be useful to institutional investors and qualified purchasers ("QPs"), as defined under the Investment Company Act,<sup>14</sup> who are eligible to invest in certain non-public offerings that are relying on exceptions from registration under the Securities Act of 1933 ("Securities Act") and the Investment Company Act.

In addition, projected performance may be useful for institutional investors and QPs that either have the financial expertise to evaluate investments and to understand the assumptions and limitations associated with such projections, or that have resources that provide them with access to financial professionals who possess this expertise. Such investors often test their own opinions against performance projections they receive from other sources, including issuers and investment advisers. Because Rule 2210 generally precludes a member from providing projected performance or targeted returns in marketing communications distributed to institutional investors and QPs, these investors cannot obtain a member's potentially different and valuable perspective.

FINRA recognizes, however, that any proposed rule amendment that would allow projections of performance or targeted returns in specified communications must not increase the risk of potential harm to retail investors. As discussed below, the proposed rule change is narrowly tailored to address the need for projections or targeted returns by restricting their use

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<sup>14</sup> Section 2(a)(51)(A) of the Investment Company Act defines the term "qualified purchaser" as (i) any natural person who owns not less than \$5 million in investments (as defined by the SEC); (ii) a family-owned company that owns not less than \$5 million in investments; (iii) a trust not formed for the purpose of acquiring the securities offered, as to which each trustee or other person authorized to make decisions with respect to the trust, and each settlor or other person who has contributed assets to the trust, is a person described in clauses (i), (ii), or (iv); and (iv) any other person, acting for its own account or the account of other qualified purchasers, who in the aggregate owns and invests on a discretionary basis not less than \$25 million in investments. See 15 U.S.C. 80a-2(a)(51)(A).

only in specified scenarios involving institutional investors or QPs, well-established categories of persons that have been previously determined to be financially sophisticated or able to engage expertise for purposes of the securities laws.<sup>15</sup> As a general matter, the proposed rule change would not alter the current prohibitions on including projections of performance or targeted returns in most types of retail communications. In addition, even in situations where a natural person qualifies as an institutional investor or QP, Exchange Act Regulation Best Interest<sup>16</sup> would require members to act in the investor's best interest when making a recommendation of a securities transaction or investment strategy involving securities, regardless of whether a projection is used as a basis for the recommendation.

#### Proposed Amendments

The proposed rule change would create a new, narrowly tailored, exception to the general prohibition of projections. First, the proposed rule change would permit institutional communications to include projections of performance or targeted returns. An institutional communication is any written (including electronic) communication that is distributed or made available only to institutional investors,<sup>17</sup> but does not include a member's internal

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<sup>15</sup> See, e.g., Privately Offered Investment Companies, Investment Company Act Release No. 22597 (April 3, 1997), 62 FR 17512 (April 9, 1997) (adopting rules to implement a legislative exclusion from regulation under section 3(c)(7) of the Investment Company Act for privately offered investment companies "whose investors are all highly sophisticated investors, termed 'qualified purchasers'").

<sup>16</sup> See 17 CFR 240.151-1 ("Reg BI").

<sup>17</sup> Rule 2210(a)(4) provides that "institutional investor" means any:

- (A) person described in Rule 4512(c), regardless of whether the person has an account with a member;
- (B) governmental entity or subdivision thereof;
- (C) employee benefit plan, or multiple employee benefit plans offered to employees of the same employer, that meet the requirements of Section 403(b) or Section 457 of the Internal Revenue Code and in the aggregate have at least 100 participants, but does not include any participant of such plans;
- (D) qualified plan, as defined in Section 3(a)(12)(C) of the Exchange Act, or multiple qualified plans offered to employees of the same employer, that in the aggregate have at least 100 participants, but does not include any participant of such plans;
- (E) member or registered person of such a member; and
- (F) person acting solely on behalf of any such institutional investor.

communications.<sup>18</sup> Second, the proposed rule change would permit projected performance and targeted returns in communications that are distributed or made available only to QPs and that promote or recommend a private placement that is sold solely to QPs (“QP private placement communications”).<sup>19</sup> Recipients of QP private placement communications are referred to herein as “QP private placement investors.”<sup>20</sup> Institutional investors and QP private placement investors are referred to herein collectively as “Projection-Eligible Investors.”

Even within these narrow circumstances, the proposed rule change would impose additional investor protection obligations. The exception would be conditioned on: (1) the member adopting and implementing written policies and procedures reasonably designed to ensure that the communication is relevant to the likely financial situation and investment objectives of the investor receiving the communication and to ensure compliance with all

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Rule 4512(c) defines “institutional account” to mean the account of: (1) a bank, savings and loan association, insurance company or registered investment company; (2) an investment adviser registered either with the SEC under Section 203 of the Advisers Act or with a state securities commission; or (3) any other person (whether a natural person, corporation, partnership, trust or otherwise) with total assets of at least \$50 million.

<sup>18</sup> See Rule 2210(a)(3). The definition of “institutional investor” provides in part that no member may treat a communication as having been distributed to an institutional investor if the member has reason to believe that the communication or any excerpt thereof will be forwarded or made available to a retail investor. See FINRA Rule 2210(a)(4). Accordingly, if a member distributed or made available a communication containing projected performance or a targeted return to an institutional investor, and the member had reason to believe the institutional investor would forward or make available that communication to a retail investor, FINRA would not consider the communication to be an institutional communication for purposes of the proposed rule change’s requirements.

<sup>19</sup> The proposed rule change would create a new exception from the prohibition on performance projections for communications that are distributed or made available only to QPs and that promote or recommend either a Member Private Offering that is exempt from the requirements of FINRA Rule 5122 pursuant to Rule 5122(c)(1)(B), or a private placement exempt from the requirements of FINRA Rule 5123 pursuant to Rule 5123(b)(1)(B). Both Rule 5122(c)(1)(B) and Rule 5123(b)(1)(B) exempt from those rules’ requirements private offerings sold solely to qualified purchasers, as defined in Section 2(a)(51)(A) of the Investment Company Act.

<sup>20</sup> In most cases, an individual investor who has \$5 million or more in investments, but who does not have at least \$50 million in assets, will be both a qualified purchaser under the Investment Company Act and a retail investor for purposes of Rule 2210. Accordingly, some QP private placement communications will be either correspondence or retail communications under the rule. See FINRA Rule 2210(a)(2), (a)(5), and (a)(6).

applicable requirements and obligations; (2) the member having a reasonable basis for the criteria used and assumptions made in calculating the projected performance or targeted return, and retaining written records supporting the basis for these criteria and assumptions;<sup>21</sup> (3) the communication prominently disclosing that the projected performance or targeted return is hypothetical in nature and that there is no guarantee that the projected or targeted performance will be achieved; and (4) the member providing sufficient information to enable the investor to understand (i) the criteria used and assumptions made in calculating the projected performance or targeted return, including whether the projected performance or targeted return is net of anticipated fees and expenses; and (ii) the risks and limitations of using the projected performance or targeted return in making investment decisions, including reasons why the projected performance or targeted return might differ from actual performance.

#### Written Policies and Procedures

The proposed rule change would require a member to adopt and implement written policies and procedures reasonably designed to ensure that the communication is relevant to the likely financial situation and investment objectives of the investor receiving the communication and to ensure compliance with all applicable requirements and obligations. In adopting written policies and procedures concerning the investor's likely financial situation and investment objectives, members should consider including content that requires the member to consider the audience that receives a communication that presents projected performance or a targeted return.

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<sup>21</sup> FINRA recognizes that there are some differences between targeted returns and projections of performance. As discussed above, targeted returns are aspirational and may be used as a benchmark or to describe an investment strategy or objective to measure the success of a strategy. Projections of performance, on the other hand, use historical data and assumptions to predict a likely return. Thus, targeted returns may not involve all (or any) of the assumptions and criteria applied to generate a projection. However, FINRA does not believe that the difference between targeted returns and projections of performance is always readily apparent to the recipient of a communication. Accordingly, the presentation of both projections of performance and targeted returns would be subject to the same conditions, including that both must have a reasonable basis.



In particular, such a communication should only be distributed where the member reasonably believes the investors have access to resources to independently analyze this information or have the financial expertise to understand the risks and limitations of such presentations. If an investor does not have this financial expertise and receives a communication containing a projection or targeted return, FINRA would expect that the written policies and procedures be reasonably designed to ensure that the investor has the resources necessary to access financial professionals that possess this expertise.<sup>22</sup>

For example, members could meet the requirement to adopt and implement policies and procedures reasonably designed to ensure that the projected performance or targeted returns are relevant to the likely financial situation and intended audience of the institutional communication or QP private placement communication by relying on its past experiences with particular types of institutional investors and QP private placement investors who seek this information. A firm may wish to further tailor its intended audience for such a communication to persons or entities that have expressed interest in particular types of securities, or who have invested in similar securities in the past.

In addition, even in situations where an investor has the financial expertise or resources necessary to understand the risks and limitations of a projection or targeted return, if the member recommends a securities transaction or investment strategy involving securities to an investor who is a “retail customer” as defined in Reg BI,<sup>23</sup> the member must establish, maintain, and

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<sup>22</sup> FINRA would not view the mere fact that an investor would be interested in high returns as satisfying the requirement that the projected performance or targeted return is relevant to the likely financial situation and investment objectives of the intended audience.

<sup>23</sup> Reg BI defines “retail customer” to mean a natural person, or the legal representative of such natural person, who (i) receives a recommendation of any securities transaction or investment strategy involving securities from a broker, dealer, or natural person who is an associated person of a broker or dealer, and (ii) uses the recommendation primarily for personal, family, or household purposes. See 17 CFR 240.151-1(b)(1).

enforce written policies and procedures reasonably designed to achieve compliance with Reg BI.<sup>24</sup>

### Reasonable Basis Requirement

The “reasonable basis” requirement follows well-established precedents. FINRA Rules 2210 and 2241 (Research Analysts and Research Reports) require a price target in a research report to have a reasonable basis.<sup>25</sup> SEC rules also require performance projections contained in specified documents to be based on good faith and have a reasonable basis.<sup>26</sup>

FINRA believes that it is important for members to consider appropriate factors in forming a reasonable basis for the criteria used and assumptions made in calculating projected performance or a targeted return pursuant to proposed Rule 2210(d)(1)(F)(iv). Accordingly, FINRA is proposing to include a new Supplementary Material to Rule 2210 that would list some, but not all, factors that members should consider in developing a reasonable basis. FINRA incorporated some of the relevant factors that members of the financial research and analysis industry use when considering the basis for a recommendation to a customer.<sup>27</sup>

Proposed Supplementary Material 2210.01 would provide that, in forming a reasonable basis for the criteria used and assumptions made in calculating projected performance or a targeted return pursuant to proposed Rule 2210(d)(1)(F)(iv), with no one factor being

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<sup>24</sup> See 17 CFR 240.151-1(a)(2)(iv).

<sup>25</sup> See FINRA Rule 2210(d)(1)(F)(iii) and FINRA Rule 2241(c)(1)(B).

<sup>26</sup> See Securities Act Regulation S-K, 17 CFR 229.10(b) (providing in part that the use in documents specified in Securities Act Rule 175 and Exchange Act Rule 3b-6 of management’s projections of future economic performance have a reasonable basis and reflect its good faith assessment of a registrant’s future performance).

<sup>27</sup> Some, but not all, of the proposed factors in the proposed Supplementary Material come from the CFA Institute’s discussion of Standard V in the Institute’s Standards of Practice Handbook. Standard V requires, among other things that CFA Institute Members and Candidates “[h]ave a reasonable and adequate basis, supported by appropriate research and investigation, for any investment analysis, recommendation, or action.” See CFA Institute, Standards of Practice Handbook 155-156 (11<sup>th</sup> ed. 2014).

determinative, members should consider multiple factors. Such factors may include, but are not limited to, the following:

- 1) Global, regional, and country macroeconomic conditions (for example, considering potential civil or political instability or weather conditions that may impact projected performance);
- 2) Documented fact-based assumptions concerning the future performance of capital markets;
- 3) In the case of a single security issued by an operating company, the issuing company's operating and financial history;
- 4) The industry's and sector's current market conditions and the state of the business cycle (for example, including a consideration of any characteristics unique to the industry and sector, such as the effect of rising mortgage rates on the housing sector);
- 5) If available, reliable multi-factor financial models based on macroeconomic, fundamental, quantitative, or statistical inputs, taking into account the assumptions and potential limitations of such models, including the source and time horizon of data inputs;
- 6) The quality of the assets included in a securitization (taking into consideration, for example, the ability to assess the credit quality of underlying assets through available data and the performance of similar pools);
- 7) The appropriateness of selected peer-group comparisons (for example, the relative similarities or differences among the components of a selected peer group versus the subject issuer, the number of constituents in the peer group, and the reasonableness of the comparison);

- 8) The reliability of research sources (including, for example, whether there is a relationship between the issuer and the research source that could pose a conflict of interest; whether the research has been subject to peer review before publication; whether the research is based on reliable or verifiable factual information);
- 9) The historical performance and performance volatility of the same or similar asset classes;
- 10) For managed accounts or funds, the past performance of other accounts or funds managed by the same investment adviser or sub-adviser, provided such accounts or funds had substantially similar investment objectives, policies, and strategies as the account or fund for which the projected performance or targeted returns are shown;
- 11) For fixed income investments and holdings, the average weighted duration and maturity;
- 12) The impact of fees, costs, and taxes; and
- 13) Expected contribution and withdrawal rates by investors.

Proposed Supplementary Material 2210.01(b) also would provide that members may not base projected performance or a targeted return upon (i) hypothetical, back-tested performance or (ii) the prior performance of a portfolio or model that was created solely for the purpose of establishing a track record.<sup>28</sup>

### Disclosure Requirements

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<sup>28</sup> See MassMutual Institutional Funds, 1995 SEC No-Act. LEXIS 747 (September 28, 1995) (permitting the use of open-end management investment company performance that included the performance of unregistered predecessor separate investment accounts (“SIAs”) whose assets were transferred to the investment company, based in part upon the representation that the predecessor SIAs were created for purposes entirely unrelated to the establishment of a performance record). FINRA would not consider an investment manager’s proprietary seed capital accounts that were created for purposes unrelated to the establishment of a performance record to be prohibited by proposed Supplementary Material 2210.01(b)(ii).

The requirement to provide sufficient information in the communication to enable the intended audience to understand the criteria used and assumptions made in calculating the projected performance or targeted return is not intended to prescribe any particular methodology or calculation of such performance. Nor does FINRA expect a firm to disclose proprietary or confidential information regarding the firm's methodology and criteria. Firms would be expected, however, to provide a general description of the methodology used sufficient to enable the investors to understand the basis of the methodology, as well as the assumptions underlying the projection or targeted return. Without this basic information, particularly regarding assumptions about future events, it is more likely that a projection or targeted return would mislead a potential investor.

The proposed rule change also would require a member to provide sufficient information in the communication to enable a Projection-Eligible Investor to understand the risks and limitations of using the projected performance or targeted return in making investment decisions, including reasons why the projected performance or targeted return might differ from actual performance. This requirement is intended to help ensure that such investors do not unreasonably rely on a projection or targeted return given its uncertainty and risks.

For example, an institutional communication or QP private placement communication may need to disclose, as a reason why the projected performance or targeted return might differ from actual performance, that the projection does not reflect actual cash flows into and out of an investment portfolio. This is particularly true when a projection is expressed as an internal rate of return ("IRR"), since forward-looking IRR shows a return earned by investors over a particular period, calculated on the basis of future cash flows to and from investors.<sup>29</sup> If the

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<sup>29</sup> IRR is also known as money-weighted returns and reflects the percentage rate earned on each dollar invested for each period the dollar was invested. IRR is calculated as the discount rate that makes the net

actual future cash flows differ from the assumptions, the actual IRR may differ from the projected IRR.

#### General Standards and Supervision under Rule 2210

As with all communications with the public, institutional communications and QP private placement communications that contain projected performance or targeted returns must meet Rule 2210's general standards, including the requirements that communications be fair and balanced, provide a sound basis for evaluating the facts in regard to any particular security or type of security, and not contain false, exaggerated, unwarranted, promissory or misleading content.<sup>30</sup> Accordingly, in addition to the reasonable basis standard, any communication containing a projection or targeted return would be prohibited from presenting exaggerated or unwarranted projections or targeted returns. FINRA believes this constraint would prohibit a member from presenting a projection that purports to show, for example, longer term returns for an equity security offered shortly before or after the date of the communication, as it would be viewed as unwarranted and lacking a sound basis due to the difficulty in predicting future securities markets and economic conditions.

Members currently must adopt appropriate procedures for the supervision and review of both institutional and retail communications.<sup>31</sup> If the proposed rule change is adopted, these supervisory procedures would need to include the review of projections of performance or

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present value of all cash flows from an investment equal to zero. This can be contrasted to a time-weighted return, which is the compounded growth rate of \$1 over the time period. Average annual total returns used by mutual funds pursuant to Securities Act Rule 482 are an example of time-weighted returns. Time-weighted returns ignore the size and timing of investment cash flows and, therefore, provide a measure of manager or strategy performance, while IRR measures how a specific portfolio performed in absolute terms. See Regulatory Notice 20-21 (July 2020).

<sup>30</sup> See FINRA Rule 2210(d)(1)(A) and (B).

<sup>31</sup> See FINRA Rule 2210(b)(1) and (b)(3).

targeted returns used in both institutional communications and QP private placement communications, including compliance with the proposed rule change's specific conditions. In addition, members generally would be required to approve prior to use any QP private placement communication that falls within Rule 2210's definition of "retail communication."<sup>32</sup>

Members that use third-party vendors to perform core business or regulatory oversight functions must establish and maintain a supervisory system, including written supervisory procedures, for any activities or functions performed by third-party vendors that are reasonably designed to ensure compliance with applicable securities laws and regulations and with applicable FINRA rules.<sup>33</sup> Accordingly, if a member relies on third-party models or software to create a projection or targeted return, the member would be expected to establish and maintain a supervisory system reasonably designed to ensure that any projections or targeted returns created by a third-party vendor are used consistently with the proposed rule change's requirements.

For example, the member would need to ensure that there is a reasonable basis for the criteria used and assumptions made in calculating the projected performance or targeted return and would need to retain written records supporting the basis for such criteria and assumptions. Members should make reasonable efforts to determine whether the model or software is sound and should make reasonable inquiries into the source and accuracy of the data used to create the projection or targeted return. If the member has reason to suspect that the third-party model or software lacks a sound basis, the member should investigate the matter and, if it cannot be

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<sup>32</sup> As discussed above, if a QP is an individual that has less than \$50 million in assets, the QP generally will be a retail investor under Rule 2210 since the QP does not fall within the definition of institutional investor. In such cases, if the QP private placement communication were distributed or made available to more than 25 QPs that fall within the definition of retail investor within a 30-day period, it would be a retail communication that a registered principal generally must approve prior to use. See FINRA Rule 2210(b)(1).

<sup>33</sup> See Regulatory Notice 21-29 (August 2021).

reasonably assured that the model or software is sound, must not use it. Among factors that a member may wish to employ to evaluate the third-party model or software are the assumptions used to create the projection or target, the rigor of its analysis, the date and timeliness of any research used to create the model or software, and the objectivity and independence of the entity that created the model or software.

As discussed above, members also must keep in mind that if they use a projection of performance or targeted return in connection with a recommendation of a securities transaction or investment strategy involving securities to a retail customer, the recommendation must meet the requirements of Reg BI.<sup>34</sup>

#### Comparison to Projections Permitted by FINRA Rule 2214

There are several key differences between the types of projections that Rule 2214 permits as compared to those that the proposed rule change would allow. First, Rule 2214 differs from the proposed rule change in terms of how a projection may be communicated. Rule 2214 allows a projection of performance that is created by an investment analysis tool that any retail customer uses on a one-on-one interactive basis, either independently or with a member's assistance, and that provides individualized results to each user. In contrast, unlike Rule 2214, under the proposed rule change, there is no interactive element associated with the receipt of projections. Instead, firms could provide projections or targeted returns to Projection-Eligible Investors using any form of communication that otherwise complies with the proposed rule change, applicable requirements of FINRA rules, and the federal securities laws.

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<sup>34</sup> See 17 CFR 240.151-1. The definition of "retail customer" under Reg BI differs from the definition of "retail investor" under FINRA Rule 2210, which includes any person other than an institutional investor, regardless of whether the person has an account with a member. See FINRA Rule 2210(a)(6). Accordingly, a natural person could be a "retail customer" for purposes of Reg BI but an "institutional investor" under Rule 2210 (e.g., a natural person with at least \$50 million in total assets). See *supra* note 17 (definition of "institutional investor" under FINRA Rule 2210(a)(4)).



Second, Rule 2214 requires the tool to produce simulations and statistical analyses that present the likelihood of various investment outcomes if certain investments are made or certain investment strategies are undertaken. Although the rule does not expressly require the use of a particular type of statistical analysis, in many cases firms (or their vendors) use Monte Carlo simulations for this process.<sup>35</sup> In contrast, the proposed rule change would not require communications to Projection-Eligible Investors that include performance projections or targeted returns to consider potential returns under various scenarios and the probability of success for each scenario.

Third, Rule 2214's disclosure requirements differ somewhat from those under the proposed rule change. Rule 2214 requires an investment analysis tool, a written report generated by the tool, or a related retail communication to:

- Describe the criteria and methodology used, including the investment analysis tool's limitations and key assumptions;
- explain that results may vary with each use and over time;
- if applicable, describe the universe of investments considered in the analysis, explain how the tool determines which securities to select, disclose if the tool favors certain securities and, if so, explain the reason for the selectivity, and state that other investments not considered may have characteristics similar or superior to those being analyzed; and

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<sup>35</sup> Monte Carlo simulation involves the use of a computer to represent the operations of a complex financial system. A characteristic feature of Monte Carlo simulation is the generation of a large number of random samples from specified probability distributions to represent the operation of the system. Monte Carlo simulation is used in planning in financial risk management and in valuing complex securities. Monte Carlo simulation is a complement to analytical methods but provides only statistical estimates, not exact results. See CFA Institute, Common Probability Distributions (CFA Program Level I, 2023 Curriculum), available at <https://www.cfainstitute.org/membership/professional-development/refresher-readings/common-probability-distributions>.

- display a prescribed disclosure concerning the hypothetical nature of the projections, that they do not reflect actual investment results, and that they are not guarantees of future results.<sup>36</sup>

In contrast, the proposed rule change would require a communication to prominently disclose that the projected performance or targeted return is hypothetical in nature and that there is no guarantee that the projection of performance or targeted return will be achieved.<sup>37</sup> In addition, a member would have to provide “sufficient information to enable the investor to understand (i) the criteria used and assumptions made in calculating the projected performance or targeted return, including whether the projected performance or targeted return is net of anticipated fees and expenses; and (ii) the risks and limitations of using the projected performance or targeted return in making investment decisions, including reasons why the projected performance or targeted return might differ from actual performance.”<sup>38</sup>

While the proposed rule change’s methodology disclosure requirement resembles the methodology disclosure requirements in Rule 2214, they are worded differently to reflect different types of communications to which the proposed rule change and Rule 2214 apply. For example, an investment analysis tool permitted by Rule 2214 may recommend that an investor consider an alternative account portfolio to improve the range of its potential returns but limit the securities that may populate the portfolio. This limitation is important information to investors when considering whether to change their investments. In contrast, the proposed rule change is more likely to apply to a projection or targeted return that is included in a communication promoting a single security or investment strategy distributed to Projection-

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<sup>36</sup> See FINRA Rule 2214(c).

<sup>37</sup> See proposed FINRA Rule 2210(d)(1)(F)(iv)d.

<sup>38</sup> See proposed FINRA Rule 2210(d)(1)(F)(iv)e.

Eligible Investors, and thus would impose different disclosure requirements relative to those scenarios.

Fourth, Rule 2214 does not restrict the types of investors who may use an investment analysis tool or receive a report generated by the tool, as both institutional investors and retail investors may receive a projection of performance under Rule 2214. The reports also must include clear and prominent specified disclosures, such as a description of the criteria and methodology used, the tool’s limitations and key assumptions, and other risk and investor protection-related information.<sup>39</sup> In contrast, the proposed rule change would limit receipt of projections or targeted returns to Projection-Eligible Investors as defined in the rule.

#### Comparison to IA Marketing Rule’s Hypothetical Performance Standards

The proposed changes are in many respects consistent with the Commission’s Investment Adviser Marketing rule (“IA Marketing Rule”).<sup>40</sup> In this regard, the IA Marketing Rule permits investment advisers to present hypothetical performance, which includes “targeted or projected performance returns with respect to any portfolio or to the investment advisory services with regard to the securities offered”<sup>41</sup> in an advertisement if the investment adviser meets specified conditions and does not violate the IA Marketing Rule’s other requirements. In particular, an investment adviser must:

- Adopt and implement policies and procedures reasonably designed to ensure that the hypothetical performance is relevant to the likely financial situation and investment objectives of the intended audience;

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<sup>39</sup> See FINRA Rule 2214(c) and (d).

<sup>40</sup> See Investment Advisers Act Release No. 5653 (December 22, 2020), 86 FR 13024 (March 5, 2021) (adoption of Advisers Act Rule 206(4)-1 (Investment Adviser Marketing) (“IA Marketing Rule Release”).

<sup>41</sup> See 17 CFR 275.206(4)-1(e)(8).

- Provide sufficient information to enable the intended audience to understand the criteria used and assumptions made in calculating such hypothetical performance; and
- Provide (or, if the intended audience is an investor in a private fund provide or offer to provide promptly) sufficient information to enable the intended audience to understand the risks and limitations of using such hypothetical performance in making investment decisions.<sup>42</sup>

These requirements are similar to the proposed rule change's requirements concerning investors that may receive a communication containing a projection or targeted return and its disclosure requirements. In addition, similar to Rule 2210, the IA Marketing Rule prohibits any advertisement that includes any untrue statement of a material fact or omits to state a material fact necessary to make the statement made under the circumstances not misleading.<sup>43</sup>

As discussed above, the proposed rule change includes other requirements that are not specifically included in the IA Marketing Rule. Nevertheless, FINRA anticipates that it would interpret requirements in the proposed rule change that align with similar requirements in the IA Marketing Rule consistently with how the Commission has interpreted those IA Marketing Rule requirements. Thus, member firms should be able to comply with these proposed requirements in a manner similar to how investment advisers must comply with similar requirements applicable to the use of hypothetical performance under the IA Marketing Rule.<sup>44</sup>

#### Contributions to Investor Protection

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<sup>42</sup> See 17 CFR 275.206(4)-1(d)(6). An investment adviser presenting hypothetical performance is not required to comply with certain of the conditions in paragraph (d), such as the requirement to present performance for one-, five-, and ten-year periods.

<sup>43</sup> 17 CFR 275.206(4)-1(a).

<sup>44</sup> See IA Marketing Rule Release, supra note 40, 86 FR 13024, 13083-85.

FINRA believes that approval of the proposed rule change would contribute to investor protection by enabling Projection-Eligible Investors to access projections when considering specific investments or strategies. For example, under the current rule, Projection-Eligible Investors are not permitted to receive projections from broker-dealers, despite the fact that such projections may assist them in evaluating potential securities purchases or sales, choosing appropriate investment strategies, or creating strategic plans for their business operations. Under the proposed rule change, Projection-Eligible Investors would have access to projected performance or targeted returns that must comply with Rule 2210's existing prohibition of false or misleading statements or claims and the proposed rule change's disclosure requirements and prohibition on using back-tested performance to create the projected performance or targeted return.<sup>45</sup>

FINRA believes the proposed rule change would also contribute to investor protection by encouraging issuers of publicly offered or privately placed securities to select members that are subject to appropriate regulation and oversight for participation in securities offerings. FINRA recognizes that Projection-Eligible Investors are already able to receive projected or targeted returns in communications from parties other than registered broker-dealers, such as unregistered intermediaries<sup>46</sup> or the securities' issuer.<sup>47</sup>

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<sup>45</sup> See proposed Supplementary Material 2210.01(b).

<sup>46</sup> For example, Congress recently amended the Exchange Act to create a new registration exemption for certain mergers and acquisition brokers ("M&A Brokers"). M&A Brokers are not subject to any federal or self-regulatory organization rules governing their communications (other than general anti-fraud provisions), including any prohibitions on including projections or targeted returns in their communications. See Consolidated Appropriations Act of 2023, Pub. L. No. 117 – 328 (2022) (codified at 15 U.S.C. 78o(b)(13)).

<sup>47</sup> The majority of private offerings governed by Securities Act Regulation D (17 CFR 230.501 et seq.) are sold directly by issuers without any broker-dealer involvement. Approximately 20 percent of Regulation D offerings involve "intermediaries," such as broker-dealers. See Capital Raising in the U.S.: An Analysis of the Market for Unregistered Securities Offerings 2009-2017, SEC Division of Economic and Risk Analysis (August 2018), [https://www.sec.gov/files/dera-white-paper\\_regulation-d\\_082018.pdf](https://www.sec.gov/files/dera-white-paper_regulation-d_082018.pdf). Thus, only a small percentage of investors in private placements are afforded the protections of FINRA rules and other

Accordingly, the current prohibition of registered broker-dealers including projected performance or targeted returns in institutional communications or QP private placement communications creates an incentive for issuers to avoid the registered broker-dealer channel to offer securities and instead either use an unregistered firm, or market securities directly to potential investors. The proposed rule change would allow members to provide the same or similar information regarding projected performance or targeted returns that investors are receiving from issuers or other unregistered intermediaries, but subject to substantial requirements that enhance investor protections.

The proposed rule change also would allow Projection-Eligible Investors to receive and compare projections provided by members with projections from other entities, with appropriate safeguards. For example, it is very common for issuers to offer their securities directly to investors using performance projections in their marketing communications or offering documents.<sup>48</sup> Approval of the proposed rule change would not level the regulatory playing field between members, unregistered firms, and issuers with respect to projected performance, but it would allow members to present projections and targeted returns to Projection-Eligible Investors subject to existing and proposed investor protections.

If the Commission approves the proposed rule change, FINRA will announce the implementation date of the rule change in a Regulatory Notice.

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relevant broker-dealer regulations that apply when a Regulation D offering involves a FINRA member firm.

<sup>48</sup> Under FINRA rules, offering materials are considered communications with the public for purposes of Rule 2210 if a member was involved in preparing the materials. If a private placement memorandum (“PPM”) or other marketing document presents information that is not fair and balanced or that is misleading, then the member that assisted in its preparation may be found to have violated Rule 2210. Moreover, sales literature concerning securities offerings that a member distributes generally constitutes a communication by that member to the public, regardless of whether the member assisted in its preparation. See Regulatory Notice 23-08 (May 2023) at page 11; see also Regulatory Notice 10-22 (April 2010) and Regulatory Notice 20-21 (July 2020).

## 2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>49</sup> which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

FINRA believes that the proposed rule change strikes the right balance between protecting investors and allowing more investment information to be communicated to an appropriate audience. As discussed above, the proposed rule change would not expand the very limited exceptions that allow specified types of projected performance or targeted returns in communications to retail investors, such as price targets contained in research reports or reports generated by interactive investment analysis tools, other than QP private placement investors that meet the definition of “retail investor” under Rule 2210.<sup>50</sup>

FINRA believes that the proposed rule change will provide additional sources of information for Projection-Eligible Investors in their investment decision making. As mentioned previously, Projection-Eligible Investors often develop their own opinions regarding the future performance of an investment based on the multiple sources of information at their disposal. They test these opinions against the views and data provided by other sources, which often summarize their conclusions in terms of a projection of performance of the investment. This is particularly true in the offering of securities by issuers, including hedge funds and other investment vehicles. Rule 2210(d)(1)(F) currently does not permit members to share their views

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<sup>49</sup> 15 U.S.C. 78q-3(b)(6).

<sup>50</sup> See supra note 20.

on projection-related data with Projection-Eligible Investors in these situations due to its restrictions on members' communicating projected performance information.

Even so, the proposed changes will provide safeguards for communications that contain projections of performance or targeted returns. The proposed changes would require members to adopt and implement policies and procedures reasonably designed to ensure that the communication is relevant to the likely financial situation and investment objectives of the Projection-Eligible Investor receiving the communication. They would mandate that members have a reasonable basis for the criteria used and assumptions made in calculating the projections of performance or targeted returns.

The proposed changes also would require a member to provide sufficient information to enable the Projection-Eligible Investor to understand the criteria used and assumptions made in calculating the projected performance or targeted return, and to understand the risks and limitations of using projected performance or targeted returns in making investment decisions.

As discussed above, the proposed changes recognize that Projection-Eligible Investors are already able to receive projected performance or targeted returns in communications from parties other than broker-dealers and more closely aligns the ability of broker-dealers to offer projections to such investors with the abilities of issuers and other non-member firms to offer projections. The proposed rule change also would allow Projection-Eligible Investors to receive and compare projections provided by members with projections from other entities, with appropriate safeguards designed to protect investors.

FINRA believes that Projection-Eligible Investors would be better protected if issuers instead offered their securities through broker-dealers, which are subject to a much more rigorous set of rules governing communications than issuers, and that are subject to regulatory



oversight from the Commission, FINRA and state securities regulators. The proposed rule change may enable more issuers to use broker-dealers for their securities offerings. In addition, Projections-Eligible Investors who are retail customers under Reg BI will receive the additional protections of that rule.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Economic Impact Assessment

FINRA has undertaken an economic impact assessment, as set forth below, to analyze the regulatory need for the proposed rulemaking, its potential economic impacts, including anticipated costs and benefits, and the alternatives FINRA considered in assessing how to best meet its regulatory objectives.

1. Regulatory Need

Among other things, commenters during the retrospective review of rules governing communications with the public expressed concerns that the current prohibition on projections of performance imposes undue restrictions on broker-dealer customers, and in particular institutional investors and QP private placement investors, without providing them a concomitant benefit.<sup>51</sup> The amendments in this proposed rule change are intended to improve the flow of information by allowing members to communicate to Projection-Eligible Investors, subject to

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<sup>51</sup> See letters responding to Regulatory Notice 14-14 (April 2014) from the Financial Services Roundtable (May 22, 2014) and the Securities Industry and Financial Markets Association (May 23, 2014), both available at [www.finra.org](http://www.finra.org). Additionally, commenters on Regulatory Notice 17-06 (February 2017) urged FINRA to revise the proposal to permit projections of performance of single securities in communications to QPs. See infra notes 65-71 and accompanying text.

conditions, information regarding the projected performance of an individual security and similar communications related to an asset allocation or other investment strategy.

## 2. Economic Baseline

The economic baseline used to evaluate the impact of the proposed amendments is the current regulatory framework. This baseline serves as the primary point of comparison for assessing economic impacts, including the incremental benefits and costs of the proposed rule change.

FINRA believes that many members providing products and services to Projection-Eligible Investors would likely choose to rely on the proposed exception for projections. FINRA estimates that there are a significant number of such members.<sup>52</sup>

Some of these members may have Projection-Eligible Investor customers that already have access to or are receiving projections-related communications from a member that is dually registered, a member's advisory affiliate, or an investment adviser owned by an associated person of the member, as part of the clients' investment advisory relationship. For example, some dually registered members and dually registered representatives communicate information regarding projected performance to their investment advisory clients already.<sup>53</sup> Similarly,

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<sup>52</sup> Based on Consolidated Audit Trail (CAT) data for 2021, there were 1,169 firms that conducted equity transactions for customers. Of those 1,169 firms, 859 firms conducted equity transactions for institutional customers in 2021. It is not known how many firms conducted equity transactions for QPs. Also, it is not known how many firms conducted debt and OTC transactions for customers. However, based on Rule 5122/5123 filings, it is known that about 360-380 firms were involved in private placement offerings to accredited investors in any given year between 2018 and 2021. While not all accredited investors are QPs, the information from Rule 5122/5123 filings in 2018-2021 indicates how many firms may have been involved in private placement offerings to QP customers.

<sup>53</sup> FINRA estimates that, as of December 31, 2021, approximately 480 member firms are dually registered as broker-dealers and investment advisers. FINRA further estimates that these dually registered firms have approximately 421,000 registered representatives, and 241,000 (or about 57 percent) of these individuals are dually registered as both investment adviser and broker-dealer representatives. FINRA estimates that approximately 160-170 of the dually registered firms have a total of 1,600-1,700 representatives that are solely registered as investment adviser representatives. FINRA notes that in addition to the dually

members that are not registered as investment advisers may still have registered representatives that have customers with access to investment advisory services.<sup>54</sup> Members and their registered representatives that are investment advisers that provide projections of performance of, among other things, individual securities (such as investments in private funds managed by the member of a related investment adviser) to their advisory clients may not be impacted by the proposal, since they are already able to provide this information in some circumstances when acting as an investment adviser.

FINRA also notes that Projection-Eligible Investors may be solicited to purchase individual securities directly by an issuer without the involvement of a broker-dealer, and that issuers often use performance projections and targeted returns in their communications with Projection-Eligible Investors.<sup>55</sup>

### 3. Economic Impacts

FINRA anticipates that the proposed rule change will impact primarily Projection-Eligible Investors and those broker-dealer firms that serve these customers. Retail investors could be impacted if an institutional investor receives a projection for an investment that the retail investor is also considering. In these situations, the retail investor may receive relatively less information regarding performance projections or targeted returns for the investment than their institutional counterparts. However, Reg BI is designed to mitigate this potential harm by

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registered representatives, these investment adviser representatives may also be communicating projections-related communications to their investment advisory clients.

<sup>54</sup> FINRA estimates that, as of December 31, 2021, approximately 2,900 member firms are only registered as broker-dealers and these firms have approximately 267,000 registered representatives. FINRA further estimates that approximately 73,000 of these individuals are registered both as investment adviser and broker-dealer representatives. These dually registered representatives may have customers with access to projections-related communications through their investment advisory relationships with other firms.

<sup>55</sup> See Exchange Act Rule 3a4-1, 17 CFR 240.3a4-1.

requiring a broker-dealer to act in a retail customer's best interest when recommending a securities transaction or investment strategy involving securities.

#### Anticipated Benefits

The proposed rule change would allow members to communicate, for example, information regarding the projected performance of an individual security to Projection-Eligible Investors. Such communications have the potential to better inform Projection-Eligible Investors about the individual security and the underlying assumptions upon which the recommendations are based.<sup>56</sup> FINRA anticipates that these benefits primarily would accrue to customers that either do not make their own performance projections or wish to compare their own projections against projections furnished by their broker-dealer, and do not have an investment advisory relationship with the member, and thus are not already receiving communications related to anticipated returns. For these benefits to accrue, the performance projections or targeted returns must be objectively informative, and the magnitude of benefit depends on the extent to which customers value these communications and find them informative. Additionally, the proposed rule change would benefit dually registered firms by creating comparable investment adviser and broker-dealer standards for communications that include performance projections and targeted returns to customers who have both investment advisory and brokerage accounts with such firms. This would eliminate confusion for customers that have both types of accounts and reduce the effort needed for dually registered firms to comply with two separate sets of requirements related to such communications. Finally, the proposed rule change would contribute to investor

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<sup>56</sup> Similar benefits would apply to the proposed amendments that would allow members to communicate information to institutional investors regarding the projected performance of a particular asset allocation or other investment strategy.

protection by reducing the incentive for issuers to use unregistered firms or to market securities directly to potential investors instead of using registered broker-dealers.

#### Anticipated Costs

The proposed rule change would impose costs on members that choose to rely on the exception and communicate performance projections or targeted returns for an individual security or asset allocation or other investment strategy to Projection-Eligible Investors. Hence, FINRA anticipates that only members expecting the benefits to exceed the implementation costs would choose to incur these costs.

Members that would rely on the proposed exception to distribute communications to Projection-Eligible Investors that contain performance projections or targeted returns would incur costs associated with supervising these communications and complying with the proposed rule change's conditions. However, the proposed rule change does not alter the existing core supervision requirements for the review and supervision of institutional communications and QP private placement communications, thereby allowing members to adopt procedures that are appropriate to their business.

As discussed above, to the extent that performance projections are reliable and informative, allowing members to provide projected performance or targeted returns for an investment opportunity only to institutional investors may create an information imbalance as compared to retail investors who are considering the same investment opportunity. Because such retail investors will not be eligible to receive these communications, they may be at an informational disadvantage when making investment decisions. In developing the proposed changes, FINRA carefully considered the risks, and associated costs, of presenting targeted returns or performance projections to retail investors. FINRA believes that it is appropriate,

through this proposed rule change, to permit members to provide communications containing performance projections and targeted returns to institutional investors and QP private placement investors.

#### Competitive Effects

Currently, members that are dually registered or that employ dually registered persons may provide customers with performance projections in their other registered capacity. Thus, the proposed rule change may improve the competitive position of members that are not dually registered or that do not employ dually registered persons since the amendments will allow them to provide a potentially valuable service to their Projection-Eligible Investor customers.

#### 4. Alternatives Considered

In considering how to best meet its regulatory objectives, FINRA considered alternatives to certain aspects of this proposed rule change.

In this regard, FINRA considered whether members should be permitted to provide projections of performance or targeted returns in all retail communications, including for asset allocation, other investment strategies or for single investment products, such as mutual funds and ETFs. FINRA carefully weighed the potential benefit of providing such a communication to persons other than Projection-Eligible Investors against the potential harm. FINRA has chosen to focus this proposed rule change on communications to Projection-Eligible Investors because they are more likely to have the sophistication and resources to evaluate any performance projections or targeted returns they receive in the context of other information they are evaluating when making an investment decision.

FINRA also considered whether the proposed rule change should require members to provide a range of targets or projections, rather than a single projection, for investment planning

illustrations. FINRA believes that, while a range of projections would be useful in particular situations, it is not necessary in all situations and can be confusing in certain situations. For these reasons, FINRA decided to give members the flexibility to determine whether a range of projections would be useful.

C. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Background

In February 2017, FINRA published Regulatory Notice 17-06 (the “Notice”), requesting comment on proposed amendments that would have created an exception to the rule’s prohibition on projecting performance to permit members to distribute customized hypothetical investment planning illustrations that include the projected performance of an asset allocation or other investment strategy, but not an individual security, subject to specified conditions (the “Notice proposal”). A copy of the Notice is available on FINRA’s website at <http://www.finra.org>.

The comment period expired on March 27, 2017. FINRA received 23 comments in response to the Notice. Twenty One commenters supported the proposal and two commenters opposed the proposal. A list of the commenters in response to the Notice and copies of the comment letters received in response to the Notice are available on FINRA’s website.<sup>57</sup> A summary of the comments and FINRA’s response is provided below.

Comments on Proposal

Comparison to Investment Adviser Advertising Standards

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<sup>57</sup> See SR-FINRA-2023-016 (Form 19b-4, Exhibit 2b) for a list of abbreviations assigned to commenters (available on FINRA’s website at <http://www.finra.org>).

Supporters noted that the rule change would lessen the regulatory inconsistencies regarding the use of performance projections between broker-dealers and stand-alone investment advisers and would eliminate the current opportunities for regulatory arbitrage.<sup>58</sup> Commenters also observed that allowing dually registered representatives to use projections in investment planning illustrations with customers would remove the current compliance difficulty with such situations. This difficulty arises particularly when it is uncertain at the time of the illustration's use whether the customer will open a fee-based or commission-based account.<sup>59</sup>

However, some commenters contended that, even with this proposed changes, the FINRA communications rules still would impose greater burdens on broker-dealers than communications standards governing other financial intermediaries, such as SEC guidance applicable to investment advisers or the CFTC rules governing commodity pool operators.<sup>60</sup> WealthForge noted that FINRA's prohibition on projections of performance puts broker-dealers that are offering private funds under Securities Act Regulation D at a disadvantage as compared to Regulation D offerings that are not made through a broker-dealer, since no express restrictions on projections on performance apply to an issuer's communications.

As discussed above, subsequent to FINRA's publication of the Notice proposal for comment, the SEC adopted the IA Marketing Rule, which permits the presentation of performance, including hypothetical targeted or projected performance returns, in investment adviser advertisements, provided that the adviser meets specified conditions and does not violate the IA Marketing Rule's other requirements.<sup>61</sup>

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<sup>58</sup> See EDA, Fidelity, FSI, ICI, IRI, IPA, M Holdings, Wellington, Wells Fargo.

<sup>59</sup> See FSI, IPA, M Holdings.

<sup>60</sup> See MMI, SIFMA.

<sup>61</sup> See 17 CFR 275.206(4)-1(d); see also 17 CFR 275.206(4)-1(a).



The proposed rule text incorporates much of the rule text in the IA Marketing Rule’s provisions permitting the presentation of hypothetical performance. A key difference is that the IA Marketing Rule does not expressly prohibit including hypothetical performance in retail investment adviser advertisements; instead, these provisions impose conditions based on the “intended audience” of an investment adviser advertisement. In this regard, the IA Marketing Rule Release states that “[w]e intend for advertisements including hypothetical performance information to only be distributed to investors who have access to resources to independently analyze this information and who have the financial expertise to understand the risks and limitations of these types of presentations.”<sup>62</sup> In contrast, the proposed rule change expressly would permit the presentation of projected or targeted returns only in institutional communications and QP private placement communications.

Despite these differences, however, in practice both rules are intended to limit the use of projected or targeted returns to communications that are distributed to persons who have the resources or financial expertise to understand the risks and limitations associated with such performance. As noted above, the IA Marketing Rule is intended to ensure that advertisements containing hypothetical performance only be distributed to persons possessing the resources and expertise to understand such performance’s risks and limitations.<sup>63</sup>

The proposed rule change also would require members to have a reasonable basis for the criteria and assumptions used to calculate the projected or targeted returns, and the Supplementary Material would list factors, among others, that a member should consider in forming such a reasonable basis. While the IA Marketing Rule does not expressly require

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<sup>62</sup> See IA Marketing Rule Release, supra note 40, 86 FR 13024, 13078.

<sup>63</sup> See supra note 62, 86 FR 13024, 13083.

targeted or projected performance returns to have a reasonable basis, it requires performance presentations to be fair and balanced and not misleading, requires all investment adviser advertisement discussions of potential benefits to clients or investors also to provide fair and balanced treatment of material risks and limitations associated with the potential benefits, and requires that any material statement of fact have a reasonable basis that the adviser can substantiate upon SEC demand.<sup>64</sup>

In addition, investment adviser communications that include targeted or projected performance returns must provide sufficient information to enable the intended audience to understand the risks and limitations of relying on targeted or projected performance returns to make investment decisions, which likely would require similar disclosures regarding the hypothetical nature of such performance. Accordingly, FINRA believes that the proposed rule change generally would not impose substantially greater burdens on broker-dealers that present projections of performance or targeted returns as compared to investment advisers that present such performance.

#### Projections of Single Security Performance

The Notice proposal would have prohibited the projection of performance of a single security regardless of whether an illustration is used with a retail investor or an institutional investor. The Notice requested comment on whether the proposed rule change should permit the use of performance projections for single investment products that operate like an asset allocation or other investment strategy for which projections might be appropriate. A number of commenters responded that the proposal should allow projections for single investment products that operate similar to a diversified asset allocation model (such as ETFs, diversified mutual

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<sup>64</sup> 17 CFR 275.206(4)-1(a)(2) and (4).

funds, unit investment trusts, variable annuities, and private equity and real estate funds).<sup>65</sup>

For the reasons discussed above, FINRA does not agree that the proposed rule change should be revised to permit members to distribute communications to retail investors that include performance projections for single securities whose returns depend on the performance of an underlying investment portfolio, such as an ETF, mutual fund, UIT, variable annuity, or private or real estate fund.

Many commenters stated that FINRA should either amend the proposal, or issue a new proposal, to allow members to use performance projections in any type of communication with institutional investors, including sales literature concerning single securities.<sup>66</sup> These commenters noted that a broker-dealer that is raising capital for a new private equity fund may not include projected performance returns for existing investments in the new fund's pitch book and other marketing materials, due to FINRA rules.<sup>67</sup> 3PM noted that this approach would be consistent with the differentiation of institutional investors under FINRA's suitability rule and FINRA's interpretive letters permitting the use of related performance in institutional communications.

Commenters stated that institutional investors often ask to see projected performance, and that the risk of investor harm from such use is diminished, since institutional investors either

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<sup>65</sup> See CAI, EDA, IRI, Monument, NYSBA Committee, 3PM, WealthForge. FINRA heard similar views from parties that commented on FINRA's retrospective review of the communications rules. See Regulatory Notice 14-14 (April 2014). The Financial Services Roundtable recommended that FINRA permit projections of performance, since in its view projections play an important role in educating investors and allowing them to compare products, and they provide an important insight into what an investment manager seeks to achieve. Similarly, the SIFMA observed that data about targeted returns are highly material to potential investors.

<sup>66</sup> See ACA, Credit Suisse, EDA, IPA, MMI, Monument, SIFMA, 3PM, Wellington.

<sup>67</sup> See ACA, Monument.

have investment sophistication or can hire someone who does.<sup>68</sup> These commenters noted that PPMs often contain performance projections, so it would make sense to allow these projections in sales material.<sup>69</sup> Multiple commenters requested that FINRA permit the use of projected performance of a single security in institutional communications since the rules governing capital acquisition brokers do not prohibit the use of projections of performance in private placement marketing materials, and the same justifications exist for permitting projections of performance in institutional communications.<sup>70</sup>

Several commenters further stated that FINRA should permit projections of performance in communications distributed to QPs.<sup>71</sup> These commenters noted that capital acquisition brokers (“CABs”) already may distribute communications that include projections of performance to QPs, as CAB Rule 016(i) defines “institutional investor” to include qualified purchasers.<sup>72</sup> NYSBA commented that “[r]egular 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.”

As discussed above, FINRA recognizes that projections of issuer performance or targeted returns are more common in offering documents, such as PPMs, for unregistered securities offerings. FINRA also believes that institutional investors, as defined in FINRA Rule

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<sup>68</sup> See MMI, 3PM.

<sup>69</sup> See ACA, Monument.

<sup>70</sup> See IPA, Monument, NYSBA Committee.

<sup>71</sup> See IPA, Monument, NYSBA Committee.

<sup>72</sup> See Capital Acquisition Broker Rule 016(i)(6).

2210(a)(4), and QP private placement investors often either have the investment sophistication and experience, or are able to hire advisers with investment acumen, necessary to avoid the potential harm that may occur when single security performance projections or targeted returns are presented in retail communications.<sup>73</sup> While FINRA does not necessarily agree that non-CAB members should have the same rules governing their communications as CABs, in this circumstance FINRA believes that there is no additional risk to investors for a non-CAB firm to distribute communications with projections of performance or targeted returns to QP private placement investors than for a CAB's similar communication to QPs. In this regard, a CAB is already permitted to include projections of performance in its communications to QPs to whom it is seeking to sell newly issued unregistered securities.<sup>74</sup>

For these reasons, FINRA has amended the Notice proposal to create a new exception that permits institutional communications and QP private placement communications to project the performance or provide a targeted return of a single security,<sup>75</sup> as well as the performance of an asset allocation or other investment strategy, subject to specified conditions.

#### Requiring a Range of Outcomes

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<sup>73</sup> As discussed above, in addition to the requirement that the recipient be either an institutional investor or QP private placement investor, the proposed rule change would require members to have written policies and procedures reasonably designed to ensure that the communication containing the projection or targeted return is relevant to the likely financial situation and investment objectives of the investor receiving the communication.

<sup>74</sup> Among other things, a CAB is permitted to act as a placement agent or finder on behalf of an issuer in connection with the sale of newly issued, unregistered securities to institutional investors. See CAB Rule 016(c)(1)(F)(i) (definition of "Capital Acquisition Broker"). The term "institutional investor" includes persons meeting the definition of "qualified purchaser" in section 2(a)(51) of the Investment Company Act. See CAB Rule 016(i)(6). Because CAB Rule 221 (Communications with the Public) does not prohibit CABs from including projections of performance in their communications with the public, QPs may already receive projected performance from a CAB in connection with the offer or sale of newly issued unregistered securities.

<sup>75</sup> The proposed rule change would allow institutional communications to include hypothetical projections of performance of any single security, including stocks as well as registered investment companies.

The Notice also asked whether the proposal should require members to provide a range of projections in investment planning illustrations, rather than permitting a single projection of performance. Industry commenters noted that, while members should be allowed to provide a range of performance projections in illustrations rather than a single performance figure, FINRA should not require a range. Instead, these commenters recommended that FINRA allow members to have the flexibility to determine whether providing a range of performance projections makes sense in particular situations.<sup>76</sup> Other commenters recommended that FINRA require projections to include a range of outcomes, including outcomes that assume a declining market.<sup>77</sup>

FINRA believes that it is not necessary to require in all cases that institutional communications and QP private placement communications that include projections of performance present a range of possible outcomes. FINRA believes that members should have the flexibility to determine whether a range of outcomes would be useful in particular situations.

#### Reasonable Basis Standard

M Holdings supported the reasonable basis standard because it provides members with flexibility given that investment strategies have different features and costs. However, many commenters requested that FINRA provide more clarity as to the “reasonable basis” standard. In addition, commenters asked that FINRA allow a portfolio manager’s previous performance record with particular investments to be one factor of a reasonable basis for projecting future performance.<sup>78</sup> Other commenters expressed concern that the proposal would allow too much

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<sup>76</sup> See EDA, IRI, M Holdings.

<sup>77</sup> See GSU, PIABA, 3PM.

<sup>78</sup> See MMI, SIFMA.

leeway as to what is considered a reasonable basis, and that FINRA needs to provide specific guidance as to what would be permissible.<sup>79</sup>

3PM noted 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 be considered as factors supporting a projection of performance. 3PM also noted that a fund manager may need to adjust its projected performance if a fund grows to a point where the manager will no longer be able to find enough appropriate investments that meet the fund's investment criteria (*i.e.*, the fund experiences "style drift").

GSM urged FINRA to require the communication to unambiguously and specifically disclose all information used to generate the projection, including an explanation of the reasonable basis behind the projection. CAI requested that FINRA simply eliminate the requirement that projections have a reasonable basis on the ground that it is too subjective, and that the proposal's required disclosures are sufficient to protect investors.

FINRA disagrees that the proposed rule should not require performance projections to have a reasonable basis. As discussed above, both the SEC and FINRA already apply a reasonable basis standard in other contexts involving forecasts and projections. Additionally, FINRA would be concerned that, absent such a requirement, members could include wildly optimistic projections in communications solely for the purpose of promoting the sale of a security or an investment planning service, rather than providing useful information to an investor.

As discussed above, FINRA agrees that many factors may provide a reasonable basis for a performance projection, which will vary depending on the context. The proposed rule change

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<sup>79</sup> See NASAA, PIABA.

would include factors, among others, that a member should consider in forming such a reasonable basis. In addition, a reasonable basis might be established, for example, by reference 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. A more detailed discussion of the factors a member should use in forming a reasonable basis can be found above in the Purpose section of this proposed rule change.

#### Customized Illustrations

The Notice proposal would have permitted “a customized hypothetical investment planning illustration that projects performance of an asset allocation or other investment strategy and not an individual security,” subject to specified conditions. Multiple commenters asked that the proposal be amended not to require that illustrations be “customized,” or that FINRA provide more clarity as to what “customized” means. These commenters stated that many investors may fit the same investment profile, and thus arguably a member should be able to present these investors with the same projections of performance.<sup>80</sup> They also noted that performance projections for particular asset classes are often based on generally accepted investment theory and are not customized for individual accounts. Fidelity suggested using language from FINRA Rule 2211(b)(5)(B), which permits the use of a personalized hypothetical variable product illustration “which reflects factors relating to an individual customer’s circumstances.”

Wells Fargo recommended that FINRA expand the rule to allow members to provide customers with non-customized asset allocation projections based on “firm capital market assumptions.” Wells Fargo stated that forward-looking illustrations of an asset allocation

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<sup>80</sup> See Fidelity, ICI, MMI.



strategy's projected growth rate, volatility measures, yield and downside risk would be vital information to help investors understand their portfolios.

As discussed above, FINRA has determined not to proceed with amendments that would permit the use of "a customized hypothetical investment planning illustration" with retail investors. Instead, FINRA has determined to amend the Notice proposal to permit institutional communications and QP private placement communications to project performance or provide a targeted return, subject to specified conditions. Accordingly, the comments on the meaning of "customized" in the proposed amendments are now irrelevant to this proposed rule change.

#### Interplay with Other Projections Exceptions

Fidelity recommended that FINRA amend both FINRA Rule 2210(d)(1)(F)(i) (permitting hypothetical illustrations of mathematical principles) and proposed Rule 2210(d)(1)(F)(iv) to refer to a "specific investment" rather than "investment" or "specific security," respectively, and to delete the reference to "investment strategy" in paragraph (d)(1)(F)(i) so that there is no conflict with the language in proposed paragraph (d)(1)(F)(iv).

Commenters also asked that FINRA clarify how this rule change would impact communications that rely on other provisions that permit performance projections, such as reports generated by investment analysis tools pursuant to FINRA Rule 2214, or hypothetical illustrations of mathematical principles, or hypothetical illustrations concerning variable insurance products.<sup>81</sup> In particular, IRI requested clarification on whether an investment analysis tool report generated pursuant to Rule 2214 may project the performance of a single security, and whether projections of an asset allocation strategy's performance in a personalized illustration may also show the performance of specific securities. The ICI requested clarification as to

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<sup>81</sup> See CAI, ICI, IRI.

whether Rule 2214 would apply to illustrations of different asset allocations and different withdrawal rates in retirement in educational material.

FINRA does not intend to modify the requirements of other exceptions to the prohibition on projections contained in Rule 2210(d)(1)(F) as part of creating a new exception for projected performance and targeted returns in institutional communications and QP private placement communications. Accordingly, FINRA does not believe it is necessary or appropriate to modify the current language contained in these exceptions. A communication that qualifies under another exception to the prohibition on performance projections would not need to be modified to meet the requirements for including performance projections or targeted returns in institutional communications or QP private placement communications pursuant to proposed Rule 2210(d)(1)(F)(iv). FINRA has included in the Purpose section above a detailed discussion of the differences between the proposal and Rule 2214.<sup>82</sup> To the extent that members need further guidance regarding Rule 2214, FINRA believes that such guidance should be provided separately from this rule filing.

CAI inquired how the proposal would impact existing FINRA staff guidance on communications with the public, such as a 1998 letter interpreting the application of FINRA communications rules to communications of members that are dually registered as broker-dealers and investment advisers, and guidance that permitted the use of blended fund performance in specified asset allocation illustrations.<sup>83</sup> CAI suggested that FINRA withdraw or modify the

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<sup>82</sup> See Comparison to Projections Permitted by FINRA Rule 2214, *supra*.

<sup>83</sup> See Interpretive Letter to Dawn Bond, FSC Securities Corporation (July 30, 1998), <https://www.finra.org/rules-guidance/guidance/interpretive-letters/dawn-bond-fsc-securities-corporation> and “Blended Fund Family Performance Concerns NASD Regulation,” NASD Regulatory & Compliance Alert, Vol. 10, No. 3 at p. 10 (November 1996), <https://www.finra.org/sites/default/files/RCA/p524569.pdf>.

1998 interpretive letter to clarify that member communications promoting investment advisory services are not subject to FINRA's communications rules.

FINRA does not intend for the proposed rule change to impact prior guidance on the application of Rule 2210 to communications made by dually registered members or the use of blended performance. Accordingly, FINRA does not believe it is necessary to withdraw the 1998 interpretive letter or provide additional guidance about the presentation of blended performance.

#### Supervision of Communications with Projections

CAI opposed the proposed requirement that a registered principal either approve each investment planning illustration that includes projected performance or a template on which such projections are based. Instead, it suggested that members should be able to supervise all illustrations, including those not based on a template, in the same manner as correspondence. In contrast, 3PM recommended that FINRA require a registered principal to approve any performance projections prior to use based on whether there is a reasonable basis to rely on the methodology, assumptions and limitations provided with the projected performance. Wells Fargo asked for clarification as to whether the proposed rule change would alter how a member is required to supervise electronic communications that include a performance projection under FINRA Rule 3110.

As discussed above, FINRA has determined not to proceed with a new exception from the prohibitions on projecting performance in non-QP retail communications; however, a QP private placement communication that includes a projection or targeted return may fall within the definition of retail communication to the extent that it is distributed or made available to more than 25 QP private placement investors that are not institutional investors under Rule 2210

within a 30-day period. Accordingly, to the extent that a member distributes such a retail communication to QP private placement investors, a registered principal will be required to review and approve the communication prior to use. In addition, members must adopt written policies and procedures reasonably designed to ensure compliance with all applicable requirements and obligations, including the obligation for the member to have a reasonable basis for the criteria used and assumptions made in calculating the projected performance or targeted return.<sup>84</sup>

The proposed rule change would not alter the standards for review of electronic communications. Thus, the proposed rule change's review standards would apply equally to paper and electronic personalized illustrations that include performance projections.

#### Required Disclosures

Two commenters stated that, if FINRA moves forward with the proposal, FINRA should clarify with specificity the required disclosures that must be given to investors, and provide guidance on how members may calculate and present projections.<sup>85</sup> For example, NASAA noted that FINRA should state how members calculate fees, costs or commissions in relation to hypothetical performance, how members must compose an asset allocation or investment strategy, and how a projection would have a reasonable basis where it was inconsistent with the historical performance of the asset allocation. NASAA also recommended that FINRA require disclosure of the underlying securities that make up the customized hypothetical illustration, and if applicable, that the broker-dealer's past projections proved to be inaccurate.

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<sup>84</sup> See proposed Rule 2210(d)(1)(F)(iv)b. and c.

<sup>85</sup> See GSU, NASAA.

PIABA expressed concern that retail investors will regard projections of performance of asset classes as forecasts or predictions of how their investments will perform going forward, and that boilerplate disclaimers are insufficient to avoid investor confusion. 3PM recommended that FINRA require, in addition to the proposal's disclosure standards, a 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, a description of the methodology used to develop the projected performance, and an explanation as to why the methodology used is a good predictor of the projected performance.

As discussed above, FINRA no longer proposes to permit projections of performance of an asset allocation or other investment strategy in non-QP retail communications beyond what is currently permitted under Rule 2210(d)(1)(F). Nevertheless, FINRA has modified the disclosure requirements in the proposed rule with respect to institutional communications and QP private placement communications. In this regard, institutional communications and QP private placement communications that include projections of performance or targeted returns would have to prominently disclose that the projected performance or targeted return is hypothetical in nature and that there is no guarantee that the projected or targeted performance will be achieved. Members also would have to provide sufficient information to enable the Projection-Eligible Investor to understand the criteria used and assumptions made in calculating the projected performance or targeted return, and to understand the risks and limitations in using projected performance or targeted returns in making investment decisions. FINRA believes that these required disclosures strike an appropriate balance of alerting Projection-Eligible Investors to the hypothetical nature and uncertainty of such a projection without providing so much disclosure that its effectiveness is diminished.

FINRA does not believe it is either appropriate or feasible to create more detailed requirements on how members should calculate performance projections or targeted returns. Because these projections or targeted returns may occur in a variety of contexts, FINRA believes it is better to allow members to create their own standards provided that they have a reasonable basis. As discussed above, members still would be required to make all presentations consistent with Rule 2210's fair and balanced standard,<sup>86</sup> and FINRA believes that it is better to consider these communications on a case-by-case basis.

#### Other Comments

Several commenters contended that an investment adviser's fiduciary duty under the Advisers Act provides greater investor protections than the suitability standard applicable to broker-dealers under FINRA rules, and that this higher standard mitigates the potential risks of advisers using projections.<sup>87</sup> NASAA stated that past SEC no-action letters to investment advisers, such as Clover Capital,<sup>88</sup> provide more "regulatory rigor" than the FINRA rule proposal with regard to hypothetical performance. NASAA also stated that, despite FINRA's statement that back-tested performance typically is not a reasonable basis for a projection, it is "virtually inevitable" that back-testing would be used. Several commenters recommended that FINRA keep its current prohibitions on projections to avoid potential manipulations or bias by brokers, at least until broker-dealers are subject to a fiduciary duty.<sup>89</sup>

While FINRA disagrees that the Notice proposal lacked regulatory rigor as compared to standards under the Advisers Act, as discussed above, the revised proposal incorporates many of

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<sup>86</sup> See FINRA Rule 2210(d)(1)(A).

<sup>87</sup> See GSU, NASAA.

<sup>88</sup> See Clover Capital Management, Inc., 1986 SEC No-Act. LEXIS 2883 (October 28, 1986).

<sup>89</sup> See GSU, NASAA, PIABA.

the same requirements for the presentation of targeted or projected performance returns that are contained in the IA Marketing Rule, which has supplanted past SEC no-action letters concerning the presentation of performance in investment adviser advertisements. In addition, the proposed rule change includes specific disclosure and reasonableness requirements that members must meet to use this exception to the prohibition on performance projections. As discussed above, FINRA does not propose to allow members to use back-tested performance as one of the bases for creating a performance projection.

GSU recommended that all projections-related communications, and the means by which they are generated, must be subject to stringent document retention guidelines, and that these communications be presumptively discoverable in case of a dispute and explicitly included in FINRA's Discovery List 1. IPA urged FINRA to adopt the proposal because it appeared that the Department of Labor's ("DOL") Fiduciary Rule proposal will require members to include projections of performance in retirement plan statements.

Members that distribute institutional communications and QP private placement communications that include projections of performance or targeted returns will be required to retain records related to their activities in this area as required by Exchange Act Rules 17a-3 and 17a-4. FINRA does not believe that the proposed rule change should address discovery rules used in arbitration, as they are beyond its scope.

FINRA notes that, subsequent to the publication of the Notice, Congress passed the Setting Every Community Up for Retirement Enhancement Act of 2019 ("SECURE Act").<sup>90</sup> Among other things, the SECURE Act amended the Employee Retirement Income Security Act

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<sup>90</sup> The SECURE Act was enacted as Division O of the Further Consolidated Appropriations Act, 2020, Public Law 116-94 (2019).

(“ERISA”) to require an annual lifetime income disclosure in statements sent to participants in benefit plans governed by ERISA. Pursuant to the SECURE Act, the DOL adopted an interim final rule that specifies the requirements for such lifetime income stream disclosures.<sup>91</sup> The proposed amendments to Rule 2210 would not impact members that are required to provide such disclosures in plan benefit statements. In this regard, FINRA historically has interpreted Rule 2210’s filing and content standards as not applying to communications that are required by other regulatory agencies, including communications required by DOL rules.<sup>92</sup>

Credit Suisse requested a number of new rules and guidance addressing the use of performance information in communications, including: (1) allowing institutional communications to show both actual and related performance on a gross basis; (2) clarifying that targeted returns contained in fund promotional material are not projections of performance, or permit the use of targeted returns in institutional communications; (3) confirming that estimated returns about underlying fund investments are not subject to the prohibitions on projections of performance; and (4) clarifying that model returns and back-tested performance can provide a reasonable basis for projected performance and targeted returns in institutional communications. Fidelity urged FINRA to focus on harmonizing its rules governing related performance with SEC staff interpretations under the Advisers Act, and to focus on principles-based disclosure solutions across all forms of communications, including social media and mobile devices.

While FINRA appreciates these suggestions, it believes that some of these recommendations (such as those concerning related or back-tested performance) extend beyond

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<sup>91</sup> See Department of Labor, “Pension Benefit Statements – Lifetime Income Illustrations,” 85 FR 59132 (September 18, 2020).

<sup>92</sup> See, e.g., Regulatory Notice 12-02 (January 2012).



the scope of the proposal's intent, and thus are not germane to this proposed rule filing. FINRA believes that it has addressed the other comments, such as those concerning targeted returns.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-FINRA-2023-016 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-FINRA-2023-016. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection.

All submissions should refer to File Number SR-FINRA-2023-016 and should be submitted on or before [INSERT DATE 21 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>93</sup>

**Sherry R. Haywood,**

*Assistant Secretary.*

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<sup>93</sup> 17 CFR 200.30-3(a)(12).