

**MEMO# 31189**

May 2, 2018

# **FINRA Staff Issues Guidance Permitting Related Performance Information in Institutional Communications for Variable Contracts**

[31189]

May 2, 2018 TO: ICI Members SUBJECTS: Advertising

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Variable Insurance Products RE: FINRA Staff Issues Guidance Permitting Related Performance Information in Institutional Communications for Variable Contracts

In April, FINRA staff issued an interpretive letter<sup>[1]</sup> permitting the inclusion of related performance information<sup>[2]</sup> in institutional communications concerning variable contracts, subject to numerous conditions.

## **Background**

FINRA Rule 2210 governs broker-dealers' communications with the public, and its content standards require that communications be fair and balanced; provide a sound basis for evaluating the facts in regard to any particular security; not omit material information; and not include false, exaggerated, or misleading statements, or misstate material facts.<sup>[3]</sup> With limited exceptions,<sup>[4]</sup> FINRA has historically taken the position that inclusion of related performance information in communications with investors does not comply with FINRA Rule 2210(d). In recent years, however, FINRA staff has shown greater openness to members' use of related performance information in institutional communications. <sup>[5]</sup>

## **Summary of Letter and Conditions**

Jackson National Life Distributors LLC and its insurance affiliates ("Jackson") requested interpretive guidance regarding the use of related performance information in communications pertaining to variable annuity and life insurance contracts ("variable contracts") that are distributed solely to institutional investors (as defined in FINRA Rule 2210(a)(4)) functioning as intermediaries. Jackson stated that the use of related performance information would be in communications relating to: (i) 1940 Act-registered

open-end funds that are investment alternatives of Jackson's registered separate accounts ("underlying fund(s)"), and (ii) Jackson's 1940 Act-registered separate accounts that invest in the underlying funds ("separate account(s)").

In the Interpretive Letter, FINRA staff stated its belief that the use of related performance information in institutional communications concerning variable contracts in the manner proposed by Jackson is consistent with the applicable standards of Rule 2210. Below is a summary of the conditions, which are similar to those in the Hartford Letter:

- Related performance information may be provided only if it is actual performance of all registered open-end funds (other than the underlying fund) that (i) have substantially similar investment policies, objectives, and strategies as the subject underlying fund, and (ii) are managed or were previously managed by the same adviser or sub-adviser that manages the underlying fund.
- The materials with related performance information will be provided only to institutional investors.
- If there are multiple related funds, this investment performance will be presented either in a composite or a list.
- All institutional communications will be clearly labeled as such, and institutional investors receiving them will be instructed not to provide them to those who are not institutional investors.
- The presentation of related fund performance will be net of fees and expenses of the related funds, and the communication will prominently disclose the fees and expenses of the subject underlying fund (and if applicable, that its fees and expenses are higher than those of the related funds).
- Related sub-account performance information may also be presented, provided it is net of both the sub-account's and the related funds' fees and expenses. In this case, the communication will prominently disclose the sub-account's and related funds' fees and expenses.
- Related performance information will (i) include the performance of each related fund, (ii) be for a period of at least one year and since the inception of the investment strategy, and (iii) be current as of the most recently-ended calendar quarter.
- Related performance information will be clearly labeled as such and contain clear disclosure of the applicable dates for the performance.
- For an underlying fund in existence for more than one year, its actual performance will be displayed more prominently than the related performance information, and its performance information will reflect all fees and expenses.
- The communications will disclose any material differences between the related fund(s) and the subject underlying fund(s).
- All communications that contain related performance information shall comply with all other applicable FINRA rules and federal securities laws and be subject to the same supervisory requirements that Jackson applies to all other firm communications.

The Interpretive Letter also reiterates FINRA's view that presentation of related performance information in communications used with retail investors generally does not comply with FINRA Rule 2210(d).

Matthew Thornton  
Assistant General Counsel

## endnotes

[1] Interpretive letter to Joan E. Boros, Esq., Stradley Ronon Stevens & Young, LLP (April 16, 2018)(“Interpretive Letter”), *available at* [www.finra.org/industry/interpretive-letters/april-16-2018-1200am](http://www.finra.org/industry/interpretive-letters/april-16-2018-1200am).

[2] The Interpretive Letter defines “related performance information” as “the actual performance of all registered open-end management investment companies (other than the Underlying Fund [defined below]) that have (i) substantially similar investment policies, objectives, and strategies as the Underlying Fund that is the subject of an institutional communication, and (ii) are currently managed or were previously managed by the same adviser or sub-adviser that manages the Underlying Fund that is the subject of an institutional communication (the “Related Funds”).”

[3] FINRA Rule 2210(d)(1)(A) and (B).

[4] See NASD Notice to Members 97-47 (Aug. 1997), footnote 2 (permitting members, under appropriate conditions, to describe predecessor performance in their sales materials); and Interpretive Letter to Yukako Kawata, Davis Polk & Wardwell (Dec. 30, 2003) (permitting members to include related performance information in sales materials for private funds relying on Section 3(c)(7) of the Investment Company Act, if the information was made available only to qualified purchasers).

[5] See Interpretive Letter to Edward P. Macdonald, Hartford Funds Distributors, LLC (May 12, 2015)(permitting related performance information in institutional communications pertaining to mutual funds, subject to conditions)(“Hartford Letter”), *available at* [www.finra.org/industry/interpretive-letters/may-12-2015-1200am](http://www.finra.org/industry/interpretive-letters/may-12-2015-1200am); *see also* Interpretive Letter to Clair Pagnano, K&L Gates LLP (June 9, 2017) (permitting related performance information in institutional communications pertaining to continuously offered closed-end funds, subject to conditions), *available at* [www.finra.org/industry/interpretive-letters/june-12-2017-1200am](http://www.finra.org/industry/interpretive-letters/june-12-2017-1200am).